22CA0739 Travelers v Cartaya 10-05-2023

COLORADO COURT OF APPEALS

DATE FILED: December 27, 2023 9:06 PM
FILING ID: 8170B34E27772
CASE NUMBER: 2023SC880

DATE FILED: October 5, 2023
CASE NUMBER: 2022CA739

Court of Appeals No. 22CA0739
City and County of Denver District Court No. 20CV32891
Honorable A. Bruce Jones, Judge

Travelers Indemnity Company,

Plaintiff-Appellee,

v.

Juan Cartaya,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE WELLING
Lipinsky and Gomez, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 5, 2023

Spencer Fane LLP, Evan Stephenson, Kayla L. Scroggins-Uptigrove, Denver, Colorado, for Plaintiff-Appellee

Haddon, Morgan & Foreman, P.C., Jeffrey S. Pagliuca, Ty Gee, Adam Mueller, Meredith O'Harris, Denver, Colorado, for Defendant-Appellant

Appendix A

¶ 1 Defendant-appellant, Juan Cartaya, appeals the trial court's entry of judgment and award of costs in favor of Travelers Indemnity Company (Travelers) after a jury found Cartaya liable for fraud and negligent misrepresentation. We affirm.

I. Background

A. Insurance Claim Dispute and Appraisal

¶ 2 GSL Group, Inc. (GSL) owns a commercial building. Travelers issued an insurance policy (the Policy) to GSL on that property. In June 2015, a storm damaged GSL's building. GSL submitted a claim to Travelers. The parties disagreed on the loss amount. GSL retained a public adjuster, Derek O'Driscoll, who valued the claim at $1,498,771.21. Travelers' adjuster, Justin McKinney, valued the claim at $794,945.88.

¶ 3 The parties invoked an appraisal provision in the Policy, which states as follows:

> If we and you disagree on the value of the property, the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having

> jurisdiction. The appraisers will state separately the value of the property, the amount of Net Income and operating expense or the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

Travelers selected Trent Gillette as its appraiser; GSL selected Cartaya.

¶ 4 Cartaya estimated a total repair cost of $2,221,537.33. He shared with Gillette his estimate worksheet, in which he included a line item of $556,417.20 for general roof repairs. Separately, he included a line item of $603,864 for "roof purlin repairs" or "structural items" related to Lefever Building Systems (Lefever). Lefever, however, had in fact quoted only $27,137 for "purlin replacement." Lefever's president and owner, Rick Taylor, sent this quote to O'Driscoll.

¶ 5 In September 2017, Gillette and Cartaya signed a "compromise agreement" award of $1,600,000 (appraisal award). Gillette sent

McKinney a report documenting the appraisal process and the "award breakdown." Travelers paid the appraisal award within the thirty-day limit specified in the Policy.

B. Federal Court Proceedings

¶ 6 GSL was dissatisfied with Travelers' handling of its claim. It sued Travelers in state court alleging bad faith, delay, and breach of contract. Travelers removed the case to federal court. Cartaya was not a party to the federal case.

¶ 7 The federal court granted Travelers' motion for partial summary judgment and vacated the appraisal award. The federal court concluded, based on the undisputed facts, that Cartaya wasn't impartial and that the appraisal award included a "grossly-overinflated estimate of the costs of roof repairs." But the federal court denied Travelers' motion for summary judgment on its counterclaims, which included an unjust enrichment claim. Accordingly, Travelers sued GSL and Cartaya in state court.

C. State Court Proceedings

¶ 8 In state court, Travelers brought claims for fraud and negligent misrepresentation against Cartaya and other claims

against GSL. The state court severed and stayed Travelers' claims against GSL pending resolution of the federal case.

¶ 9 Cartaya moved for summary judgment. In his motion, Cartaya asserted that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, cloaked him with arbitral immunity for his actions as an appraiser. He further argued that Travelers couldn't justifiably rely on his estimates. The state court denied Cartaya's motion, and Travelers' claims proceeded to trial.

¶ 10 At trial, over Cartaya's objection, the court took judicial notice of the federal court's vacatur of the appraisal award.

