# STATE OF MICHIGAN

# COURT OF APPEALS

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SIGMA FINANCIAL CORPORATION,

Plaintiff-Appellant,

and

GENESIS FINANCIAL SERVICES and ROBERT W. FERGAN,

Plaintiffs,

v

JIMMY L. SHAWVER and EVELLA J. SHAWVER,

Defendants-Appellees.

UNPUBLISHED
February 19, 2004

No. 239164
Oakland Circuit Court
LC No. 01-031288-CZ

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SIGMA FINANCIAL CORPORATION, GENESIS FINANCIAL SERVICES, CORPORATION, and ROBERT W. FERGAN,

Plaintiffs/Counterdefendants-Appellants/CrossAppellees,

v

JIMMY L. SHAWVER and EVELLA J. SHAWVER, Trustees of the JIMMY L. SHAWVER and EVELLA J. SHAWVER Revocable Trust,

Defendants/Counterplaintiffs-Appellees/CrossAppellants.

No. 240111
Oakland Circuit Court
LC No. 01-031289-CZ

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Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In Docket No. 239164, plaintiffs appeals as of right from the trial court's order granting defendants' motion for summary disposition of the complaint raising third party beneficiary and breach of warranty claims. In Docket No. 240111, plaintiffs appeal as of right from the trial court's confirmation of the arbitration award by granting defendants' motion for summary disposition. Defendants filed a cross appeal in Docket No. 240111, challenging the trial court's denial of attorney fees. We affirm the consolidated appeals and reverse the trial court's denial of attorney fees as raised in defendants' cross appeal.

Individual plaintiff Robert W. Fergan, sold securities through plaintiff Sigma (Sigma) Financial Corp. Plaintiff Fergan also acted as an investment advisor through his company, plaintiff Genesis Financial Services. Defendants contracted with plaintiffs to purchase investments. The new account application, signed by defendants and individual plaintiff Fergan as the representative of plaintiff Sigma, contained the following provisions:

> ARBITRATION DISCLOSURES.
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> * ARBITRATION IS FINAL AND BINDING ON THE PARTIES.
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> * THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.
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> * PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS.
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> * THE ARBITRATORS AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.
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> * THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.
>
> AGREEMENT TO ARBITRATE CONTROVERSIES.
>
> IT IS AGREED THAT ANY CONTROVERSY BETWEEN US ARISING OUT OF YOUR BUSINESS OR THIS AGREEMENT, SHALL BE SUBMITTED TO ARBITRATION CONDUCTED BEFORE THE NEW YORK STOCK EXCHANGE, INC. OR ANY OTHER NATIONAL SECURITIES EXCHANGE ON WHICH A TRANSACTION GIVING RISE TO THE CLAIM TOOK PLACE (AND ONLY BEFORE SUCH EXCHANGE) OR THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS THE UNDERSIGNED MAY ELECT AND IN ACCORDANCE WITH THE RULES OBTAINING OF THE SELECTED ORGANIZATION. ARBITRATION MUST BE COMMENCED BY SERVICE UPON THE OTHER PARTY OF A WRITTEN DEMAND FOR ARBITRATION OR A WRITTEN NOTICE OF INTENTION TO ARBITRATE, THEREIN ELECTING THE ARBITRATION TRIBUNAL. . .

In addition to the new account document, defendants executed subscription agreements to purchase investments, and the subscription agreements contained various representations and warranties. Defendants filed for arbitration raising various claims premised on misrepresentations regarding the investments made. In order to submit the claim to arbitration, uniform submission agreements were executed by the parties involved in the arbitration. The uniform submission agreement contained the following provisions:

> 1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.
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> * * *
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> 4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

Following an extensive arbitration proceeding, defendants were awarded $250,451 in compensatory damages, $55,655.77 in attorney fees based on "statute and case law," and $11,989.53 in costs. Plaintiffs then filed an original action alleging theories of third party beneficiary and breach of warranty. Plaintiffs also filed a complaint to vacate the arbitration award which was consolidated with the original action. The trial court granted defendants' motions for summary disposition, rejecting plaintiffs' allegations that res judicata did not apply and that the lawsuit was based on the subscription agreements, which did not contain an agreement to arbitrate provision. The trial court confirmed the arbitration award, but denied defendants' request for attorney fees.

