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ROBERT WAYNE DRUMMOND AND GAYLE DRUMMOND, APPELLANTS, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

785 N.W.2d 829

Filed July 23, 2010. No. S-09-931.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.
3. **Words and Phrases.** As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Reversed and remanded for further proceedings.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellants.

Stephen S. Gealy and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Robert Wayne Drummond and Gayle Drummond made application to the district court for confirmation of an arbitration award under Neb. Rev. Stat. § 25-2612 (Reissue 2008). The Drummonds received the award after arbitration of their claims for underinsured motorist coverage. State Farm Mutual Automobile Insurance Company (State Farm) moved the district court to strike the Drummonds' application for confirmation on the grounds that State Farm had paid the arbitration award in full and that as such, confirmation of the award was moot. The Drummonds appeal from that order. We reverse the

decision of the district court and remand the cause for further proceedings.

BACKGROUND

On April 29, 2003, Robert was in San Diego, California, attending a professional conference. While loading his luggage into the back of a taxicab, the taxicab suddenly accelerated in reverse, running over Robert and trapping him beneath it. Robert suffered significant physical injuries as a result, including permanent impairment of his left arm, left shoulder, and right knee. Robert also suffers from chronic pain syndrome, depression, and posttraumatic stress disorder.

The Drummonds retained the services of an attorney in San Diego regarding their personal injury action. The liability insurer for the taxicab driver tendered $100,000, the limit of his liability coverage. The Drummonds then notified State Farm that they intended to make a claim for underinsured motorist benefits pursuant to their policy with State Farm. State Farm evaluated the claim and determined that damages were no more than $300,000, and so tendered payment of $200,000 as a full settlement of all claims. The Drummonds refused to completely settle all their claims, but accepted $200,000 as a payment for the undisputed amount.

State Farm and the Drummonds eventually agreed to submit the issue of the full extent of the Drummonds' damages to arbitration. The arbitration hearing was held on October 3, 2008, before a single arbitrator selected by State Farm. On October 21, the arbitrator issued an award finding that Robert's damages were $899,285.59 and that Gayle's loss of consortium damages were $115,000. The arbitrator gave State Farm credit for $300,000 paid.

State Farm paid the award set by the arbitrator. The Drummonds then requested that State Farm pay attorney fees expended in the arbitration action. State Farm refused. On April 16, 2009, the Drummonds applied to the Lancaster County District Court for confirmation of the arbitrator's award, citing § 25-2612. State Farm filed a motion to strike the Drummonds' application, arguing that its payment of the award rendered the matter moot. The district court agreed with

State Farm and granted the motion to strike. The Drummonds have appealed.

ASSIGNMENT OF ERROR

The Drummonds assign, consolidated and restated, that the district court erred in refusing to confirm the arbitration award upon the Drummonds' application because it concluded that the Drummonds' application for confirmation was moot.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[1]

[2] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.[2]

ANALYSIS

The Drummonds allege that the district court erred when it refused to confirm their arbitration award because it determined the issue was moot. The Drummonds argue that under § 25-2612, which is part of Nebraska's Uniform Arbitration Act, the district court had no choice but to confirm the arbitration award. In their request for confirmation, the Drummonds stated they sought confirmation in order to obtain attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 2004) and could only do so once a judgment was entered against State Farm. State Farm contended in its motion to strike that the district court was correct in deciding the issue was moot because it had paid the award in full. We note that the issue of attorney fees is not before us at this time.

Section 25-2612 states, "Within sixty days of the application of a party, the court shall confirm an award, unless within the

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[1] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[2] *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009).

time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614." Neb. Rev. Stat. § 25-2613 (Reissue 2008) provides the procedure for vacating an award, while Neb. Rev. Stat. § 25-2614 (Reissue 2008) provides the procedure for modifying or correcting an award.

Nebraska has not yet addressed this particular issue, but in its order, the district court cited three cases from other jurisdictions that have. In *Stewart Title Guar. Co. v. Tilden*,[3] a Wyoming case, a confirmation of an arbitration award was sought. The Wyoming court stated that the purpose of confirming an arbitration award is to provide a judgment that can then be enforced through court proceedings.[4] Although the language "'shall confirm'" was present in the Wyoming statute, the court held that because the award had been paid, the case was moot and the trial court had no jurisdiction over the matter.[5]

Keahey v. Plumlee[6] involved a dispute over a commission from a real estate sale. Real estate agents were awarded a commission, and when payment was not made, they sought to confirm the award. Appellant objected, citing a statute that prevented a real estate broker from suing on his or her own behalf. The Arkansas appellate court found that confirmation of an arbitration award could not be likened to filing suit and that confirmation was intended to be a means of enforcing an unsatisfied award.[7]

The facts in *Keahey* are clearly distinguishable from the present case, as *Keahey* did not involve seeking confirmation of a satisfied arbitration award.[8] *Murphy v. National Union Fire Ins. Co.*[9] involved a statute much the same as that of Nebraska

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[3] *Stewart Title Guar. Co. v. Tilden*, 64 P.3d 739 (Wyo. 2003).

[4] *Id.*

[5] *Id.* at 741.

[6] *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006).

[7] *Id.*

[8] *Id.*

[9] *Murphy v. National Union Fire Ins. Co.*, 438 Mass. 529, 781 N.E.2d 1232 (2003).

and Wyoming, and the court there held that satisfaction of an award rendered confirmation a moot issue.

The reasoning in *Tilden* and *Murphy* has been specifically rejected by some courts, however. These courts cite to the plain language of Nebraska's Uniform Arbitration Act requiring courts to confirm an arbitration award regardless of whether the award has been satisfied.[10] Quoting a federal district court case, the Hawaii Supreme Court stated:

> "But whether these awards have been satisfied—a fact disputed by plaintiff—has no bearing on whether the arbitration awards should be confirmed. . . . Indeed, as the defendants themselves have pointed out subsequent to the briefing, a court may confirm an arbitration award against a party even when the party has complied with that award. . . ."[11]

We find this reasoning persuasive.

[3] Section 25-2612 clearly states that unless a party moves for modification or vacation of an arbitration award within 60 days, "the court *shall* confirm an award." (Emphasis supplied.) We also note that as a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.[12] We find that § 25-2612 does not allow for the exercise of discretion by the court when a request of confirmation is made where there has been no application for vacation or modification. And because the award had not yet been confirmed under § 25-2612, the district court erred in determining that the case was moot.[13] Therefore, when a party applies for confirmation of an award under § 25-2612, a

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[10] *Mikelson v. United Services Auto Ass'n*, 122 Haw. 393, 227 P.3d 559 (2010); *Bernstein Family Ltd. Partnership v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 883 N.Y.S.2d 201 (2009); *Marchelletta v. Seay Construction Services, Inc.*, 265 Ga. App. 23, 593 S.E.2d 64 (2004); *Kutch v. State Farm Mutual Auto. Ins. Co.*, 960 P.2d 93 (Colo. 1998); *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996).

[11] *Mikelson, supra* note 10, 122 Haw. at 396, 227 P.3d at 562 (quoting *District Council No. 9 v. APC Painting, Inc.*, 272 F. Supp. 2d 229 (S.D.N.Y. 2003)).

[12] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[13] See *Mikelson, supra* note 10.

district court shall confirm the award unless a party has moved for vacation, modification, or correction of the award.

CONCLUSION

The plain language of § 25-2612 requires that a court confirm an arbitration award upon application of a party. We therefore reverse the district court's decision granting State Farm's motion to strike and remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JENNIFER DAVIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLANTS AND CROSS-APPELLEES.

786 N.W.2d 655

Filed July 23, 2010. No. S-09-985.

1. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Pleadings: Notice.** Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
4. **Justiciable Issues.** The required showing of a case or controversy is made when the plaintiff shows the existence of a justiciable controversy and an interest in the subject matter of the action, i.e., that there is a controversy between persons whose interests are adverse and that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenge.
5. **Class Actions.** A class action cannot be employed to circumvent affirmative defenses or to revive claims which are no longer viable.