¶ 11 Subsequently, Cartaya moved for a directed verdict; he also asked the court to reconsider its denial of the prior motion for summary judgment. The trial court denied his motion and declined to reconsider its order denying summary judgment.

¶ 12 The jury returned a verdict for Travelers on its fraud claim and awarded $603,864 in damages. Although the jury also found for Travelers on its negligent misrepresentation claim, it awarded no damages on that claim. The trial court ordered Cartaya to pay Travelers' costs. The trial court properly certified the judgment and

cost order as final orders pursuant to C.R.C.P. 54(b), vesting us with jurisdiction over this appeal.

II. Analysis

¶ 13 On appeal, Cartaya contends that the trial court reversibly erred by (1) finding that he wasn't entitled to arbitral immunity for his conduct as an appraiser; (2) taking judicial notice of the fact that the federal court had vacated the appraisal award; and (3) declining to find, as a matter of law, that Travelers couldn't reasonably rely on his estimate for roof purlin repairs. Accordingly, he asks us to vacate or reverse the judgment and the costs award.

A. Arbitral Immunity Under the FAA

¶ 14 First, Cartaya contends that the trial court erred by concluding that he wasn't entitled to arbitral immunity from civil liability as a matter of law under the FAA for acts performed during the appraisal process. We disagree.

1. Standard of Review

¶ 15 Interpretation of the terms of an insurance policy is a question of law reserved for the trial court, which we review de novo. *See Owners Ins. Co. v. Dakota Station II Condo. Ass'n*, 2019 CO 65, ¶ 31. Whether an individual or an entity is entitled to immunity is

also a legal question subject to de novo review. *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 2013 COA 87, ¶ 11 (citing *Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 20), *aff'd on other grounds*, 2015 CO 24.

2. Trial Court Order and Applicable Law

¶ 16 In his motion for summary judgment, Cartaya argued that the FAA conferred arbitral immunity.[1] He didn't cite to the Colorado Uniform Arbitration Act (CUAA). *See* §§ 13-22-201 to -230, C.R.S. 2023. And the trial court declined to resolve whether state or federal law governed. Nevertheless, in denying Cartaya's motion, the operative portion of the trial court's analysis centers on federal common law addressing the applicability of the FAA. *See Evanston*

---

[1] Arbitral immunity is a "doctrine [that] generally rests on the notion that arbitrators acting within their quasi-judicial duties are the functional equivalent of judges and, as such, should be afforded similar protection." *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (citing *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996)). The doctrine is considered "essential to protect the decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants." *Id.* (quoting *New Eng. Cleaning Servs., Inc. v. Am. Arb. Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999)). The doctrine, however, "does not protect arbitrators . . . from all claims asserted against them. The key question . . . is whether the claim at issue arises out of a decisional act." *Id.* at 1159.

Ins. Co. v. Cogswell Props., LLC, 683 F.3d 684, 691-96 (6th Cir. 2012); *Salt Lake Trib. Publ'g Co. v. Mgmt. Plan., Inc.*, 390 F.3d 684, 688-92 (10th Cir. 2004); *cf. Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 129 F. Supp. 3d 1150, 1152-53 (D. Colo. 2015) (applying "the substantive law of Colorado," but finding "*Salt Lake Tribune* highly persuasive" and concluding that an appraisal process set forth in an insurance policy was "not an arbitration under the CUAA").

¶ 17 Travelers notes on appeal that Cartaya "cites CUAA cases and appears to suggest obliquely that the CUAA may apply to [him]." We agree with Travelers that such a contention isn't preserved. At base, however, we don't discern that this is a material dispute. Cartaya simply argued in a footnote that he prevails *even if* the CUAA applies. In his reply brief, he clarifies his position: "the FAA governs" and "federal common law" is determinative. This is where the swords first cross.

¶ 18 The FAA applies if a court concludes that (1) a contract containing an arbitration clause (2) evidences a transaction involving interstate commerce. 9 U.S.C. § 2; *see also Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir. 1990)

("The *sine qua non* of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in interstate commerce."); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 425 (Colo. App. 2003) ("This is not a rigorous inquiry. The contract need have only the slightest nexus with interstate commerce." (quoting *Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 725 (Colo. App. 1998))). Travelers asserts that the interstate commerce requirement isn't satisfied here. This is so, it maintains, because pursuant to the McCarran-Ferguson Act, *see* 15 U.S.C. §§ 1011-1015, Congress relinquished its commerce powers over insurance to the states, thereby reverse-preempting the FAA.

