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Supreme Court of Texas.
Bison Building Materials, Ltd., Petitioner,
v.
Lloyd K. Aldridge, Respondent.
No. 06-1084.

January 16, 2008

Appearances:
Thomas Christian Van Arsdel, Winstead Sechrest & Minick, PC, Houston, Texas, for petitioner.
Kurt Arbuckle, Kurt Arbuckle, PC, Houston, Texas, for respondent.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 06-1084, Bison Building Materials versus Lloyd Aldridge.
THE COURT MARSHALL: May it please the Court, Mr. Van Arsdel will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS CHRISTIAN VAN ARSDEL ON BEHALF OF THE PETITIONER

MR. VAN ARSDEL: Good morning and may it please the Court. We are here today to address two errors. The first error was committed by the Court of Appeals, when they dismissed this appeal for want of jurisdiction and we understand that jurisdiction is the issue of the day not only in this case but in the [inaudible] case to be argued later on this morning. But there is a second error at issue in this case and that was the error committed by the trial court when it refused to enforce a valid post-injury waiver. This issue is of paramount importance to workplace-injury litigants in this state. If the trial court's order is allowed to stand, it could serve as a precedent, which could lead to the review and undoing of validly executed post-injury settlements in this state. And for that reason, we

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ask this Court to accept jurisdiction or reverse the Trial Court's order and render judgment in Bison's favor. Starting the jurisdiction issue in this case, the Court of Appeals erred because it had jurisdiction over the trial court's order pursuant to the Texas Civil Practice and Remedies Code 71.098(a) provides for appellate jurisdiction over a number of Trial Court orders concerning arbitration.

JUSTICE HECHT: The Court of Appeals said that, "This is governed by the Federal Arbitration Act and the party seem to agree with that." Is that true?

MR. VAN ARSDEL: That's true, your Honor.

JUSTICE HECHT: Why, why do we look to the state law for-- it doesn't seem to apply to Federal Arbitration Agreements.

MR. VAN ARSDEL: Your Honor, even though substantively the law that governs this arbitration agreement and the award that was reached in this case is governed by the FAA, if the review is initiated in the Texas Court, Texas procedure governs and that is why we're talking about the Texas Arbitration Act section 171.098.

JUSTICE HECHT: Well, I think that assuming Texas procedure governs, still 171.002 of the chapter says-- this chapter doesn't apply to any of the list of things that one of-- claim for personal injury, then I guess it would make it not applicable to the agreement in this case.

MR. VAN ARSDEL: That's true. And that is why the party stipulated that the FAA would be the governing law.

JUSTICE HECHT: Would you still think we look to 170-- a part of that chapter for appealability?

MR. VAN ARSDEL: That's right, it's procedural law that Texas courts have to follow. In fact, if we follow the Federal Law, it's clear that Federal Law allows for the appeal of an order directing a rehearing. It's not clear that the Texas Arbitration Act does the same and that's why we're talking about the Texas Arbitration Act today.

JUSTICE BRISTER: But the question, the question is did the legislature intend chapter 171 to apply-- to state that the procedural requirements when the contract is governed by the FAA?

MR. VAN ARSDEL: Yes, I believe it did your Honor.

JUSTICE BRISTER: Why-- What part of it says it does?

MR. VAN ARSDEL: Well, I believe it's the case that no matter what law the parties determine governs their dispute. It's the procedural law of the state -

JUSTICE BRISTER: Right, we've got a lot of other procedures. 171 is for contracts governed by the Texas Arbitration Act. This was not governed by the Texas. We have a lot of other procedures that we can apply-- Texas, [inaudible] Texas-- what is there about 171 that says, "This is intended to apply to FAA appeals as well? Is there anything in it that says so?"

MR. VAN ARSDEL: Well, certainly there's nothing explicit in it. I would direct this Court's attention to the holding of Tanox versus Akin, Gump which held that parties may determine the scope of review that a trial court can use in reviewing an arbitration award, and that's exactly what the parties did here is grant an expanded scope of review. Notwithstanding the parties' agreement to expand the scope of review, that holding still used the Texas Arbitration Act to determine whether there was appealability of an order.

JUSTICE BRISTER: And you say that's not a jurisdictional question, that's the scope of review.

MR. VAN ARSDEL: The Tanox decision was, yes.

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JUSTICE BRISTER: Well, that's what you're all in for here. You're saying it's not jurisdictional and we disagree that they all look at everything rather than differential standard?

MR. VAN ARSDEL: Correct.

JUSTICE: Could you do that on a deal of an administrative agency? An administrative agency make find-- fact-findings were supposed to reveal some-- substantial evidence review, isn't that a jurisdictional standard?

MR. VAN ARSDEL: I'm not sure I follow, your Honor.

JUSTICE BRISTER: Substantial evidence of review or administrative agencies-- that's all we have jurisdictional review.

MR. VAN ARSDEL: Correct.

JUSTICE BRISTER: And if an agency and a party - fighting with the agency over a rule wanted us not to apply substantial evidence review. They both agreed to. We couldn't do that, could we?

