IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 19, 2011 Session

MORGAN KEEGAN & COMPANY, INC.
v.
WILLIAM HAMILTON SMYTHE, III, INDIVIDUALLY; WILLIAM H. SMYTHE, IV, TRUST U/A/DTD 12/29/87, WILLIAM H. SMYTHE, III, TRUSTEE; AND SMYTHE CHILDREN'S TRUST #2 FBO KATHERINE S. THINNES U/A/DTD 12/29/87

An Appeal from the Chancery Court for Shelby County
No. CH092353 Walter L. Evans, Chancellor

W2010-01339-COA-R3-CV - Filed March 24, 2011

This appeal addresses appellate jurisdiction to review a trial court's order on an arbitration award. The parties engaged in arbitration over a dispute in which the respondent investors asserted that the petitioner investment company mismanaged their funds. The investors prevailed and received a substantial arbitration award against the investment company. The investment company filed a petition in the trial court to vacate the arbitration award, alleging partiality and bias on the part of two members of the arbitration panel. After a hearing, the trial court held in favor of the investment company. The trial court entered an order vacating the arbitration award and remanding the matter to the regulatory authority for a rehearing before another panel of arbitrators. The respondent investors now appeal. Pursuant to Tenn. Code Annotated § 29-5-319(a), we dismiss the appeal for lack of appellate jurisdiction.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed for Lack of Jurisdiction

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Christopher S. Campbell and Laura S. Martin, Memphis, Tennessee; and Dale Ledbetter, Fort Lauderdale, Florida, for the Respondents/Appellants, William Hamilton Smythe, III, et al.

John S. Golwen, William G. Whitman, and Annie T. Christoff, Memphis, Tennessee, for the Petitioner/Appellee Morgan Keegan & Company, Inc.

OPINION

FACTS AND PROCEEDINGS BELOW

For a number of years, Respondent/Appellant William Hamilton Smythe, III ("Smythe"), had multiple investment accounts at Petitioner/Appellee Morgan Keegan & Company ("Morgan Keegan") for himself and as trustee for members of his family.[1] In the contract that Smythe signed when the investment accounts at Morgan Keegan were opened, Smythe agreed to arbitrate any disputes in accordance with the Financial Industry Regulatory Authority ("FINRA") procedures.

Over time, Smythe came to believe that Morgan Keegan had improperly invested his accounts in several funds, specifically with respect to the RMK family of funds ("the Fund") managed by James L. Kelsoe. After sustaining significant losses in the accounts, on April 30, 2008, Smythe, individually and as trustee of the funds at issue (collectively "Smythe"), filed a claim with the FINRA to initiate an arbitration proceeding against Morgan Keegan. In the claim, Smythe alleged that Morgan Keegan had engaged in improper investment activity related to the Fund. On August 4, 2008, Morgan Keegan filed its response to the Smythe claim.

In connection with the arbitration proceedings, pursuant to FINRA rules, Smythe and Morgan Keegan each received a list of potential arbitrators. Both parties were given the opportunity to strike arbitrators from the list. They ranked the remainder and returned to FINRA the ranked list of arbitrators. Both parties' lists included an arbitrator by the name of Eugene R. Katz ("Katz").

After that, in accordance with FINRA rules, FINRA created a separate combined ranked list of arbitrators from the lists provided by Smythe and Morgan Keegan, deleting arbitrators who had been stricken by either party. FINRA then "appointed an arbitration Panel based on the parties' consolidated lists." The panel of arbitrators appointed for the Smythe case included Katz. It also included Marion R. Allen, who later withdrew and was replaced by Michael S. Hill ("Hill"). The final Panel ("Panel") for the Smythe case was comprised of Spencer Buchanan ("Buchanan"), Hill, and Katz. Katz and Hill were also on the panel of arbitrators in unrelated cases against Morgan Keegan arising from the same Fund. Each Panel member submitted an arbitrator disclosure report that was provided to the parties.