¶ 19 The trial court didn't rule on this issue and we needn't resolve it to decide this matter. This is because, even assuming that the transaction implicates interstate commerce, we agree with Travelers' alternative argument: the appraisal provision didn't constitute an arbitration agreement within the coverage of the FAA. Therefore, we decline to address the interstate commerce issue further.

¶ 20 The FAA doesn't define "arbitration," *Evanston Ins. Co.*, 683 F.3d at 693 (citing *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004)), so we must decide which source of law provides that definition, *see also AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985) ("The [FAA], adopted in 1925, made agreements to arbitrate enforceable without defining what they were."). The parties effectively stipulate to the application of federal common law. Indeed, one of the bases on which Cartaya challenges the trial court's order is its perceived reliance on *Teachworth*, in which the Fifth Circuit based its analysis on Texas law. *See* 898 F.2d at 1061-62 (finding *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987), "persuasive" and thereby applying Texas law to define "arbitration," ultimately holding that "the appraisal provision was not an arbitration agreement").

¶ 21 Cartaya cites several circuit court decisions that rejected *Teachworth*'s approach and applied federal common law to define "arbitration," inviting us to do the same. *See, e.g.*, *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 218 F.3d 1085, 1091 (9th Cir. 2000) (McKeown, J., concurring) (all three judges specially

concurring to "question the vitality of *Wasyl*[, 813 F.2d at 1582]"); *see also Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013); *Evanston Ins. Co.*, 683 F.3d at 693; *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 689 ("It should not be necessary, but it definitely is, to stress that whether a given dispute resolution procedure is *arbitration* within the meaning of the FAA is a question of federal, not state, law." (quoting I Ian R. MacNeil et al., *Federal Arbitration Law* § 2.1.2A (Supp. 1999))).

¶ 22 True enough, in finding that "an appraisal is not, *per se*, a form of arbitration," and in highlighting the significant differences between the respective processes, the trial court "endorse[d]" *Teachworth*, 898 F.2d at 1061-62. It didn't, however, follow the Fifth Circuit in applying state substantive law to define "arbitration" under the FAA. As noted above, the trial court declined to resolve the governing law issue. Yet, in resolving the limited question of whether *this* appraisal process was an arbitration, the trial court relied primarily on *Salt Lake Tribune*, 390 F.3d at 689, and other federal cases applying the same rationale. It appears Cartaya

invites us to conduct a substantially similar analysis while urging us to reach the opposite conclusion.

¶ 23 Accepting the parties' stipulation that federal common law governs, we lay out the legal framework before applying it to the present case.

¶ 24 Under federal law, whether the appraisal process in this case is "arbitration" under the FAA depends on how closely it resembles classic arbitration. *See Evanston Ins. Co.*, 683 F.3d at 693 (citing *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 689); *see also Martinique Props., LLC v. Certain Underwriters at Lloyd's London*, 567 F. Supp. 3d 1099, 1106 (D. Neb. 2021) (noting that resemblance to "classic arbitration" isn't a "bright-line rule" but endorsing that test because it accurately highlights the "crux of the question"). "Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute." *Evanston Ins. Co.*, 683 F.3d at 693 (quoting *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 689); *see also Fit Tech, Inc.*, 374 F.3d at 7 (holding that "common incidents" of classic arbitration include a final, binding remedy by a third party, "an independent adjudicator, substantive standards, . . . and an opportunity for each side to present its

case"); *see also Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) ("[T]he essence of arbitration . . . is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator."). Indeed, arbitration is "a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding[] — [a]lso termed (redundantly) binding arbitration." *Evanston Ins. Co.*, 683 F.3d at 693 (emphasis omitted) (quoting Black's Law Dictionary 119 (9th ed. 2009)); *see also Salt Lake Trib. Publ'g Co.*, 390 F.3d at 690 ("Process is arbitration under the FAA where 'the decision of the dispute resolver shall be both final and binding, subject only to the limited judicial review spelled out in the FAA.'" (quoting MacNeil, § 2.3.1.1)).