## I. Docket No. 239164

Plaintiffs first allege that the trial court erred in concluding that the original complaint was barred by res judicata. We disagree. The trial court's grant or denial or summary disposition is reviewed de novo. *Stone v State of Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002). An agreement to arbitrate is a contract. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). The scope of the arbitration is determined by the contract, *id*., and contract construction presents a question of law for the court that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). An arbitration award is res judicata in a given case where the parties agreed to submit the issues to arbitration. *Hopkins v City of Midland*, 158 Mich App 361, 370; 404 NW2d 744 (1987).

Review of the plain language of the agreement to submit to arbitration reveals that "all related counterclaims and/or third party claims" were to be asserted in the submission to the arbitration panel.[1] Furthermore, the new account application containing the arbitration provision was submitted on plaintiff Sigma's stationary. This arbitration language provided that "any controversy" arising out of "your business" would be submitted to arbitration. Thus, the question of any third party beneficiary or breach of warranty claim should have been submitted at arbitration. Plaintiffs' attempt to distinguish the new account arbitration provision from the subscription agreements is without merit in light of the broad arbitration language applicable to the parties' "business" relationship. Moreover, an exercise in semantics will not create a factual issue precluding summary disposition, *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000), and this Court is not bound by a plaintiff's label for his cause of action because to do so would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Accordingly, the attempt to exempt the original action from the doctrine of res judicata is without merit, and the trial court properly granted defendants' motion for summary disposition.[2]

Plaintiffs also allege that the trial court erred in awarding costs. We cannot conclude that the trial court's conclusion was clearly erroneous or that the amount of the award was an abuse of discretion. *McDonald v Grand Traverse County Election Commission*, 255 Mich App 674, 702; 662 NW2d 804 (2003). Plaintiffs' contention that the trial court adjourned the matter to ponder the merits of the claim is not substantiated by the record. Rather, the transcript provides that a break was taken from this action to address other cases.

II. Docket No. 240111

Plaintiffs raise a litany of issues attacking the arbitration award and alleging that summary disposition for defendants was improper. We disagree. The trial court's grant or denial or summary disposition is reviewed de novo. *Stone, supra*.

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[1] Consequently, plaintiffs' contention that the original action should be remanded to the arbitration panel is without merit. The new account agreement provided that arbitration was binding and final. The plain language of the parties' arbitration agreements did not allow the parties to pick and choose to bifurcate issues covered by the agreements.

[2] We note that plaintiffs also allege that the trial court erred in applying the doctrine of collateral estoppel. However, review of the record reveals that the trial court did not decide this issue. Consequently, this issue is not preserved for appellate review. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Furthermore, we need not address this issue in light of our disposition of the res judicata issue. Additionally, plaintiffs contend that the trial court erred in ruling on the motion for summary disposition prior to addressing the motion to amend the complaint to add additional parties. To apply the doctrine of res judicata, the parties need only be substantially identical. *In re Humphrey Estate*, 141 Mich App 412, 434; 367 NW2d 873 (1985). The doctrine is applicable to the parties or their privies. *Id*. Plaintiffs merely sought to add additional parties that were included in the original arbitration decision. Moreover, these additional parties were officers of the corporate entities and thus qualified as "parties or their privies" for purposes of a res judicata analysis. Therefore, this claim of error is without merit.

MCR 3.602(J)(1) provides that a court shall vacate an arbitration 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.

Arbitration awards are given great deference and courts have stated unequivocally that they should not be lightly set aside. *Bell v Seabury*, 243 Mich App 413, 422; 622 NW2d 347 (2000). Courts play only a limited role in reviewing arbitrators' decisions and may vacate an award only under narrowly defined circumstances. *Id.* at 522 n 4. A court may not review an arbitrator's findings of fact or decision on the merits. *Port Huron Area Sch Dist v PHEA*, 426 Mich 143, 150; 393 NW2d 811 (1986). "An allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision." *Gordon Sel-Way v Spence Bros*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Plaintiffs complain that the trial court did not review the entire 1,600-page transcript of the arbitration proceeding. In fact, however, plaintiffs declined to file the transcript of the arbitration proceeding with their motion to vacate and instead attached only excerpts of an unofficial record to their pleadings. There is no requirement that a verbatim record of arbitration proceedings be made, and no findings of fact or conclusions of law are even required. *DAIIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982). Rather, a court's review of an arbitration award is generally restricted to cases where an error of law appears on the face of the award. *Id.* In this case, because plaintiffs were attempting to overturn the arbitration award, it was their burden to provide a complete record. See *Lew Lieberbaum & Co, Inc v Randle*, 85 F Supp 2d 123, 126 (ED NY, 2000).