After the other Morgan Keegan cases on which Katz and Hill had served as arbitrators were resolved unfavorably to Morgan Keegan, Morgan Keegan objected to Katz and Hill

[1]The underlying facts are not disputed for purposes of this appeal.

remaining as members of the Smythe Panel. On October 2, 2009, Morgan Keegan filed a motion for the recusal of arbitrator Katz, alleging that he was no longer "independent and neutral" because of, *inter alia*, his involvement in the other arbitration cases against Morgan Keegan and a connection to another claimant against Morgan Keegan arising out of the same Fund. On October 12, 2009, Morgan Keegan filed a motion for the recusal of arbitrator Hill based on his participation as an arbitrator in the other Morgan Keegan case. Arbitrators Katz and Hill both declined to recuse themselves from the Panel.

The matter of the removal of Katz and Hill from the Smythe Panel was then submitted to the Director of Arbitration ("the Director") for consideration under FINRA Rule 12410(a)(1).[2] On October 29, 2009, the Director denied the motions to remove Katz and Hill.

The arbitration hearing on the Smythe claim was conducted from November 2 through November 6, 2009, before the Panel. On November 11, 2009, the Panel issued an award in favor of Smythe, finding that Morgan Keegan was liable to Smythe in the amount of $697,000 in compensatory damages, plus prejudgment interest, $20,000 in witness fees, and $195,160 in attorney fees pursuant to Tennessee Code Annotated § 48-2-121.

Unhappy with the Panel's ruling, on November 25, 2009, Morgan Keegan filed the instant Petition and Application of Vacatur in the trial court below. Morgan Keegan asked the trial court to vacate the arbitration award "because there was evident partiality or corruption in the arbitrators [Katz and Hill] or either of them," and "because the arbitrators were guilty of misbehavior by which the rights of Morgan Keegan have been prejudiced." The petition alleged that arbitrators Katz and Hill were not impartial because, among other things, both had previously sat as arbitrators on cases in which the arbitration panel held against Morgan Keegan based on the same investments or the same fund manager, that Katz had an indirect financial interest in the outcome, and that Hill had previously rendered a judgment for

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[2]That Rule provides:

> Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, upon request by a party or on the Director's own initiative.
>
> (1) The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be definite and capable of reasonable determination, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this rule will be resolved in favor of the customer.

FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12410(a)(1).

punitive damages in a claim related to investments in the same Fund. On this basis, Morgan Keegan requested that the trial court vacate the arbitration award and remand the case to FINRA for a "new arbitration hearing before a neutral and unbiased panel." Smythe filed a response and a memorandum of law in which he objected to the petition of vacatur and requested that the award rendered by FINRA be confirmed.

The parties submitted briefs and exhibits to the trial court. On February 25, 2010, the trial court heard arguments on Morgan Keegan's motion to vacate. At the conclusion of the hearing, the trial court granted Morgan Keegan's motion and remanded the case to FINRA for a new hearing. The trial court stated:

> The Court has reviewed and considered each of the areas of concern that has been raised by the Petitioners in the cause and the Court is of the opinion that a reasonable person under the facts of the case that have been presented would conclude that Mr. Hill and Mr. Katz could not be perceived as being impartial and fair and would be predisposed to view any facts in the light most damaging to the Petitioners because of their previous hearings and conclusions and other matters involving Morgan Keegan.
>
> And the Court is of the opinion that the arbitration award, which may be confirmed on rehearing was nevertheless filled with an air of partiality to the extent that the Court cannot conclude that a reasonable person could reasonably hear and make a fair determination of the facts in the case and that the process was the result of evident partiality on the part of Mr. Hill and Mr. Katz and that the process should be replayed.
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> So the Court is vacating the arbitrators' award and referring the matter back to FINRA for a new hearing.

On March 16, 2010, the trial court entered an Order Granting Motion for Vacatur and Remanding Case to FINRA for New Hearing. The written order incorporated the trial court's oral ruling, holding that the arbitration award "is vacated for all the reasons herein and the case is remanded to FINRA for a new hearing." Smythe now appeals, challenging the trial court's decision to vacate the arbitration award.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Smythe raises the following issues:

1. Whether the evidence presented by Morgan Keegan demonstrated evident partiality of Arbitrator Eugene Katz.

2. Whether the evidence presented by Morgan Keegan demonstrated evident partiality of Arbitrator Michael Hill.
3. Whether the court below erred in finding that a reasonable person would have to conclude that Arbitrators Eugene Katz and Michael Hill were evidently partial to Smythe.
4. Whether the decision of the FINRA Director of Arbitration not to remove Arbitrators Katz and Hill from the Panel was fair to Morgan Keegan.

