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FIFTH DIVISION
March 4, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROYAL INDEMNITY CO.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
CHICAGO HOSPITAL RISK POOLING PROGRAM,)	
)	
Defendant-Appellant.,)	
)	Nos. 04 L 12616
consolidated with)	07 L 04628
)	
THE HOME INSURANCE COMPANY, by and)	
through ROGER A. SEVIGNY, Commissioner)	
of Insurance for the State of)	
New Hampshire Solely in his Capacity as)	
Liquidator of The Homes Insurance)	
Company,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
CHICAGO HOSPITAL RISK POOLING PROGRAM)	
(CHRPP) for itself and its Member,)	
Palos Community Hospital,)	Honorable
)	Barbara A. McDonald,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Epstein concurred in the
judgement.

O R D E R

HELD: The trial court correctly determined the excess insurers' cause of action against the primary insurer for negligent failure to settle a covered loss within policy limits was not subject to arbitration. The claim against the primary insurer for alleged malfeasance for failure to reasonably settle a covered loss within policy limits was not contemplated in a contractual provision calling for the arbitration of disputes between the insured and the primary insurer over whether to settle claims against the insured for covered losses.

Defendant, Chicago Hospital Risk Pooling Program (CHRPP), appeals from the circuit court's decision denying its motion to compel arbitration of the equitable subrogation causes of action filed by Plaintiffs Royal Indemnity Company (Royal) and Home Insurance Company (Home). Defendant brought this interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)(1)), contending the circuit court erred when it held the agreement between CHRPP and the insured does not require the excess insurers' claims to be arbitrated. For the reasons that follow, we affirm the circuit court's judgment.

BACKGROUND

This is the second interlocutory appeal before this court regarding the arbitrability of plaintiffs' claims against CHRPP.

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In *Royal Indemnity Co. v. Chicago Hospital Risk Pooling Program*, 372 Ill. App. 3d 104, 111 (2007) (*Royal Indemnity I*), this court determined Royal's use of "following form" language in its excess policy applied solely to coverage and did not constitute an agreement or expression of its intent to be bound by the arbitration clause contained in the trust agreement. We further held Royal's identification of the underlying policy as the trust agreement was not a clear and unequivocal expression of its intent to incorporate the entire agreement and that, therefore, as a nonsignatory to the arbitration agreement, it could not be compelled to arbitrate its claim against CHRPP pursuant to that agreement. *Id.* We held the circuit court erred in granting CHRPP's motion to compel arbitration and reversed and remanded the matter for further proceedings consistent with our opinion. *Id.* The current interlocutory appeal flows from those further proceedings.

CHRPP is an Illinois trust that was established in 1978 by a group of Chicago-area nonprofit community hospitals pursuant to the Illinois Religious and Charitable Risk Pooling Trust Act (215 ILCS 150/1 *et seq.* (West 2004)). CHRPP acts as a charitable risk pooling trust to provide self-funded coverage of malpractice liabilities to its member hospitals. Under the trust agreement, several Chicago hospitals combine their individual assets to

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share the risks and burdens of self-insurance against potential medical malpractice claims. The trust agreement, which is at the center of this controversy, was entered into by the participating hospitals, one of which is Palos Community Hospital (Palos), the trustees, who are either officers, directors or full-time employees of one of the participating hospitals, and the independent corporate fiduciary, which is the Continental Illinois National Bank and Trust Company of Chicago or any other recognized independent bank appointed by the trustees. Royal was an excess and surplus claims insurance carrier that provided

medical professional liability coverage in excess of the primary liability coverage provided to Palos under the trust agreement. The excess insurance coverage provided by Royal was \$ 5 million in excess of the \$5 million layer provided by CHRPP. The excess insurance coverage provided by Home was up to \$20 million over the coverage provided by CHRPP and Royal.

A medical malpractice action was filed against the defendants Palos, two of its physicians, and members of its staff regarding the delivery and care of an infant born on March 5, 1985. That action, known as "The Donahue Action," alleged that as a proximate result of the defendants' actions, an infant, Daniel Donahue, suffered "severe and permanent disabilities including, but not limited to, brain damage, blindness, severe lack of gross motor function control, and daily seizures,

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requiring daily professional care." Pursuant to the trust agreement, CHRPP retained counsel to represent the defendants in the underlying Donahue action. Counsel investigated Palos' defense and potential damages and concluded the hospital's liability exposure for the Donahue action would likely exceed CHRPP's \$5 million primary coverage. Counsel recommended to settle the matter within that layer of coverage before the matter proceeded to trial. However, CHRPP allegedly did not follow that recommendation and the matter proceeded to trial in 2002. Once the trial commenced, the plaintiff's attorney in the Donahue action refused to settle within the primary coverage layer. Before a verdict was rendered in the case, a settlement agreement was reached in the amount of \$18 million. CHRPP became liable for its entire \$5 million layer of primary liability coverage, Royal became liable for its entire \$5 million layer of excess liability coverage, and the remaining \$8 million was paid by Home.

In its second amended complaint filed in the instant case, Royal raised an equitable subrogation claim alleging CHRPP breached its good-faith duty to settle the Donahue action. Home filed a first amended complaint based on the same theory. The cases were eventually consolidated. Specifically, the amended complaints alleged CHRPP was made aware by its hired counsel and Royal that Palos' liability exposure was likely to exceed the \$5

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million layer of coverage provided by CHRPP, and that CHRPP knew or should have known the matter could have been settled within that layer but refused to do so. Additionally, the amended complaints alleged that approximately two weeks after the trial commenced CHRPP still refused to settle, despite being informed by hired counsel that the case was a "dead bang loser," in effect ignoring the admonishments until it was too late. According to the complaints, once CHRPP agreed to settle the matter, the plaintiff's counsel in the Donahue matter demanded no less than \$18 million, which caused Royal to be liable for its entire \$5 million layer of excess liability coverage and Home to be liable for \$8 million.

In response, CHRPP filed a motion to dismiss the complaints and compel arbitration on the grounds that the claims filed by Royal and Home were subject to arbitration under the trust agreement that established self-insured coverage with CHRPP. Specifically, CHRPP alleged arbitration of plaintiffs' claims was required because plaintiffs, as subrogees of Palos, were bound to arbitrate such disputes under the terms of the trust agreement's arbitration clause. Royal and Home opposed the motion, alleging the terms of the trust agreement did not require arbitration of its subrogation claims against CHRRP.

On June 23, 2009, the trial court denied defendant's motion to compel arbitration, finding plaintiffs' claims were outside

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the scope of the arbitration clause. CHRPP timely filed its notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a) (188 Ill. 2d R. 307(a)).

ANALYSIS

Because a motion to compel arbitration is analogous to a motion for injunctive relief, we have jurisdiction over this interlocutory order under Rule 307(a). *Nagle v. Nadelhoffer, Nagle, Kuhn, Mitchell, Moss & Saloga, P.C.*, 244 Ill. App. 3d 920, 924 (1993). A denial or grant of such a motion can be reviewed by this court as an interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)). *Yandell v. Church Mutual Insurance Co.*, 274 Ill. App. 3d 828, 830 (1995). The only question properly before us on an interlocutory appeal of this type, however, is whether there was a sufficient showing to sustain the order of the trial court granting or denying the relief sought. *J&K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 667 (1983).

The specific question before us is whether Royal and Home, acting as subrogees for Palos Hospital, are required by the trust agreement's arbitration clause to arbitrate their claims against CHRPP. The trial court did not hold an evidentiary hearing or make any factual findings in this case. Furthermore, none of the relevant underlying facts are in dispute. Rather, the court's

decision was based on a purely legal analysis. Thus, we review the trial court's denial of the motion to compel arbitration *de novo*. *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 115 (2003); *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 496 (2002).

I. Waiver

Initially, plaintiffs contend CHRPP has waived its right to arbitration. "Waiver may occur when a party conducts itself in a manner inconsistent with the arbitration clause, thereby demonstrating an abandonment of that right." *Feldheim v. Sims*, 326 Ill. App. 3d 302, 309 (2001). Although Illinois courts generally disfavor finding a waiver of arbitration rights, "[a] party's course of action amounts to waiver when it submits arbitrable issues to a court for decision on the substantive merits of the cause." *Feldheim*, 326 Ill. App. 3d at 309-310; *Glazer's Distribution of Illinois, Inc. v. MWS-Illinois, LLC*, 376 Ill. App. 3d 411, 426-27 (2007). However, there is "no hard-and-fast rule" on what constitutes a waiver of the right to arbitration, and each case must be decided on its own unique facts. *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1002 (2003).

In both *Feldheim* and *Glazer's*, this court held that by submitting arbitrable issues to the circuit court for resolution on their merits by that court *prior* to ever raising or mentioning

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any right to arbitrate said issues, the parties seeking arbitration waived any contractual right to arbitrate the claims. See *Feldheim*, 326 Ill. App. 3d at 310; *Glazer's*, 376 Ill. App. 3d at 426-27. In this case, unlike *Feldheim* and *Glazer's*, we find CHRPP has consistently sought arbitration of plaintiffs' claims.

Although we recognize CHRPP filed a section 2-619 motion to dismiss plaintiffs' subrogation claims, we note CHRPP also clearly alleged at the same time that, in the alternative, the claims should be subject to arbitration under the trust agreement. Because the record before us indicates CHRPP never demonstrated an intention to abandon its argument that arbitration of plaintiffs' claims is required, we find CHRPP did not waive the issue. See *LAS, Inc.*, 342 Ill. App. 3d at 1002.

II. Proper Venue to Determine Scope of Arbitration Clause

CHRPP contends that under the terms of the arbitration clause in the trust agreement, the scope of arbitration should have been determined by an arbitrator, not the circuit court. We disagree.

In *Royal Indemnity I*, we specifically recognized that "where the parties are in conflict as to the scope of the provision for arbitration and the question of the parties' contractual intention as to scope is reasonably debatable, the issue of arbitrability should be initially determined by the

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arbitrator.' " *Royal Indemnity Co.*, 372 Ill. App. 3d at 111, quoting *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 499 (2002). However, we noted that this heavy presumption in favor of arbitrability does not apply to the issue of which claims are arbitrable, and that courts should not assume the parties agreed to arbitrate. *Royal Indemnity Co.*, 372 Ill. App. 3d at 111, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 934, 944 (1995). Accordingly, we held "the general rule is that whether particular disputes are arbitrable under a contractual arbitration clause are questions for the court to decide as a matter of contract interpretation." *Royal Indemnity Co.*, 372 Ill. App. 3d at 111, citing *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 984 F.2d 113, 117 (4th Cir. 1993).

Here, the question is whether Royal and Home, acting as subrogees for Palos Hospital, are required by the trust agreement's arbitration clause to arbitrate their claim of negligent or bad faith refusal to settle against CHRPP. We find that question is ultimately one for a court to decide, not an arbitrator. See *Royal Indemnity Co.*, 372 Ill. App. 3d at 111.

III. Scope of Arbitration Clause

CHRPP contends that as subrogees of Palos, plaintiffs had the same obligation to arbitrate its claims that Palos would have

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had. Specifically, CHRPP contends that because Palos would be required to arbitrate any claim against CHRPP concerning CHRPP's conduct during the settlement of the Donohue case under the terms of the arbitration clause, the subrogee-plaintiffs are likewise required to arbitrate any settlement dispute it may have with CHRPP. CHRPP also contends that contrary to the trial court's decision, the scope of the arbitration clause in this case is clear: if the parties disagree about a settlement, the settlement dispute is subject to arbitration.

Plaintiffs counter that the trust agreement's arbitration clause does not encompass the type of claim plaintiffs have raised here, namely that CHRPP engaged in tortious conduct in its capacity as a primary insured during the Donahue case.

The Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 2004)) embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 443 (1998). While we recognize arbitration is a favored method of dispute resolution, we note "our supreme court has consistently cautioned that an agreement to arbitrate is a matter of contract, and the parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language." *Royal Indemnity Co.*, 372 Ill. App. 3d at 110, citing *Salsitz v.*

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Kreiss, 198 Ill. 2d 1, 13 (2001); *Ozdeger v. Altay*, 66 Ill. App. 3d 629, 631-32 (1978). Moreover, although arbitration provisions are generally interpreted broadly, courts may only give as large a construction to arbitration agreements "as the words of the instrument and the intentions of the parties, as drawn from their expression, will warrant." See *Rauh v. Rockford Products Co.*, 143 Ill. 2d 377, 387 (1991).

The trust agreement's arbitration provision, which is found in section 6.21, provides in relevant part that:

"The Trustees shall devise a policy to govern the settlement of claims against a Hospital for Covered Losses ***. The policy so devised shall provide for consultation with a representative of said Hospital involved and, where appropriate, the defense counsel selected pursuant to Section 6.18, before any settlement is approved, and further shall provide that any settlement shall require the concurrence of both a majority of the Trustees and the Hospital."

The provision further provides that:

"In the event that any Hospital and the Trustees are unable to concur in a settlement, and the Trustees conclude that said inability is to the detriment of the

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Participating Hospitals, said settlement dispute shall be subjected to arbitration by an ad hoc committee Trustees who are representatives of the participating hospitals appointed by the Chairman of the Trustees. The decision reached by said ad hoc committee shall be final and not subject to attack in any court of law or equity, either directly or collaterally."

We note the arbitration provision, when read as a whole, is clearly intended to establish the procedure to be used to resolve disputes between CHRPP and a covered hospital over whether to settle "covered losses." What constitutes a covered loss is defined in section 4.2 of the trust agreement:

"The term 'Covered Loss' as used in this Trust Agreement shall mean:

All sums that any Covered Person as defined herein shall become legally obligated to pay as damages, including punitive damages:

- (1) because of Bodily Injury or Property Damages caused by an occurrence, or
- (2) because of personal injury, or
- (3) because of Malpractice Injury,

To which this Trust Agreement applies arising directly out of or in connection

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with the maintenance or operation of the Hospital or an allied health facility operated by the Hospital or the rendering of or failure to render patient care or professional services by a Covered Person."

It is clear the term "covered losses" as used in the arbitration provision refers to claims that allege a "personal" or "malpractice" injury stemming from the "maintenance or operation" of a covered hospital or allied health facility, or the "rendering of or failure to render patient care or professional services" by a covered person. Plaintiffs' cause of action that CHRPP, as a primary insurer, acted negligently or in bad faith by failing to settle the claim against Palos within the policy limits is clearly not a cause of action arising from a "covered loss" as defined in the trust agreement. Moreover, we note plaintiffs' cause of action does not stem from a situation where Palos and the CHRPP trustees were "unable to concur in a settlement" and the trustees determined said inability was "to the detriment of the Participating Hospitals," something the arbitration clause specifically identifies as necessary to trigger arbitration of a "settlement dispute" under the trust agreement. Neither the arbitration clause nor the other provisions in the trust agreement itself say anything regarding

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whether arbitration is required where a third party or a covered hospital seeks to recover damages against CHRPP for a tortious breach of duty involving liability coverage.

Because plaintiffs' claims do not fall within the clear language of the arbitration clause in the trust agreement, we find the trial court was correct in determining the arbitration clause's scope was not intended to encompass the type of claims at issue here.

CONCLUSION

We affirm the trial court's judgment.

Affirmed.