The record does not support plaintiffs' claim that the trial court erroneously failed to apply Michigan law. To the contrary, the record indicates that the court considered the arbitration award within the context of MCR 3.602(J)(1). While it was not improper for the court to state that it was necessary "first and foremost" to see whether the arbitration award was facially erroneous, it is apparent that the court nevertheless considered plaintiffs' remaining claims because it summarized the parties' arguments, commented on the case law they provided, referred to exhibits, and was clearly aware of the law and proceedings surrounding the award. To the extent that plaintiffs urged the applicability of certain federal exceptions, plaintiffs failed to meet the threshold requirement of providing a complete record necessary to properly present those claims. *Lieberbaum, supra*. Also, plaintiffs' claim that the arbitrators refused to allow material testimony is contradicted by their statement at the arbitration proceeding that they were given a fair opportunity to present their case.

Plaintiffs argue that the arbitrators' award of attorney fees and costs was improper because the arbitrators did not identify the specific authority on which they relied in awarding attorney fees. We disagree. Defendants requested attorney fees pursuant to MCL 451.810. Subsection (a) of that statute provides for an award of attorney fees and costs where securities were offered or sold "by means of any untrue statement" or omission of material facts. *Sparling Plastic v Sparling*, 229 Mich App 704, 713; 583 NW2d 232 (1998). The arbitrators awarded attorney fees "pursuant to statute and case law." Because attorneys fees were requested by defendants, and are expressly authorized by MCL 451.810, the award of attorney fees was not contrary to law. We reject plaintiffs' challenge to attorney fees based on the statute of limitations. This claim rests on plaintiffs' assertion that Evella Shawver's testimony was untruthful. However, the arbitrators' findings of fact, including their determinations of credibility, are not reviewable. *Gavin supra*.

Plaintiffs additionally argue that the trial court erred in stating that the face of the arbitration award did not reveal the statute of limitations as a defense raised by plaintiffs. We agree that the trial court erred in this regard. However, it is not apparent from the face of the arbitration award that the arbitrators erred in rejecting this defense. *Gavin, supra*. Speculation into the arbitrators' "mental path" is not permitted. *Id.* Therefore, the trial court's misstatement amounts to harmless error.

Plaintiffs argue that the arbitration award should be vacated because of misconduct by the arbitrators. Plaintiffs argue that they should have been permitted unlimited cross-examination of Mrs. Shawver regarding what advice she received from her friend, "Diane." Even repeated erroneous rulings are generally not enough, however, to establish misconduct, absent "most egregious" error adversely affecting a party's rights. *Hunt v Mobil Oil Corp,* 654 F Supp 1487, 1512 (SD NY, 1987). Here, plaintiffs acknowledged at the arbitration hearing that they had no idea "whether [Diane] said anything" to Mrs. Shawver. We are not convinced that plaintiffs have established error, let alone that, "but for such error, a substantially different award must have been made." *Gavin, supra.*

Plaintiffs' argument that the arbitrators' award of damages is contrary to law is not sufficiently briefed and lacks citation to supporting authority. Accordingly, we deem the issue abandoned. *Alibri v Detroit/Wayne County Stadium Authority,* 254 Mich App 545, 559; 658 NW2d 167 (2002).