¶ 25 Furthermore, the language employed by the parties in their contract has little probative weight. *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 690. If the contract states that the third party's decision is final and binding, courts must nonetheless scrutinize the process the parties created to ascertain whether the third party's decision does, in fact, resolve the dispute. *Id.* "[W]hat is important is

[whether] the parties clearly intended to submit some disputes to their chosen instrument for the *definitive settlement* of grievances under the Agreement." *Id.* (quoting *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988)).

3. Analysis

¶ 26 Unlike the present case, *Salt Lake Tribune* didn't implicate insurance appraisal processes. *See* 390 F.3d at 687-88. Nonetheless, the Tenth Circuit's reasoning in that case is instructive. Moreover, the parties agree that it controls.

¶ 27 *Salt Lake Tribune* involved an option contract for the purchase of a newspaper. The contract fixed the option's exercise price at the fair market value of the newspaper's assets. *Id.* at 686-87. In the event the parties couldn't agree on the fair market value, the contract provided that each side was to appoint an appraiser to assess it. If the appraisers' assessments differed from each other by more than ten percent, the parties "would jointly select a third appraiser and the exercise price would equal the average of the two closest appraisal values reported by the three appraisers." *Id.* at 687.

¶ 28 On those terms, the Tenth Circuit concluded that there was no arbitration agreement under the FAA. *Id.* at 690-91. The court determined that, "[a]t most, [the third appraisal] supplied a data point that the parties could use in establishing the exercise price." *Id.* at 690. Because the third appraisal wouldn't be used at all if the first two appraisals were closest in value, it "would hardly settle the parties' dispute" and, therefore, "standing alone, does not constitute an arbitration." *Id.* at 690-91. Likewise, the court rejected the argument that the "entire process" was an arbitration. *Id.* at 691. It explained that "the three-appraisal process does not resemble classic arbitration" and that "to the extent there existed a dispute requiring arbitration, the [first two appraisers] produced the dispute by affixing values more than ten percent apart." *Id.*

¶ 29 Also informative is *Evanston*, which involved an insurance policy with an appraisal clause. 683 F.3d at 686. The appraisal processes in the *Evanston* policy are identical to those in the present case in all relevant respects. *See id.* In that case, the Sixth Circuit applied *Salt Lake Tribune*'s final-and-binding-settlement test. *Id.* at 693-94. But rather than analyzing the policy's appraisal

processes under that test, the court resolved the issue pursuant to the policy's reservation-of-rights clause. *Id.*

¶ 30 In *Evanston*, after a fire damaged a section of the insured's building, the parties disputed the cash value of the loss for which the insurance company was liable. *Id.* at 687. The parties agreed in the policy to submit the determination of the amount of loss and the value of the building to appraisal. *Id.* at 693. The court noted that, although the appraisal provision stated that "[a] decision agreed to by any two [of the umpire and appraisers] will be binding," it also provided that "[i]f there is an appraisal, we [the insurance company] will still retain our right to deny the claim." *Id.* Therefore, the court determined that the "[p]olicy does not provide for a final and binding remedy by a neutral third party." *Id.* at 693-94. It concluded that "the appraisal provision at issue is not akin to an arbitration clause" and the "FAA does not govern the parties' dispute." *Id.* at 696.

¶ 31 As in *Evanston*, the federal district court in *Summit Park* analyzed an appraisal provision in an insurance policy that was, in all pertinent ways, identical to the one at issue in the present case. *See Summit Park Townhome Ass'n*, 129 F. Supp. 3d at 1151.

Although that case considered the applicability of the CUAA, not the FAA, the court found "*Salt Lake Tribune* highly persuasive," ultimately "conclud[ing] that the appraisal process set forth in the policy is not an arbitration." *Id.* at 1153.

¶ 32 In part, the court's analysis hinged on a faithful application of *Salt Lake Tribune*'s final-and-binding-settlement test. "For one," the court stated, "the [appraisal] process here, under which a decision must be 'agreed to by any two [of the appraisers and the umpire]' will not settle the parties' disagreement over the amount of the loss if no two can agree." *Summit Park Townhome Ass'n*, 129 F. Supp. 3d at 1153 (citing *Enzor v. N.C. Farm Bureau Mut. Ins. Co.*, 473 S.E.2d 638, 640 (N.C. Ct. App. 1996)). This observation, we believe, highlights the confluence between the dispositive inquiry in *Salt Lake Tribune* and the key facts of the present case. We return to it after disposing of an alternative basis for resolving this case.

¶ 33 The *Summit Park* court also focused on the policy's reservation-of-rights clause: "Even assuming the more likely scenario that two [of the appraisers and the umpire] do agree, the parties' dispute will not be settled through to completion because there will still be legal issues for the Court to resolve." *Id.* The

court noted that "appraisal establishes only the amount of a loss and not liability for the loss under the insurance contract," whereas "arbitration is a quasi-judicial proceeding that ordinarily will decide the entire controversy." *Id.* (quoting *Minot Town & Country v. Fireman's Fund Ins. Co.*, 1998 ND 215, ¶ 8). Evoking the *Evanston* rationale, the court emphasized the proviso in the policy's appraisal process, which "reserve[d] to [the insurer] its 'right to deny the claim,' likely in recognition of the fact that, whatever the amount of loss, other parts of the policy or applicable law could limit coverage or preclude it altogether." *Id.* at 1154.

¶ 34 We decline to resolve this case pursuant to the Policy's reservation-of-rights clause, thereby stepping away from *Evanston*'s limited application of the *Salt Lake Tribune* test. *See Evanston Ins. Co.*, 683 F.3d at 693-94. Apart from our concern that the *Evanston* court's analysis on this issue was merely dictum, *see id.* at 691-92; *see also Martinique Props., LLC*, 567 F. Supp. 3d at 1107, we acknowledge other persuasive federal authorities holding that an insurance company's retention of its right to deny the claim doesn't affect the binding nature of an appraisal award, *see Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 149, 152 (2d Cir. 2019); *see also*

Martinique Props., LLC, 567 F. Supp. 3d at 1107-08 (collecting cases). What's more, we accept Cartaya's assertion that *coverage* for the loss here wasn't in dispute.[2] Accordingly, the rationale underlying the *Summit Park* court's partial reliance on the reservation-of-rights clause — namely, that "there will still be legal issues for the Court to resolve," 129 F. Supp. 3d at 1153 — is inapposite here.

¶ 35 Instead, we apply the final-and-binding-settlement test to the Policy's appraisal processes without regard for the reservation-of-rights clause. On this basis, we discern that the appraisal provisions don't lay out a definitive mechanism for reaching a final and binding figure as to the loss amount.

¶ 36 As indicated above, the *Summit Park* court's initial observation was prescient. *See id.* ("For one, the process . . . will not settle the parties' disagreement over the amount of the loss if no two can agree."). There, as here, the Policy provided: "A decision agreed to by any two [of the appraisers and the umpire] will be binding." But

---

[2] After the appraisal award was issued, Travelers' Executive General Adjuster conceded in an email that "[t]here were no coverage issues at play, this was strictly a disagreement in the amount of damages."

if any two of them don't agree, what then? The Policy is silent on how to resolve the ongoing dispute. To be sure — though not the facts of this case — it's conceivable that the two appraisers and the appointed umpire could all state different loss values, ergo creating an unresolved impasse despite exhaustion of the Policy's appraisal processes.

¶ 37 Therefore, in our view, the appraisal provisions here are even less definitive than those that didn't pass muster in *Salt Lake Tribune*. There, the third appraisal (a mere data point that may not be used at all) would, at least, trigger an ascertainable result with a semblance of finality — that is, "the exercise price would equal the average of the two closest appraisal values reported by the three appraisers." *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 687. Here, in contrast, if there are three disparate loss values, the Policy offers no path to finality. No third party has the power to render a decision settling the dispute. *See id.* at 689.

¶ 38 Accordingly, the appraisal processes here don't constitute arbitration within the meaning of the FAA. Thus, the FAA didn't confer arbitral immunity to Cartaya for his conduct during the appraisal process.

B. Judicial Notice of Vacatur in Federal Court

¶ 39 Next, Cartaya asserts that the trial court reversibly erred by taking judicial notice of the federal court's vacatur of the appraisal award. The judicial notice, he maintains, concerned facts related to the very issue being litigated in this suit. Further, he argues that the fact of vacatur was irrelevant and that taking judicial notice of it was unfairly prejudicial, particularly given that he wasn't a party to that case. We aren't persuaded.

1. Standard of Review and Applicable Law

¶ 40 We review a trial court's evidentiary decisions, including a decision to take judicial notice, for an abuse of discretion. *See Quintana v. City of Westminster*, 56 P.3d 1193, 1199 (Colo. App. 2002). "A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law." *People v. Orozco*, 210 P.3d 472, 475 (Colo. App. 2009).

¶ 41 Under the Colorado Rules of Evidence, if evidence is probative of a material fact, then it's relevant and presumptively admissible. CRE 401, 402. Only when the probative value of relevant evidence

is substantially outweighed by the danger of unfair prejudice does it need to be excluded. CRE 403.

¶ 42 Generally, a trial court has discretion to take judicial notice of an adjudicative fact. *People v. Sena*, 2016 COA 161, ¶ 23. CRE 201(b) provides that the kind of fact proper for judicial notice "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

2. Additional Facts

¶ 43 At a pretrial hearing, the trial court invited argument from the parties on whether it could properly take judicial notice of the fact that the federal court had vacated the appraisal award due to Cartaya's partiality.

¶ 44 Cartaya's counsel conceded that the fact of vacatur alone wasn't prejudicial. He contended, however, that it would be impermissible to elaborate on the federal court's *reason* for ordering vacatur. That is, counsel argued, "telling this jury that a federal judge has vacated the appraisal award because of [Cartaya's] partiality" would be "unfairly prejudicial."

¶ 45 Travelers' counsel responded that the jury "absolutely must . . . be informed" of the vacatur. "If we don't tell them," he continued, "they are going to believe that this appraisal award still exists and that it's valid and binding, and nothing could be more prejudicial [to Travelers] than that."

¶ 46 After weighing the comparative prejudice to each party, the trial court determined that it would take judicial notice of the fact of vacatur, but that it would instruct the jury without mentioning who had vacated the appraisal award and without mentioning the federal court's order. Likewise, although it found that Cartaya's partiality wasn't "a necessary corollary" of the "real issue" — namely, whether Cartaya committed fraud or negligent misrepresentation — the trial court agreed not to indicate why the award had been vacated. Accordingly, Cartaya was still able to argue at trial that he had acted impartially — indeed, he did so.

¶ 47 The court instructed the jury in the following terms:

> [W]hen I was speaking to you, I think on that first day of trial, and giving you some orientation, I mentioned what the evidence in a case consists of, testimony from the witnesses, exhibits that are admitted, as well as stipulations, agreements between the parties and another category is judicial notice.

> Judicial notice means I'm taking notice of a fact, finding that fact, you should consider as a fact. And it means that there's not a need for any presentation of evidence on the issue.
>
> The Court takes judicial notice as follows: The appraisal award has been vacated, it is void and no longer binding.

3. Analysis

¶ 48 As a threshold matter, the federal court's vacatur of the appraisal award is an adjudicative fact, the type of which is generally appropriate for judicial notice. *See Sena*, ¶ 23 ("The occurrence of legal proceedings or other court actions are proper facts for judicial notice." (citing *Doyle v. People*, 2015 CO 10, ¶¶ 2, 11)); CRE 201(b).

¶ 49 Next, the fact of vacatur was clearly relevant. And, as discussed below, the admission or exclusion of that fact at trial had prejudicial implications for both parties. The issue, however, is whether judicial notice led to any *unfair* prejudice. That inquiry turns on whether the trial court judicially noticed facts that went directly to the disputed issues.

¶ 50 Here, the parties disputed the propriety of Cartaya's conduct during the appraisal process, or they at least disputed the

characterization of that conduct. This dispute related to Cartaya's partiality, which in turn bore on the central issue at trial — that is, whether Cartaya committed fraud or negligent misrepresentation. There is, however, daylight between the simple fact of vacatur of the appraisal award and the very issues the parties were litigating. *See Mun. Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999). To be sure, the trial court ensured this by not identifying that the federal court had vacated the appraisal award and by eliminating any reference to the circumstances of the vacatur decision.

¶ 51 There was no mention at trial of the federal court, its order, or Cartaya's underlying partiality. This is crucial. True enough, as the trial court noted, an actor may be partial without committing fraud and negligent misrepresentation. Even so, knowledge of the federal court's finding regarding Cartaya's partiality would, no doubt, have created an inference that fraud and negligent misrepresentation occurred, thereby tainting the jury's determination of the very issues being litigated. On the other hand, failing to indicate that the putatively "valid and binding" appraisal award had in fact been vacated would've been tantamount to

placing a finger on the scale in favor of Cartaya.[3] This, the trial court correctly found, it couldn't do. And we discern that its judicial notice instruction properly balanced those competing prejudice inquiries.[4]

¶ 52 Therefore, the trial court didn't abuse its discretion by taking judicial notice of the fact that "[t]he appraisal award has been vacated."

---

[3] The signed appraisal award form and the Policy were both admitted at trial. The former indicated that the appraisal award was "valid and binding," while the latter stated that an appraisal award is "binding."

[4] According to supplemental briefing filed by the parties, long after trial and while this appeal was pending in this court, the parties to the federal case filed a joint stipulation dismissing the federal case with prejudice, terminating that case. The parties to this appeal dispute the effect of the dismissal on the adjudicatory fact of which the trial court took judicial notice. Cartaya contends that the stipulation of voluntary dismissal "nullifies and vitiates" the federal court's interlocutory order vacating the appraisal award. Travelers, on the other hand, contends that the dismissal leaves the order vacating the appraisal award intact as a final judgment on the merits. We don't need to resolve this dispute. For the reasons explained above, at the time of trial, the adjudicative fact of which the trial court took notice — that "[t]he appraisal award has been vacated, it is void and no longer binding" — wasn't improper. Nothing that occurred after trial changes this analysis.

C. Reasonable Reliance Determination

¶ 53 Next, Cartaya argues that, as a matter of law, Travelers couldn't reasonably rely on Cartaya's representation that roof purlin repairs would cost $603,864. Based on this, Cartaya contends that the trial court should have entered a directed verdict in his favor. We disagree.

1. Standard of Review

¶ 54 We review a trial court's ruling on a motion for directed verdict de novo. *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 982 (Colo. App. 2011) (citing *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16, 34 (Colo. App. 2010)). "Directed verdicts are not favored." *Flores v. Am. Pharm. Servs., Inc.*, 994 P.2d 455, 457 (Colo. App. 1999) (citing *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996)). Where the motion for a directed verdict concerns a question of fact, we consider whether the evidence, viewed in the light most favorable to the nonmoving party, "compels the conclusion that reasonable jurors could not disagree and that no evidence or inference [therefrom] has been received at trial upon which a verdict against the moving party could be sustained."

Reigel, 292 P.3d at 982 (quoting *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1163 (Colo. App. 2010)).

¶ 55 Whether an entity has the right to rely on a misrepresentation is a question of fact. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994). The findings of the trier of fact must be accepted on review unless they are so clearly erroneous as not to find support in the record. *Id.* at 1384 (citing *Page v. Clark*, 197 Colo. 306, 313, 592 P.2d 792, 796 (1979)).

2. Additional Facts and Trial Court Findings

¶ 56 Before trial, Cartaya moved for summary judgment, alleging, among other things, that Travelers couldn't establish that it had relied on his repair estimates. In denying the motion, the court said that

> Cartaya makes a variety of arguments concerning reliance. All share a common trait — their resolution depends on disputed issues of fact and/or inferences to be drawn therefrom. Summary judgment is therefore inappropriate.
>
> It is true that [Travelers'] alleged reliance appears somewhat attenuated — by way of its selected appraiser — but the Court is not persuaded that the issue should be resolved as a matter of law.

¶ 57 After the close of evidence, Cartaya moved for a directed verdict on the reliance issue. The court denied the motion, referencing its summary judgment order and reiterating that "there are factual issues that will have to be resolved by the jury regarding reasonable reliance"; it all depends on "how the jury interprets the conflicting testimony."

3. Analysis

¶ 58 On appeal, Cartaya maintains that, in light of other estimates available to Travelers, his estimate for roof repairs was obviously too high. Thus, he argues, it was unreasonable, as a matter of law, for Travelers to have relied on his estimate.

¶ 59 Cartaya cites *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738, 749 (Colo. App. 2002), in support of his contention. In that case, a division of this court upheld the trial court's rejection of fraud and misrepresentation claims; it reasoned that reliance wasn't justified because the party claiming fraud had inquiry notice of the true facts. *See id.* ("If the [party] has access to information that was equally available to both parties and would have led to discovery of the true facts, [that party] has no right to rely upon the

misrepresentation." (quoting *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587 (Colo. App. 2000)).

¶ 60 *Brush Creek*, however, isn't dispositive here. Indeed, it's "only when facts are presented to the trial court by stipulation, or uncontested documentary evidence, that an appellate court may draw its own conclusions." *Mortimer*, 866 P.2d at 1382 (first citing *Jelen & Son, Inc. v. Kaiser Steel Corp.*, 807 P.2d 1241, 1244 (Colo. App. 1991); and then citing *Werner v. Baker*, 693 P.2d 385, 387 (Colo. App. 1984)). As the supreme court in *Mortimer* emphasized, in both *Jelen* and *Werner* — cases in which the reviewing court properly held that it wasn't bound by the trial court's findings of fact — "no evidentiary hearings were held, no witnesses testified, no contradictory evidence was presented, and the [fact finder] was not required to assess the weight of the evidence or consider the credibility of witnesses." *Mortimer*, 866 P.2d at 1382.

¶ 61 In contrast, here, eight witnesses testified at trial, including Cartaya, Taylor, Gillette, and McKinney. This led to conflicting testimony. As Cartaya concedes, at least three separate sources provided drastically different figures for the same roof repair: (1) Lefever submitted a bid for about $27,000; (2) McKinney

commissioned research resulting in an estimate of $102,745.28; and (3) Cartaya submitted an estimate for "roof purlin repairs (Lefever bid)" totaling $603,864. Far from rendering the reasonableness of reliance a purely legal issue, as we lay out below, the discrepancy between these estimates and the surrounding circumstances created factual issues for the jury to resolve.

¶ 62 For example, Gillette's report — upon which McKinney relied in concluding that the appraisal award was accurate — stated, "This report and this writer's conclusions have been based solely on my interpretation of this claim without any influences of either [GSL or Travelers]." It was, Gillette maintained, "an unbiased report with recommendations based on the information that was [available] to me during this appraisal." Gillette continued, "The largest portion of my increase from the original Travelers estimate is the replacement of the purlin section. There was a bid of over $600,000 for this . . . that brought my figures up to arrive at my award amount after working with Mr. Cartaya." Gillette attributed this to "many differences of opinion."

¶ 63 Further, Cartaya asserts that, "[b]efore the appraisal, Mr. McKinney was aware of only one Lefever bid for structural roof

repair — Lefever's bid to replace a discrete number of purlins for about $27,000." Significantly, though, McKinney testified that, at the time he approved the appraisal award, he hadn't seen any documentation listing the $27,000 Lefever bid.[5] Therefore, according to McKinney, he didn't have access to the most glaring counterpoint to Cartaya's $603,864 estimate, but he did have Gillette's assurances that the report, which endorsed the "bid of over $600,000," was the product of independent review.

¶ 64 Thus, there was contradictory evidence for the jury to parse. Further, the jury was required to assess the weight due to that evidence while also considering the credibility of the witnesses. Therefore, *Brush Creek* is inapposite; this case couldn't be resolved on the basis of inquiry notice as a matter of law. Rather, the trial court correctly found that whether Travelers reasonably relied on Cartaya's representation was a question for the jury.

D. Award of Costs

¶ 65 Because we affirm the judgment in all respects, we also uphold the trial court's costs award to Travelers.

---

[5] The record reflects that Lefever sent the initial quote to O'Driscoll, not McKinney.

III. Disposition

¶ 66 The judgment is affirmed.

JUDGE LIPINSKY and JUDGE GOMEZ concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.