MR. VAN ARSDEL: I don't believe so I, I believe the rule in Tanox was following the presumption of, of the support of arbitration. We enforce the agreement to arbitrate in the first place and Tanox says, not only do we enforce the agreement to arbitrate; we will enforce the standard of review that the parties agreed to in that arbitration agreement. And, and that-- that's what ...

JUSTICE BRISTER: But is that right? Why is that right? If, if you can't agree to it in the administrative context because it's a jurisdictional limit on this-- on the Courts. We can't look at anything more than substantial evidence when it comes to us for administrative agency. Why can't we do it when the party just agreed to it in arbitration?

MR. VAN ARSDEL: Well, I think the, the administrative proceeding presumes a regulatory scheme for the legislature that had occupied the entire field. The whole presumption of arbitration is the party's reached an agreement to arbitrate in the first place and that's just the continuation of that policy to support whatever agreements they make within limits about what the powers are ...

CHIEF JUSTICE JEFFERSON: Within what, within what limits, can the parties agree that the decision of this Court applying a particular standard of review just won't be applicable?

MR. VAN ARSDEL: I don't believe, I don't believe that they could narrow the scope of review. Certainly the, the legislature has spoken as to the type of review that every decision should be able to be reviewed under and that the Texas Arbitration Act the, you know, reviewing it for corruption or fraud or decisions outside the scope of agreement. I don't think the-- an agreement could further limit that. I don't think there could be an agreement that says, "We will not allow any judicial review of the arbitration award no matter what." I think that'd be against public policy.

JUSTICE O'NEILL: But, but the point is we haven't decided that issue. That's an issue bubbling around in the Federal Courts and in the Texas Courts and we have not addressed that issue. That's a jurisdictional issue, isn't it? And if the Trial Court acted within its power and authority, do you decide whether to confirm the arbitration award then when the Court of Appeals always have jurisdiction to decide whether trial court properly exercise its jurisdiction.

MR. VAN ARSDEL: I believe so.

JUSTICE O'NEILL: So then, don't we have to address that as a threshold issue? The parties' ability to agree on a different standard of review?

MR. VAN ARSDEL: I would, I would say that would have to be a

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requirement. Yes, your Honor.

CHIEF JUSTICE JEFFERSON: Just on the question of whether an order is-- the order is interlocutory or final? Just kind of walk me through this. Can a-- if a trial court says, "I think that the basis of the arbitrator's decision is contrary to the law or to the facts, let's say to the facts, the overwhelming facts-- is that a ground to-- for a trial court to remand or, or have his arbitrator rehear?"

MR. VAN ARSDEL: Certainly not under the traditional review of the Texas Arbitration Act.

CHIEF JUSTICE JEFFERSON: When can - what are the circumstances under which the trial court has authority to send the case back to the arbitrator?

MR. VAN ARSDEL: When that Trial Court has been empowered by agreement, to have a broader scope of review such that the Trial Court had in this case. It can perform a review that a Court of Appeals would normally perform on Trial Court decisions on Trial Court bench decisions. And so any review and remand that a Court of Appeals could make under similar circumstance, that-- that's what the parties in this case have empowered this trial court to do.

JUSTICE O'NEILL: And I guess that, that's why I keep coming back to more questions because I think I heard you agree that the party's ability to pick the different standard of review is a jurisdictional issue. It's a threshold issue and if that's the case and the Court of Appeals would have jurisdiction to decide that. And once it exercised jurisdiction over that, then it could decide the others who [inaudible] before it.

MR. VAN ARSDEL: I believe that's absolutely correct. That's another reason why they erred separate and apart from the shortcomings of the trial court's order. By virtue of the fact that we had an agreement that expanded the scope of review and that gave the Court of Appeals jurisdiction to review that and make a determination.

JUSTICE GREEN: Mr. Arsdel, let me ask you a question. I don't want to go off the reservation with this but in, in getting ready for this argument, it, it appears to me that there might be two arbitration agreements that are involved here. Could be involved - it's not briefed, it's not in the lower court's opinion, but it seems to me that under the current - the arbitration agreement we're talking about which gives the trial court some-- the party's right to appeal to the trial court in certain conditions, it is - except if there is arbitration under the benefit plan portion of this set-up. And of course, there was a benefit paid under the benefit plan, which appears to have an arbitration agreement but it's not in the record and we don't know what it says. Now, if that's so why are we looking at the first arbitration agreement and not the second? Why doesn't that one apply?

MR VAN ARSDEL: Your Honor, the claim was for damages-- money damages, not benefit damages. Money damages as a result of a work place injury. The arbitration agreement you've referenced allows a work, worker, if he's gone to a, a medical provider and he believes he's entitled to a certain benefit, say a surgery or some procedures or some prescription and has been denied to him by that medical provider and Bison as the administrator of the plan, he has a right to arbitrate that decision. This is not that case.

JUSTICE GREEN: Okay, so but the provision in the first arbitration agreement it says, "It applies except or unless the other one applies." How do we know with the record that it doesn't apply except for the parties not saying that it doesn't.

MR VAN ARSDEL: Well, we have from the record, his, his claim in

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arbitration and all it mentions is money damages under the plan.

JUSTICE GREEN: Okay, so you say, we don't have to worry about that one?

MR VAN ARSDEL: That, that's my assessment.

JUSTICE GREEN: Okay, thank you.

MR VAN ARSDEL: Now, once we've passed the jurisdictional threshold issue, it's clear that under the TAA, this order was appealable.

JUSTICE WAINWRIGHT: Mr, Mr. Van Arsdel, let me follow me up on that. I'm not sure I'm clear. There's a mutual arbitration agreement attached to the trial links, mutual agreement to arbitrate claims-- then there's also attached the summary plan description of Bison Building Materials Ltd.'s workplace-injury plan. And that defines these documents as I, as I read its title, as a summary of the plan. Is the actual plan or workplace-injury plan in the record?

MR VAN ARSDEL: It is not in the record.

JUSTICE WAINWRIGHT: And Justice Green was pointing out that that the mutual agreement to arbitrate says that it covers work-related illnesses or injuries, claims for benefits under the employee benefit plan or pension plan, except for claims under employment - employment benefit or pension plan then has the two bases for the exception. If the actual plan, the workplace-injury plan, is not in the record, how can we make sure that this exception didn't apply?

MR VAN ARSDEL: I, I think by virtue of the fact that Mr. Aldrige's claim in arbitration is in the record. And you can see based on what he's plead, that it does not fit that exception, even though the full plan is not in there. The summary terms would tell you enough to show that it is, it is not part of that arbitration -

JUSTICE WAINWRIGHT: Exceptions-- is if the claims procedure culminates in an arbitration procedure different from this one. The arbitration plan in the workplace-injury plan may be different from this one but how do we know if that workplace injury plan is not in the record?

MR VAN ARSDEL: I, I think the language there explains the categories of the different types of arbitration that are never-- not covered by the plan. And I think if you look at Mr. Aldrige's complaint in arbitration, it clearly sets forth a claim for personal injury damages, which are covered by the agreement. I don't think you need to see the full scope of the other arbitration agreement to make that determination.

JUSTICE WAINWRIGHT: Okay.

MR. VAN ARSDEL: I think there's enough in the record that we can already pass that threshold.

JUSTICE WAINWRIGHT: If, if as you sleep on that, do you think differently, you might consider some supplemental briefing I'm going to look at it more closely myself.

MR VAN ARSDEL: Very well, your Honor.

JUSTICE HECHT: So somebody comes in, they've got an arbitration award and the other side says, "Well, Judge, I want you to vacate it." And, and the others-- the winner says, "Well, the judge has no grounds for that." He says, "Well, I just think it was wrong. I just think the award was wrong. So I'm going to vacate it and send it back to another arbitration, tell them try it again and we're going to keep on this doing this, until we get an arbitration awarded." I think is-- it comes out the way I hope it should. There's no appeal from that until it's all over. Is, is that your view?

MR VAN ARSDEL: Well, it-- that's what the, that's a question to be answered to answered today specifically -

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JUSTICE HECHT: I'm just asking if that's your view.

MR VAN ARSDEL: It's my view that if there's a ruling on the motion to confirm under (a) 3 of that provision, I believe an argument can be made that jurisdiction exists and certainly that's what the Texas County Court of Appeals ruled in and [inaudible] and-- what's being decided here today, later on this morning.

JUSTICE HECHT: But I mean, if-- he says, "Well, I'm just going to hold that motion to confirm or deny. What I'm going to do is vacate and send it back." Can-- is there an appeal for this?

MR VAN ARSDEL: Under that circumstance, I don't believe there would be an appeal.

JUSTICE HECHT: And it looks to me like that would just undo the whole system. I mean, the trial judge could just keep sending it back to the arbitration panel until they got something light.

MR VAN ARSDEL: It would certainly open it up to abuse, certainly. And, and at that circumstance where the, the ruling on the motion to confirm is held in abeyance until he gets the result that he likes. Perhaps a mandamus proceedings could be initiated to force a ruling on the motion to confirm, but that certainly is a, an extra burden on the parties that I don't think the legislature intended but that, that's certainly is a question that, that's more squarely foot with [inaudible] than our case because in our order, there was no rehearing direct.

JUSTICE O'NEILL: But that's no different than a motion for a new trial, I mean, technically a Court continue to grant a motion for new trial and we've held that there's no review of that motion.

MR VAN ARSDEL: Justice O'Neill, I see my time is up, may I briefly answer? Respectfully, I, I disagree. New trials are issued by the same tribunal that's seen the error live and in person. In the, in the, in the error we're talking about today, this is a de facto Court of Appeals review that, that would be ordering a new trial as if it were a Court of Appeals. And those are always appealable.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The court is ready to hear argument from the respondents.

THE COURT MARSHAL: May it please the Court. Mr. Arbuckle will present argument for the respondent.

ORAL ARGUMENT OF KURT ARBUCKLE ON BEHALF OF THE RESPONDENT

MR. ARBUCKLE: May it please the Court. Obviously, it seems to me that the key issue here is whether or not 171.098 (a) makes this order that was entered by the court interlocutory or whether it makes it appealable.

JUSTICE ONEILL: What about, what about the threshold jurisdictional issue we were discussing? If the Trial Court did not have the power to do what it did, isn't that a threshold jurisdictional issue that the Court of Appeals always has jurisdiction to decide?

MR. ARBUCKLE: Okay, I assume that, that the question that, that I'm being asked about is the question of whether or not the Court can consider the, the trial court can consider the court-- the arbitration award on the basis of as if it were a trial court sitting on them -

JUSTICE BRISTER: Plenary review. Plenary review.

MR. ARBUCKLE: Yeah. And, and the-- I did not believe that that's a jurisdictional question. And the reason I-- first of, it, it-- right

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now, that's pending before the, the United States Supreme Court and the FAA in the HallStreet case, HallStreet versus Mattel. It was argued in November, it has not been handed down out yet. But that case was tried under the FAA. There's something very unique about this particular agreement, which is in the Appendix to the, the petitioner's brief under, under part five. The second paragraph says that "The FAA applies but it does not, but, to-- only to the extent that it's not contradicted by this agreement. If this agreement is contradicted then you fall back to state law." Now state courts are general courts of jurisdiction. The presumption is that they have jurisdiction, not that they don't have jurisdiction. In, in fact, section of the Texas Practice and Remedies Code 154.027 allows arbitrations to be non-binding or binding. So clearly, a, a case that falls between those two where the, where the parties said, "Well, we will arbitrate first, but we'll allow the court to-- a party to, to have the court review that on the basis of, of whether or not there's a, there's a, a, an error. Like there would be in a trial court that doesn't-- that's not a jurisdictional question." The Court, the, the, the trial court clearly has jurisdiction to answer that-- to, to deal with that. What we're really talking about is whether or not the Court is going to enforce the party's agreement, which I think also distinguishes it from an administrative proceeding where the procedures are set by statute and by, and by the Court's decision.

JUSTICE ONEILL: But I, I guess my question is, I mean, I hear you saying that you-- the party should be able to do that under Texas law, agree to a standard review. But if, if they can't-- if we were to say that, that the parties could not agree to a different standard. In that event the trial court would not have jurisdiction to do what it did, isn't that right?

MR. ARBUCKLE: Well, sure if this Court says the Court, the trial court doesn't have jurisdiction. Obviously the court would, would not have jurisdiction -

JUSTICE ONEILL: But I'm not -

MR. ARBUCKLE: - and

JUSTICE ONEILL: That's the question, and why wouldn't the Court of Appeals have jurisdiction to review that jurisdictional issue?

MR. ARBUCKLE: Well, in this case, that issue, the, the issue of whether or not the trial court had jurisdiction was never raised by any party in the case. The, the party both agreed that under Texas law at least implicitly because it was never raised. That, that the trial had jurisdiction and when no, when no objection to jurisdiction is raised in a general court in, in the state level, a court of general jurisdiction that can be waived because it's a general court, not like a Federal Court, which is a special court of jurisdiction. So the fact is that this issue is obviously hasn't been briefed by the party in this case because it hasn't been raised by either party in this case. You know. It also is important -

JUSTICE BRISTER: Looking at the trial court's order, the trial judge didn't think the arbitration wasn't finished. I mean-- I've read the part of her order that says, you know, because there's remaining fact questions but didn't just because she thought the fact questions were decided wrong. It's not like the arbitration wasn't over. It was over.

MR. ARBUCKLE: Well, I-- okay, I think -

JUSTICE BRISTER: Disagreed with the outcome, right?

MR. ARBUCKLE: No. I don't think so. Well, I think that what the Court, I, I, I wouldn't presume to say the Court agree or disagreed

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with the outcome. What the Court found is that as a legal matter question, Reyes and, and the conspicuousness of the waiver language applied to a post-injury waiver.

JUSTICE BRISTER: But did the arbitrator, arbitrator said, "They didn't apply to it?"

MR. ARBUCKLE: He, he, he actually-- as I-- my recollection is that even though that issue was addressed by the parties, he just simply dismissed it. He didn't, he didn't write to that issue.

JUSTICE BRISTER: Well, how, how can -

MR. ARBUCKLE: But he couldn't -

JUSTICE BRISTER: I, I don't understand the trial court's order because they are fact questions of. I mean, but that's like saying, Rey-- you have a jury verdict that comes up and a judgment based on jury verdict and the Court of Appeals reverses, saying, "Well, there was a fact question here." Yet there was, and that's why we had a jury verdict on it.

MR. ARBUCKLE: There was no -

JUSTICE BRISTER: The trial Judge can't reverse this for having a fact question for some fact the arbitrator decided, can't she?

MR. ARBUCKLE: Well, the, the arbitrator never had a hearing. The arbitrator decided on what would be equivalent to a summary judgment ...

JUSTICE BRISTER: So you're saying the arbitrator has to have a hearing?

MR. ARBUCKLE: No. But I'm-- I, I-- what I'm saying is that she -

JUSTICE BRISTER: What, what ground can the trial Judge do what she did?

MR. ARBUCKLE: If it were a-- like a summary judgment, the Court can say, no, wait, if you look at what both sides presented in that summary judgment, there's a fact issue -

JUSTICE BRISTER: Arbitrators-- But, but, but, but -

MR. ARBUCKLE: - here so you couldn't grant some -

JUSTICE BRISTER: - but, but, but, but, but an arbitrator can decide things on summary disposition even if there are fact questions. That's part of the wonderful world of arbitration. They can do it anyway they want.

MR. ARBUCKLE: Well, as I understand, as I understand the Federal Arbitration Act, there're specific requirements in the Federal Arbitration Act that the parties are entitled to a hearing. So unless there is a -

JUSTICE BRISTER: Is that entitled to an oral hearing?

MR. ARBUCKLE: Well, that they're entitled to a hearing.

JUSTICE BRISTER: Well, that doesn't have to mean oral hearing.

MR. ARBUCKLE: But there was no hearing provided in this case at all. There was no-- the, the-- what it says ...

JUSTICE BRISTER: You filed briefs, -

MR. ARBUCKLE: What is, what is -

JUSTICE BRISTER: - you filed briefs. You filed arguments with the arbitrator. The arbitrator dismissed it. Now, in trial court, that's a hearing. Why is that not a hearing in arbitration?

MR. ARBUCKLE: Because the FAA says the parties are entitled to present evidence. If, if the parties are required in an arbitration to, to, to provide-- to do essentially the equivalent of summary judgment, that was what way-- if you go way back, why courts didn't like to enforce arbitration agreements because arbitrators could do that. So they set it-- in the FAA they set up some specific things and says if you, if you've got to let the parties present their evidence. The whole

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point is that you're not going to do all these discovery, you're not going to be able to go take depositions anytime you want to. So in-- so you can't decide things summarily like that because the parties don't have the opportunity that they have in Court to do the things they need to do to get to the point where you can determine that summary.

JUSTICE WAINWRIGHT: Must the evidence be live?

MR. ARBUCKLE: I'm sorry?

JUSTICE WAINWRIGHT: Must the evidence be live?

MR. ARBUCKLE: No. It can be written submission of evidence but, but, but if, if there are, for example, things like people need to be subpoenaed, for example, in this case, we had no opportunity to cross-examine the person that filed an affidavit on their behalf.

JUSTICE O'NEILL: Well, let me ask -

MR. ARBUCKLE: On [inaudible] we went in Court.

JUSTICE O'NEILL: We're talking about a hearing but, but the argument's been made that the issues that the Trial Court specified or remaining are really legal questions. And if they are really legal questions, then there really is no need for factual development before the arbitrator. And why wouldn't-- whether the waiver satisfied the fair notice requirement be a legal question?

MR. ARBUCKLE: Well, the-- that question is in the Court founded in-- the trial court founded on our favor and against the arbitration. That therefore, allowed the Court to get to-- or would've-- would cause the arbitrator to get the fact issues that the arbitrator had not gotten to. The arbitrator just said-- he signed the waiver we're through.

JUSTICE WAINWRIGHT: This--

MR. ARBUCKLE: The Court never-- he, he-- the arbitrator never discussed the ambiguity arguments and the conspicuousness of the waiver itself.

JUSTICE WAINWRIGHT: The order does, the order does say that there's a fact question on actual knowledge, which could be depending on the evidence of its competing-- a question of fact. Did the trial court indicate what it thought should happen after entering this order?

MR. ARBUCKLE: No, the only thing I -

JUSTICE WAINWRIGHT: Can it say that, no, the arbitrator needs to decide this, I mean, if, if, if-- you know-- if this is a summary judgment's type analo-- example that perhaps should apply, then if an order says they're fact questions then, I mean, there's presumably more proceedings to occur. I'm not sure that that exactly applies here, that analogy. But is there any indication what the trial court said what she thought should happen next ...

MR. ARBUCKLE: I have been -

JUSTICE WAINWRIGHT: Was wrong?

MR. ARBUCKLE: There has been, there has been no contact with anything that the, the trial court set up since the order other than when ...

JUSTICE WAINWRIGHT: Look, I'm, I'm not asking if you called the trial court -

MR. ARBUCKLE: No.

JUSTICE WAINWRIGHT: - in preparation for this argument.

MR. ARBUCKLE: No. I'm, I'm -

JUSTICE WAINWRIGHT: At the time of the entry of the order and the proceedings related to it, did the Trial Court say anything about what she thought should happen next?

MR. ARBUCKLE: No, the, the order came-- the Court took her arguments of Counsel, took it under advisement-- issued the order that-

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- and so we had - we weren't present when the order was -

JUSTICE O'NEILL: And to follow up on that point, if we were to affirm the Court of Appeals, where would that lead us?

MR. ARBUCKLE: It would lead us to the trial court either to voluntarily go back to the arbitration or to apply to the Court for an order to return this to arbitration.

JUSTICE BRISTER: I mean if the-- if, if this waiver is no good, you've got to decide whether the guy was injured or not, right? And the only person who can do that is the arbitrator, right? So you have to go back. There's no way to read this order other than-- an implied-- you have to go back to the arbitrator.

MR. ARBUCKLE: Absolutely. This order-- it remands this case.

JUSTICE BRISTER: So this, this - the trial judge, even though she didn't direct rehearing. The fact is, she did.

MR. ARBUCKLE: That's right. I agree with that completely and, and in-- and certainly when the parties appealed the case, both parties ought that to-- it's even in-- by its brief. They refer to the Court [inaudible] an order in remanding the case to the [inaudible].

JUSTICE BRISTER: But why did the Court of Appeals think they didn't have jurisdictions?

MR. ARBUCKLE: They-- well, because of its line of cases out of this Court that it was fairly recent I think at that time in which the Court questioned whether or not certain arbitration-- because of the conflict between the FAA and the TAA. The FAA allows certain interrogatory appeal but the Court had ruled that if you're talking about those kinds of issues, you, you apply state law because it's procedure.

JUSTICE BRISTER: I mean, what I'm saying without directing a rehearing vacating, I've seen cases where the arbitrator-- the parties had five issues and the arbitrator has decided three, and it seems to me that's one situation where in effect, the arbitrators thought they were done but they're clearly wrong because there was two things they haven't decided yet. But that one in this case, the arbitrators-- if the arbitrator is right, that the guy waived all his rights in this post-injury they need signed, then the arbitration is over. There was nothing left hanging by the arbitrator, assuming the arbitrator was right.

MR. ARBUCKLE: If, if-- that's right, if you make the presumption that the arbitrator was correct on how he applied the law, then that was the arbitration word was final.

JUSTICE BRISTER: So the arbitration itself was not interlocutory.

MR. ARBUCKLE: Right.

JUSTICE BRISTER: So that -

MR. ARBUCKLE: At least I agree with that.

JUSTICE BRISTER: The thing that confuses me if, if the trial Judges in effect to the Court of Appeals in this case normally have the trial court, Court of Appeals and then us. This case she got a different trier of fact as the arbitrator, the trial Court said, "It's the Court of Appeals." If a Court of Appeals just in a regular case, reversed and remanded for a new trial, nobody would argue that case is interlocutory, they've still got a trial to turn. I mean, we would review the Court of Appeal's case because the trial was finished. They reversed it for a new trial but we, we look at those all the time. Why, why did the Court of Appeals think if the-- or why did the statute say if it's reversing and remanding, that that's not appealed. It seems like it should be.

MR. ARBUCKLE: I-- you know, I, I-- both of the parties in this

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case made that presumption when we filed our appeals. Bison filed an appeal of the trial court's order and we filed our -

JUSTICE BRISTER: This was a surprise to you too?

MR. ARBUCKLE: - and we filed it, too. And, and the Court of Appeals said, wait a minute, sure you agreed to let the trial court do this but we're still-- our jurisdiction doesn't arise out of the agreement. Our jurisdiction arises out of the code and the code says that we can only review the order if it's, if it's final and this isn't final, therefore, we can't review it. That's what an-- and I, I think that after going back and being alerted to that issue by the Court of Appeals, that the Court of Appeals was correct. In, in the State Court level, you start with the general rule, which is the general rule is that the Court of Appeals can only review a case that is final either because it says it's final in unequivocal language, or because it clearly is because it disposes of all the issues. Obviously, this, this, this trial court order does not say it's final, and it obviously says that there are still issues. It says, here's the fact issues that still needs to be, be resolved. So it's not, it's not appealable in that sense unless it becomes appealable under the TAA and, and I -

JUSTICE HECHT: Why does the, why does the TAA apply?

MR. ARBUCKLE: - I do not necessarily think the TAA does apply. It only applies if this Court decides that just simply because this is an arbitration, you have to apply an arbitration act. As I mentioned, under 154.027 of the same code, which is a whole different chapter, it simply says, "The parties can have an arbitration and it can be binding or non-binding." Under those circumstances, you would just apply, it seems to me, common law. In fact, in the arguments in the-- before the Supreme Court of the United States in the HallStreet case that I mentioned earlier, that, that, that's talking about whether the FAA allows the parties to agree to it-- to these-- to, to a Court, Court review on different grounds. One of the things that the Justices concentrated on in their questioning in that case was why do you care about the FAA. This is a diversity case. Just go back and use common law. And so, and so that's why I say under common law principles, that is where you start. And where you start under common law principles, this is not an interloc-- this is an interlocutory order.

JUSTICE HECHT: In the Federal system, would this be an appealable order?

MR. ARBUCKLE: It, it-- I believe if I remember the provisions of the FAA. The, the FAA does provide for this order to be appealable?

JUSTICE HECHT: It says vacate -

MR. ARBUCKLE: But I'm, I'm not absolutely sure.

JUSTICE: It says, "You can appeal an order vacating an award."

MR. ARBUCKLE: Right. I-- and I think-- I am trying to remember whether I can think of a case that is interpreted that and I can't think of one now. I'm just going on a statutory language.

JUSTICE HECHT: It doesn't have the rehearing language-

MR. ARBUCKLE: Right.

JUSTICE HECHT: - that the state statute.

MR. ARBUCKLE: And the, and the Federal Court might have had some concern about that, that your Honor raised about whether or not the Court could just [inaudible] around until the Court got it the way they wanted it. However, I think that there are remedies for that. They may not be a direct appeal, but something like a mandamus or a writ of something or other. I, I would have to look them up. But -

JUSTICE BRISTER: Writ of something or other.

MR. ARBUCKLE: I'd have to look them up, because I, I my Latin was

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never very good, but there is a writ, writs of-- I forget what they are called. But I think that, that there are remedies if the trial court does abuse its, its discretion, in that, in that fashion.

CHIEF JUSTICE JEFFERSON: Getting to the merits-- it says Reyes-- govern this, this claim on -

MR. ARBUCKLE: Yes.

CHIEF JUSTICE JEFFERSON: - on, on fair notice and conspicuousness and the post-injury. What-- just getting to the merits, why, why would you prevail?

MR. ARBUCKLE: Okay, as the Court knows the Reyes case, says that in a pre-injury waiver-- a waiver that is signed before injury, that the, that, that is not then, is at that time that it is not governed by a labor code which now has changed it for pre, pre-injury waivers. That it has be to be conspicuous and there has to be-- or, or there has to be absolute or evidence that the person actually understood it. We say that, that based on the language of the Reyes case which does not make a distinction between a pre-injury and a post-injury waiver that, that same standard applies to a post-injury waiver, all of the principled reasons that the Court gave in that case which has to do with special workers compensation kinds of issues, apply equally on a post-injury and a pre-injury. This is not like a settlement. A settlement is something that is drawn up after if something happens. This, this maybe called a "post-injury waiver" but it's, it's a form created before there ever was an injury. So it is essentially a pre-injury waiver that is being signed to post-injury. And -

JUSTICE O'NEILL: Isn't that like a settlement? I mean you've been injured and you sit down and you sign an agreement, agreeing to take plans-- take under the benefit plan in lieu of your common law remedy. Why, why isn't that like a settlement?

MR. ARBUCKLE: Well, it's, it's not like a settlement in the same sense that a pre-injury waiver is not like a settlement because it is not negotiated at the time of the injury. It is not based on the injury. It is simply based on a form that was created long before the injury occurred. That the person is being asked to sign at a time when they are unable to work and they need to go to a doctor and someone saying, "Sure sign here and you can go to a doctor."

CHIEF JUSTICE JEFFERSON: Although, I mean there, there are settlement forms that lawyers use and they plug in the names basically. The release language is the same. The, the names change and why, why does it matter that the form was-- preexisted the injury [inaudible]?

MR. ARBUCKLE: Well, because the form puts you into a system it does not settle the case. It put you under a system where the employers through the plan and under ERISA law the summary plan description is binding on the employer. The-- it puts him into a system that the employer controls the whole gang. They control whether or not you can get benefits. They control whether or not you can go to a doctor, what doctor you can go to. Whether or not the doctor is actually going to get paid and what benefits you get, if any. Those all become controlled by the-- it's, it's essentially a cost control measure by the employer. It is not a settlement. A settlement is when you get something and you know exactly what you are getting at the time you signed, and you give up something, and you know exactly what you are giving up. In a, in a, in an injury waiver like this, that throws you into a system that essentially, all it does is throw you into a system that your employer the next day could say, "I am not going to give you any benefits under the plan." Then you are limited to suing supposedly, under the plan you cannot sue for your actual damages, even though the employers messed

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you around by getting you to sign this. So essentially the employer can say, "You signed this, it limits my liability to you ever to the plan, but you get nothing for that because I have discretion, I can, I can."
-

JUSTICE JOHNSON: Well, in this case you get 80,000 dollars worth of medical benefits and indemnity payments as we understand the record.

MR. ARBUCKLE: That's right and they were cut off after a year.

JUSTICE JOHNSON: Okay, but he did get something for it. Now also the Court-- the trial court said that he sent it back because the waiver, does the waiver satisfy the fair notice requirements? And is that a matter of law? I think we had that maybe touched on a little earlier.

MR. ARBUCKLE: Well, in this particular situation, the way I took that there's, there's two pages for this waiver and on the page that he signed is only a medical waiver and then there is another page that you can put on top of it, that's the injury waiver.

JUSTICE: So the question is, is it a matter of law or is it a matter or is it a question of fact?

MR. ARBUCKLE: I think, think it is a matter. What I said in my brief is that it's, it's a mixed question. There are fact issues that have to be determined to apply the law.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

JUSTICE WILLETT: Go ahead and talk about your second issue about the post-injury waiver at this point.