Plaintiffs also contend that vacation of the arbitration award is required because two of the arbitrators failed to disclose that they previously represented a client in a different arbitration proceeding involving MCA investments, one of the investments at issue in this case. The trial court denied plaintiffs' motion for relief from judgment with regard to this issue. A trial court's decision whether to grant relief from judgment is reviewed for an abuse of discretion. *South Macomb Disposal Authority (SMDA) v American Ins Co,* 243 Mich App 647, 655; 625 NW2d 40 (2000). MCR 3.602(J)(1)(b) provides that an arbitration award may be vacated because of "evident partiality by an arbitrator appointed as a neutral." An arbitrator's failure to disclose certain facts which might lead to an impression of bias does not per se require that an arbitration award be vacated. *Gordon Sel-Way v Spence Bros,* 177 Mich App 116, 120; 440 NW2d 907 (1989), affm'd in part and rev'd in part 448 Mich 488 (1991). An arbitrator is not required to provide the parties with "a complete and unexpurgated business biography." *North American Steel v Siderius,* 75 Mich App 391, 405; 254 NW2d 899 (1977). In order to overturn the

arbitration award, the partiality or bias must be certain and direct, not remote. *Gordon Sel-Way, supra* at 120-121.

Plaintiffs allege that arbitrators Steffl and Flood filed an arbitration claim against a broker/agent concerning an MCA investment. According to plaintiffs, Steffl and Flood did not disclose their involvement in this arbitration proceeding, which was filed four months before these proceedings began, and did not withdraw from the earlier arbitration until proceedings here were underway, but before the arbitration proceeding began.

Plaintiffs contend that the trial court erred in finding that the evidence concerning the earlier arbitration was not newly discovered. MCR 2.612(C)(1)(b). The party moving for relief from judgment has the burden of showing that the evidence could not have been discovered with reasonable diligence. *Gillispie v Tenant Affair Bd*, 122 Mich App 699, 702; 332 NW2d 474 (1983). The rules that governed this arbitration proceeding required that the parties be given an "employment history for each listed arbitrator for the past 10 years and other background information." Under the rule, the parties were permitted to request additional information. There is no indication here that plaintiffs requested additional information.

Even if the evidence properly could be characterized as newly discovered, however, the trial court's denial of plaintiffs' motion was predicated on its determination that plaintiffs failed to show that the arbitrators were biased against plaintiffs or "that the purported partiality was reflected in the arbitration award." With regard to that issue, plaintiffs argue that the evidence about the earlier arbitration "at least suggests" that there was a problem. Plaintiffs acknowledge, however, that the arbitrators "apparently" signed the "oath of arbitrator," thus representing that they had not "been involved in the past five years in a dispute involving the same subject matter contained in the case here." In any event, plaintiffs' claim of improper bias is undermined by the fact that the arbitrators specifically found no cause of action in connection with defendants' fraud and misrepresentation allegations concerning MCA investments. In light of this circumstance, plaintiffs' allegations that the arbitrators were improperly biased in defendants' favor because of the connection to MCA investments is remote at best. *Gordon Sel-Way, supra*. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for relief from judgment. *SMDA, supra.*

Finally, defendants argue on cross-appeal that the trial court erred in denying their request for costs and attorney fees in connection with the post-award proceedings. This Court reviews a trial court's decision whether to award attorney fees for clear error. *Michigan Educational Employees Mutual Ins Co v Torow*, 242 Mich App 112, 118; 617 NW2d 725 (2000).

A party who violates the Michigan Securities Act is liable for, inter alia, interest, costs, and reasonable attorney fees. MCL 451.810(a); *Sparling Plastic, supra*. Here, defendants were awarded attorney fees as part of the arbitration award in this case. This Court has held that a statutory provision that allows for attorney fees may apply to post-judgment proceedings when the statute does not place any restrictions on the recovery of attorney fees and does not limit attorney fees to services rendered at a particular level. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 690; 476 NW2d 487 (1991). The statute at issue here, MCL 451.810(a), contains no restrictive language. Although plaintiffs argue that the circuit court action arose out of a complaint to vacate an arbitration award, not an action under the Michigan Securities Act, defendants' post-award attorney fees were necessitated by the need to defend an

arbitration award under the act. Accordingly, we hold that defendants are entitled to an award of attorney fees arising from both the circuit court action and this appeal. The trial court retains the discretion to assess reasonable attorney fees, not actual attorney fees. *Smolen v Dahlmann Apts,* 186 Mich App 292, 295; 463 NW2d 261 (1990). Accordingly, we remand for a determination of reasonable attorney fees resulting from the circuit court action and this appeal. *Id.* at 298.

Affirmed in Docket No. 239164. Affirmed in part and reversed in part in Docket No. 240111, and remanded for a determination of reasonable attorney fees. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood