

STATE OF MICHIGAN
COURT OF APPEALS

PENNEE ANN HIRN,
Plaintiff-Appellant,

UNPUBLISHED
April 12, 2002

v

JOHN B. HIRN, JR.,
Defendant-Appellee.

No. 227224
Oakland Circuit Court
LC No. 98-603025-DM

Before: Jansen, P.J., and Zahra and Meter, JJ.

JANSEN, P.J. (*dissenting*).

I respectfully dissent. I would vacate the arbitration award because the arbitrator refused to hear evidence material to the controversy by not allowing plaintiff to call material witnesses, MCR 3.602(J)(1)(d), and because the arbitrator failed to follow the dictates of the arbitration agreement.

Initially, I do not find it necessary to be so dismissive of plaintiff's appeal. Plaintiff has proceeded *in propria persona* and, while her brief may not be a model of clarity, I do not believe that it approaches incomprehensibility. Further, since there are no transcripts of the arbitration hearing, I am uncertain exactly how plaintiff can be expected to cite to the record. Plaintiff included many appendices, including the arbitrator's award, to her brief and the lower court record has been provided for this Court's review.

In any event, in addressing the merits of plaintiff's claims, the arbitration agreement, by its own terms, was to be controlled by the uniform arbitration act, MCL 600.5001 *et seq.*, and the Michigan Court Rules and Michigan Rules of Evidence were to apply to the arbitration proceeding. Because this case involves statutory arbitration, our review is governed by MCR 3.602. See MCL 600.5021. MCR 3.602(J)(1) provides:

On application of a party, the court shall vacate an award if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;

(c) the arbitrator exceeded his or her powers; or

(d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

In the present case, the face of the arbitration award indicates reviewable and reversible error by the arbitrator. Plaintiff maintains that the arbitrator denied her request to call witnesses that had been subpoenaed and were present at the hearings. In the arbitration award, the arbitrator acknowledged plaintiff's allegation in this regard, but dismissed it stating that the parties were "afforded ample opportunity to present evidence and argument to the arbitrator." The arbitrator further stated that "[b]ecause this is arbitration and not litigation, the rules of evidence need not be adhered to closely." In fact, the arbitration agreement specified that both the Michigan Court Rules and Michigan Rules of Evidence would be applicable in the arbitration proceeding.

Consequently, the arbitrator's award must be vacated because the arbitrator refused to hear evidence material to the controversy by not allowing plaintiff to call her witnesses at the hearings. MCR 3.602(J)(1)(d). Moreover, the arbitrator exceeded his powers by failing to follow the dictates of the arbitration agreement; that is, to apply the Michigan Rules of Evidence to the arbitration proceeding. This, too, is an error of law that clearly appears on the face of the award. *Gordon Sel-Way, Inc v Spence Bros*, 438 Mich 488, 497; 475 NW2d 704 (1991). The arbitrator was wrong to state that the rules of evidence did not have to be adhered to closely because the arbitration agreement, from which the arbitrator draws his authority, stated that the Michigan Rules of Evidence were to apply to the arbitration proceeding. See *id.*, p 496 (arbitrators derive their authority to act from the parties' arbitration agreement).

Because the arbitrator refused to hear evidence material to the controversy by not allowing plaintiff to call material witnesses, MCR 3.602(J)(1)(d), and because the arbitrator failed to follow the dictates of the arbitration agreement requiring the use of the Michigan Court Rules and Michigan Rules of Evidence at the arbitration proceeding, *Gordon Sel-Way, supra*, p 496, I would vacate the arbitration award and remand for a new arbitration proceeding in conformance with the parties' arbitration agreement.

/s/ Kathleen Jansen