REBUTTAL ARGUMENT OF THOMAS CHRISTIAN VAN ARSDEL ON BEHALF OF PETITIONER

MR. VAN ARSDEL: Certainly, your Honor. The question is, "What this Court meant when it decided Reyes? Do the fair notice requirements apply to post-injury waiver?" In the first sentence of Reyes explains the issue. Is "Do the fair notice requirements need to be met when an employee is enrolled in a workplace injury plan?" In this case the record is clear, he enrolled in that plan almost a year before the injury. He was eligible for benefits, the moment-- basically when he started his employment and signed that form as part of his, his initiation and, and training. It wasn't until a year later after he suffered an injury, that he was then subsequently asked to sign a post-injury waiver explaining that he did not want to receive those benefits in exchange for waiving his claim for damages as a result of his injury.

JUSTICE BRISTER: But he could have received them without signing them.

MR. VAN ARSDEL: Well, what he would have received is Emergency Medical Care. That is what the plan provides. He would not have received continuing care and wage replacements under the plan, unless he sign the post-injury waiver.

JUSTICE BRISTER: Of course, he could get Emergency from the Emergency Room by showing up.

MR. VAN ARSDEL: He could do that but Bison would pay for that under this plan.

JUSTICE O'NEILL: Do you agree that the jurisdictional point that the, the trial court's power to go beyond, beyond the review that's,

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that's provided was waived, was that briefed in the Court of Appeals? It was not briefed here.

MR. VAN ARSDEL: It was not briefed to the Court of Appeals.

JUSTICE O'NEILL: So do you agree that that is issue is waived?

MR. VAN ARSDEL: Well, to the extent of subject matter jurisdiction, I am assuming that it is a subject matter jurisdiction can be waived and then possibly it is. Just to return briefly to Reyes, the very nature of what the fair notice requirements are tell us that it is only in a pre-injury context where they apply. One of the requirement of fair notice is the expressed negligence doctrine and as this Court held in Green versus Solis, , part of the express negligence doctrine is to determine whether a party has exculpated-- I guess excused itself from future negligence. The very definition of what it is assumes it is a pre-injury context. And as the law stands today indemnity agreements are virtually the only context where the fair notice requirements apply because pre-injury waivers in the work place context had been outlawed by the labor code. So even the very definition of what the fair notice requirements presume that it's a pre-injury context. For that reason alone, the trial court's determination should be reversed. Just to return briefly to Justice Johnson and Justice O'Neill, your question about whether this order that the trial court issue had truly contemplates a rehearing and it's clear that it doesn't.

JUSTICE HECHT: Clear that they what?

MR. VAN ARSDEL: It clearly does not.

JUSTICE HECHT: What were the, what were you going to do? The Judge says, "Well, there's two issues, period. Nobody does anything. Nobody says, 'Okay, well, should we have a hearing or get a remand or what should we do."'

MR. VAN ARSDEL: If this Court were to confirm and affirm the Court of Appeals, we would be essentially left in legal limbo. We would need some more direction from the Trial Court about what happens.

CHIEF JUSTICE JEFFERSON: You know, you can go straight back to the arbitrator, I think.

MR. VAN ARSDEL: Well, your Honor I disagree because the arbitrator should not have to de novo figure out the law himself when it has in fact a reviewing Court to tell him what the law is. Remember, the trial court has been empowered with a quasi Court of Appeals power to review. A Court of Appeal would never remand the case back to a trial court to say, "You need to figure out what the law is on this question of law," which is essentially what perhaps the trial court intended to do here. That would never happen. They would tell the trial court what the law is and if there is a subsequent fact issue that needs to be determined, then and only then would a remand happen.

JUSTICE O'NEILL: Well, but if it's an interlocutory order, if we were to, to affirm the [inaudible] and say that it was interlocutory, then the trial court knows it's interlocutory and the trial court needs to do something else to move it to finality, I mean, it does not seem like legal limbo would last for very long.

MR. VAN ARSDEL: That's right. We would need some further direction from the Court and hopefully at that time, in that event the trial court would clarify the issues. Perhaps to give us a true ruling on the fair notice issue to see whether it has been met or not. As only the trial court can determine at that point and then and only then, perhaps we would need to go back at her direction.

JUSTICE WILLETT: Do you all dispute that the trial court here was sort of acting as a Appellate Court and had to therefore apply or

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comply with the T.R.A.P. rules.

MR. VAN ARSDEL: That, that is exactly our contention.

JUSTICE WILLETT: So under rule 43.2, about the types of judgments that Appellate Courts may enter what specific subpart does this fall in? What does it-- where does it fit? Which one?

MR. VAN ARSDEL: It, it fits as-- well, actually it is out of conformity with that, with that rule. A Court of Appeals normally would not confirm in part and reverse in part. They have reversed the whole thing for further determination and that is not what this Court did.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Counsel. The cause is submitted and the Court will take a brief recess.

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