Morgan Keegan asserts that the issue on appeal is simply whether the trial court, in vacating the arbitration award, correctly found "that a reasonable person would find that two of the three FINRA arbitrators were evidently partial based on the facts and totality of the circumstances."

The Tennessee Uniform Arbitration Act ("TUAA") governs judicial review of arbitration awards. ***Pugh's Lawn & Landscape Co., Inc. v. Jaycon Dev. Corp.***, 320 S.W.3d 252, 260 (Tenn. 2010). The TUAA provides that "the court shall confirm an award, unless . . . grounds are urged for vacating or modifying an award." T.C.A. § 29-5-312 (2000). One of the grounds for vacating an award is "evident partiality by an arbitrator . . . ." T.C.A. § 29-5-313(a)(2) (2000). In reviewing a trial court's decision to confirm or vacate an arbitration award on this basis, factual findings are reviewed for clear error and questions of law are reviewed *de novo*. ***Uhl v. Komatsu Forklift Co., Ltd.***, 512 F.3d 294, 305-06 (6th Cir. 2008). The determination of whether subject matter jurisdiction exists is a question of law. ***Elite Emergency Servs., LLC v. Stat Solutions, LLC***, No. M2008-02793-COA-R3-CV, 2010 WL 845392 (Tenn. Ct. App. Mar. 10, 2010).

ANALYSIS

Before turning to the issues raised on appeal by the parties, under Rule 13(b) of the Tennessee Rules of Appellate Procedure, we must first determine whether we have subject matter jurisdiction to adjudicate this appeal.[3] ***See*** Tenn. R. App. P. 13(b); ***see also State ex rel. Garrison v. Scobey***, No. W2007-02367-COA-R3-JV, 2008 WL 4648359, at *4 (Tenn. Ct. App. Oct. 22, 2008). Subject matter jurisdiction concerns the authority of the Court to hear a matter. Lack of appellate jurisdiction cannot be waived. ***Person v. Kindred Healthcare, Inc.***, No. W2009-01918-COA-R3-CV, 2010 WL 1838014, at *2 (Tenn. Ct. App.

[3]Prior to oral argument, this Court asked counsel for the parties to be prepared to address the issue of whether this order is appealable in light of subsection (5) of Section 29-5-319(a), which authorizes an appeal from "[a]n order vacating an award *without directing a re-hearing*." T.C.A. § 29-5-319(a)(5) (2000) (emphasis added).

May 7, 2010); ***Boykin v. Casher (In re Estate of Boykin)***, 295 S.W.3d 632, 635 (Tenn. Ct. App. 2008). This Court may consider its own subject matter jurisdiction *sua sponte*. ***Ruff v. State***, 978 S.W.2d 95, 98 (Tenn. 1998); ***Boykin***, 295 S.W.3d at 635. "Unless an appeal from an interlocutory order is provided by the rules or by statute, appellate courts have jurisdiction over final judgments only." ***Bayberry Assocs. v. Jones***, 783 S.W.2d 553, 559 (Tenn. 1990).

This Court is granted authority to hear an appeal from a trial court's decision on an arbitration matter under the Tennessee Uniform Arbitration Act ("TUAA"), Tennessee Code Annotated § 29-5-301 *et. seq*. The TUAA delineates the appellate court's jurisdiction to consider such appeals:

> (a) An appeal may be taken from:
>
> (1) An order denying an application to compel arbitration made under § 29-5-303;
>
> (2) An order granting an application to stay arbitration made under § 29-5-303(b);
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) *An order vacating an award without directing a re-hearing*; and
>
> (6) A judgment or decree entered pursuant to the provisions of this part.
>
> (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

T.C.A. § 29-5-319 (2000) (emphasis added). Thus, to determine whether we have jurisdiction to hear Smythe's appeal in this case, we must construe Section 29-5-319.

On appeal, Smythe argues that this Court has jurisdiction over this appeal pursuant to subsection (3) of Section 29-5-319. Smythe contends that the trial court's order vacating the arbitration award also implicitly denied his request to confirm the arbitration award. Alternatively, if this Court finds that Section 29-5-319(a)(3) is not applicable, Smythe asserts that we should find "good cause" pursuant to Rule 2 of the Tennessee Rules of Appellate Procedure[4] to suspend the Court's rules and exercise our discretion to hear this appeal in the

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[4]Rule 2 of the Tennessee Rules of Appellate Procedure provides:

> For good cause, including the interest of expediting decision upon any matter, the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and

(continued...)

interest of justice and judicial economy. In response, Morgan Keegan argues that subsection (3) of Section § 29-5-319(a) is inapplicable. Morgan Keegan contends that we should draw a negative inference from the language in subsection (5) of the statute and hold that if a trial court's order vacating an arbitration award goes on to direct a rehearing, the order is not appealable.

The parties have not cited, nor have we found, any Tennessee caselaw addressing whether a trial court's order vacating an arbitration award and directing a rehearing is appealable pursuant to Section 29-5-319(a). The issue, then, is one of first impression. When presented with an issue of first impression, particularly where it involves the interpretation of a uniform act, it is useful to review decisions in other states.[5] ***See Parrish v. Marquis***, 172 S.W.3d 526, 530 (Tenn. 2005). Decisions from states that, like Tennessee, have adopted the Uniform Arbitration Act, are persuasive because the TUAA specifically states that it "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it." T.C.A. § 29-5-320 (2000).

Subsection (3) of T.C.A. § 29-5-319(a)

Smythe argues that this Court is authorized to hear his appeal under subsection (3) of Section 29-5-319(a), which states that "[a]n order confirming or denying confirmation of an award" is appealable. In support, Smythe relies on the reasoning in ***Hicks v. UBS Financial Services, Inc.***, 226 P.3d 762 (Utah Ct. App. 2010). In ***Hicks***, one party filed a motion with the trial court to confirm the arbitration award, and the other party filed a motion to vacate the award. These motions were consolidated and considered together by the trial court. After a hearing, the trial court entered a single order in which it denied the motion to confirm the award, granted the motion to vacate the award, and ordered a rehearing. ***Hicks***, 226 P.3d at 766. The party whose motion to confirm was denied then appealed. On appeal, the appellate court first addressed whether it had jurisdiction to hear the appeal pursuant to the same provisions in the Uniform Arbitration Act at issue in the instant case. The ***Hicks*** court

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[4](...continued)

> may order proceedings in accordance with its discretion . . . .

Tenn. R. App. P. 2.

[5]At oral argument, this Court requested that the parties submit to the Court any supplemental authority that was supportive of their positions on subject matter jurisdiction. Smythe submitted supplemental authority in letter form. Morgan Keegan filed a supplemental brief, including several pages of argument. On February 3, 2011, Smythe filed a motion to strike Morgan Keegan's supplemental brief as being outside the scope of this Court's instructions. We grant in part Smythe's motion to strike as to the argument portion of Morgan Keegan's brief. We will, however, consider the table of authorities submitted by Morgan Keegan.

noted that subsection (3) granted the appellate court authority to adjudicate the denial of the motion to confirm, but that subsection (5) appeared to bar appellate jurisdiction over the trial court's decision to vacate and direct a new hearing, "the opposite of an allowed appeal of an order vacating without ordering a rehearing." ***Id.*** at 766-67.

The ***Hicks*** court then reviewed decisions under the Uniform Act from other jurisdictions. It noted a split of authority as to whether an appellate court has jurisdiction over the appeal of an order addressing both a motion to confirm and a motion to vacate. Ultimately, considering Utah precedent and the Utah constitution, the ***Hicks*** court concluded that it was bound by *stare decisis* to adopt the minority position and conclude that it had jurisdiction over the appeal. ***Id.*** at 767-68 (citing ***Amalgamated Transit Union, Local 382 v. Utah Transit Auth.***, 99 P.3d 379 (Utah App. 2004), and Utah Const. art. VIII, § 5). The ***Hicks*** court noted the state constitution's mandate for an appeal as a matter of right "in all cases from all final orders and judgments." It reasoned that the trial court's decision was a final judgment because, "[b]y granting Hicks's motion to vacate and denying UBS's motion to confirm, the district court resolved all claims before it and was left with nothing further to rule upon." ***Id.*** at 768. Therefore, the ***Hicks*** court held that it had jurisdiction over the appeal. ***Id.***

As noted in ***Hicks***, a minority of jurisdictions have determined that, when a trial court denies confirmation of an arbitration award, vacates the arbitration award, and orders a rehearing, the order is final and appealable under Uniform Act provisions identical to Section 29-5-319(a)(3). ***See Karcher Firestopping v. Meadow Valley Contractors, Inc.***, 204 P.3d 1262, 1264-66 (Nev. 2009) (surveying other states' positions on the issue); ***see also Nat'l Ave. Bldg. Co. v. Stewart***, 910 S.W.2d 334, 341 (Mo. Ct. App. 1995) (accepting jurisdiction over the appeal when the trial court's order both denied a motion to confirm the arbitration award and vacated the trial court's decision and remanded the case for further proceedings); ***Air Shield Remodelers Inc. v. Biggs***, 969 S.W.2d 315, 317 (Mo. Ct. App. 1998) (same). In line with these cases, Smythe urges this Court to find that it is authorized under subsection (3) of Section 29-5-319(a) to hear this appeal.

In the case at bar, the record on appeal reflects that the only request made by Smythe to confirm the arbitration award was included in his response and memorandum in opposition to Morgan Keegan's petition for vacatur; Smythe did not file a motion to confirm the Panel's arbitration award. Moreover, the trial court's order does not state expressly that any such request for confirmation was denied; the order states only that the arbitration award "is vacated . . . and the case is remanded to FINRA for a new hearing." Under these circumstances, we cannot find that the trial court's order is in effect an order "denying confirmation of an [arbitration] award." T.C.A. § 29-5-319(a)(3). ***See Person v. Kindred Healthcare, Inc.***, No. W009-01918-COA-R3-CV, 2010 WL 1838014, at *4 (Tenn. Ct. App.

May 7, 2010) (holding that, where the appellant filed a motion to dismiss based on an arbitration agreement, but no party filed a motion to compel arbitration, the trial court's denial of the motion to dismiss cannot be deemed to be an order "denying an application to compel arbitration" under Section 29-5-319(a)(1)). Therefore, the caselaw cited by Smythe is inapplicable to the facts in this case.[6] There being no other authority indicating that subsection (c) applies in this situation, we must conclude that we are not authorized under Section 29-5-319(a)(3) to hear this appeal.

Subsection (5) of T.C.A. § 29-5-319(a)

Morgan Keegan argues that subsection (5) of Section 29-5-319(a) indicates that this Court is not authorized to exercise jurisdiction over an appeal from a trial court's order vacating an arbitration award and directing a rehearing. As noted above, subsection (5) states that an appeal may be taken from "an order vacating an award *without directing a re-hearing*." Morgan Keegan urges us on appeal to draw the negative inference from this provision and hold that the appellate court is without jurisdiction where, as here, the trial court vacates the arbitration award *and* directs a rehearing.

In support of its position, Morgan Keegan cites, *inter alia*, the Missouri case of ***Crack Team USA, Inc. v. American Arbitration Association***, 128 S.W.3d 580 (Mo. Ct. App. 2004). In ***Crack Team***, involving a lower court order similar to the order in the instant case, the Missouri Court of Appeals interpreted the Missouri counterpart to Tennessee Code Annotated § 29-5-319, identical in all pertinent respects. Like Tennessee's statute, the Missouri statute authorizes appeals from "[a]n order vacating an [arbitration] award without directing a rehearing." ***Crack Team***, 128 S.W.3d at 581 (quoting V.A.M.S. § 435.440).

The Missouri appellate court in ***Crack Team*** held that an appeal from an order vacating an arbitration award and directing a rehearing was not authorized under the plain language of the Missouri statute. The court reasoned that, "[b]y providing for an appeal only from an order vacating an award without directing a rehearing, Section 435.440.1(5) [identical to Tennessee Code Annotated § 29-5-319(5)] implicitly bars appeals from orders that direct a rehearing." ***Id.*** at 583 (citing ***Maine Dep't of Transp. v. Maine State Employees Ass'n***, 581 A.2d 813, 815 (Me. 1990)). To hold otherwise, the court stated, "would render the language 'without directing a rehearing' without effect, mere surplusage. Such a construction would be inconsistent with the rules of statutory interpretation." ***Id.*** (citation omitted). The ***Crack Team*** court observed that this construction of the statute was consistent with decisions in several other jurisdictions interpreting the same provision of the Uniform Act. ***Id.*** (citing

[6]We do not address the issue of whether Tennessee would adopt the majority or minority view under the facts presented in ***Hicks v. UBS Financial Services, Inc.***, 226 P.3d 762 (Utah Ct. App. 2010).

Connerton, Ray & Simon v. Simon, 791 A.2d 86 (D.C. 2002); ***Carner v. Freedman***, 175 So. 2d 70 (Fla. Dist. Ct. App. 1965); ***Maine Dept. of Transp.***, 581 A.2d at 815; ***Kowler Assocs. v. Ross***, 544 N.W.2d 800 (Minn. Ct. App. 1996); ***Neb. Dept. of Health & Hum. Serv's v. Struss***, 623 N.W.2d 308 (Neb. 2001); ***Stolhandske v. Stern***, 14 S.W.3d 810 (Tex. Ct. App. 2000); ***Prudential Secs., Inc. v. Vondergoltz***, 14 S.W.3d 329 (Tex. Ct. App. 2000)); ***see also Boyce v. St. Paul Prop. & Liab. Ins. Co.***, 618 A.2d 962, 969 n.4 (Pa. Super. Ct. 1992).

Considering these authorities, we must construe the Tennessee statute. In interpreting the statute, we apply "well-defined precepts" of statutory interpretation:

> Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. ***Houghton v. Aramark Educ. Res., Inc.***, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. ***In re C.K.G.***, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. ***Eastman Chem. Co. v. Johnson***, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. ***Abels ex rel. Hunt v. Genie Indus., Inc.***, 202 S.W.3d 99, 102 (Tenn. 2006). When a statute is ambiguous, however, we may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning. ***Colonial Pipeline***[***v. Morgan***], 263 S.W.3d [827,] 836 [(Tenn. 2008)]. Courts must presume that a legislative body was aware of its prior enactments and knew the state of the law at the time it passed the legislation. ***Owens v. State***, 908 S.W.2d 923, 926 (Tenn.1995).

Estate of French v. Stratford House, No. E2008-00539-SC-R11-CV, 2011 WL 238819, at *5 (Tenn. Jan. 26, 2011).

From our review of the language in the Tennessee statute and the caselaw from other jurisdictions, we are persuaded that subsection (5) of Section 29-5-319(a) must be construed as in ***Crack Team*** and the majority of courts that have considered the issue.[7] In our view, the language in the TUAA is plain and unambiguous. We agree that, by including the phrase "without directing a rehearing" in subsection (5) to modify "[a]n order vacating an award,"

[7]Neither party has cited a case that has interpreted the pertinent provision of the Uniform Act differently, nor have we found one.

the legislature indicated its intent to exclude from the list of appealable orders an order that vacates an award *and* directs a rehearing.

This interpretation of Section 29-5-319(a)(5) is consistent with the reasons for the well-established rule that a trial court's decision to grant a new trial is not a final, appealable order, as explained in a recent decision by this Court:

> It is well-settled that an "order granting a new trial is not a final judgment and is not appealable as of right." ***Evans v. Wilson***, 776 S.W.2d 939, 941 (Tenn. 1989) (citing ***Panzer v. King***, 743 S.W.2d 612, 616 (Tenn. 1988)). ***See also Davis v. Flynn***, No. E1999-00421-COA-R3-CV, 2000 WL 807613, at *1 (Tenn. Ct. App. June 21, 2000). This is because an order granting a new trial does not end the litigation; rather, it "ensure[s] that further proceedings [will] follow." ***State v. Miller***, No. 02C01-9708-CC-00300, 1998 WL 902592, at *3 (Tenn. Crim. App. Dec. 29, 1998); ***see Blackburn v. CSX Transp., Inc.***, No. M2006-01352-COA-R10-CV, 2008 WL 2278497, at *4 (Tenn. Ct. App. May 30, 2008) (recognizing that "an order granting a new trial is not a final order" and that it is "interlocutory"). This is implicitly recognized in Rule 4 of the Tennessee Rules of Appellate Procedure, insofar as Rule 4 provides that the thirty-day time limitation for filing an appeal runs from the date of an "order denying a new trial or granting or denying any other such [post-judgment] motion." Tenn. R. App. P. 4(b) (emphasis added); ***see also Turner v. Jordan***, 957 S.W.2d 815, 817 (Tenn. 1997) (noting that an appeal from a grant of a new trial must be by permissive interlocutory appeal).

See Cooper v. Tabb, No. W2009-02271-COA-R3-CV, 2010 WL 5441971, at *8 (Tenn. Ct. App. Dec. 22, 2010) (footnote omitted). Thus, although the *denial* of a motion for a new trial is final and appealable, an order granting a new trial is not, because it ensures that the legal proceedings will continue. In the same way, if the trial court directs a rehearing of an arbitration claim, the order ensures that the arbitration proceedings will continue. ***See Kowler Assocs.***, 544 N.W.2d at 802 (stating that, when the trial court vacates an arbitration award and directs a rehearing, "appellate review is premature because the arbitration process has not been completed").

Tennessee Rule of Appellate Procedure 2

Smythe argues that, regardless of our interpretation of Section 29-5-319(a), this Court should find "good cause" pursuant to Rule 2 of the Tennessee Rules of Appellate Procedure to suspend the rules of finality and exercise jurisdiction over this appeal. Smythe cites cases in other jurisdictions in which the appellate court found that, despite a lack of statutory

authority for an appeal of an order vacating an arbitration award and remanding for a rehearing, the appellate court should nevertheless exercise its discretion to assert jurisdiction over the appeal, in the interest of justice and judicial economy. ***See Metro. Airports Comm'n v. Metro. Airports Police Fed'n***, 443 N.W.2d 519, 523 (Minn. 1989) (holding that, although an order vacating the arbitration award and remanding the case for a rehearing is not appealable under the state's version of the uniform arbitration act, the appellate court exercised its "constitutionally independent appellate authority to review whatever case it deems necessary in the interests of justice"); ***State v. Davidson & Jones Constr. Co.***, 323 S.E.2d 466, 469 (N.C. Ct. App. 1984) (holding that, even though the order vacating the arbitration award and granting a rehearing was not a final order, the appellate court nevertheless exercised its discretion to entertain the appeal under an appellate rule governing certiorari review).

We appreciate the difficulty to the parties of again arbitrating these long-simmering disputes. Nevertheless, we must conclude that the circumstances do not warrant the exercise of our discretion to suspend the requirements of the Rules of Appellate Procedure, in direct contravention of the clear intent behind Section 29-5-319(a)(5). We note that the substantive issues raised by Smythe in this appeal are preserved and can be raised on rehearing before a new arbitration panel, if necessary.[8] Considering all of the circumstances, we must conclude that the interests of justice do not weigh in favor of suspending the Rules of Appellate Procedure to exercise jurisdiction over Smythe's appeal.

In sum, we conclude that a trial court's order vacating an arbitration award and directing a rehearing is not subject to appellate review. Section 29-5-319(a)(3) does not provide authority for this appeal, because there was no motion to confirm and the trial court did not address confirmation of the arbitration award. In addition, the plain language of Section 29-5-319(a)(5) indicates that an order vacating an arbitration award and remanding for a rehearing is not appealable. Finally, we decline to exercise our discretion under Rule 2 to suspend the Rules of Appellate Procedure or to otherwise seek to avoid the effect of the plain language of Section 29-5-319(a). Therefore, because an appeal from the trial court's decision in this cause is not authorized under Section 29-5-319(a) or any other authority, this appeal must be dismissed for lack of subject matter jurisdiction.

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[8]Smythe also cites ***Simerly v. City of Elizabethton***, No. E2009-01694-COA-R3-CV, 2011 WL 51737 (Tenn. Ct. App. Jan. 5, 2011). In ***Simerly***, the appellate court asserted jurisdiction over an appeal of an order that resolved the substantive issues between the parties but did not resolve the issue of damages. The appellate court exercised its discretion under Rule 2 to entertain the appeal in the interest of justice because, among other things, the issues that had been resolved were not likely to be pretermitted by future events. ***Simerly***, 2011 WL 51737, at *8. Such is not the situation in the instant case, as the issues on appeal may be pretermitted entirely by the rehearing.

CONCLUSION

The appeal is dismissed for lack of subject matter jurisdiction. Costs on appeal are to be taxed to Appellant William Hamilton Smythe, III, et al., and their surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE