# STATE OF MICHIGAN

# COURT OF APPEALS

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DALLAS M. BURTON, JR.,

Plaintiff-Appellant,

v

MICHAEL D. ELKINS and ELKINS & ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED
August 4, 2009

No. 283807
Oakland Circuit Court
LC No. 2003-054646-CK

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DALLAS M. BURTON, JR.,

Plaintiff-Appellant,

v

MICHAEL ELKINS and ELKINS & ASSOCIATES,

Defendants-Appellees.

No. 284969
Oakland Circuit Court
LC No. 2003-054646-CK

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Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

In Docket No. 283807, plaintiff appeals a trial court order that denied his motion to correct an arbitration award. In Docket No. 284969, plaintiff appeals a trial court order that awarded defendants sanctions pursuant to MCR 2.114. For the reasons set forth below, we affirm the orders in both appeals.

Plaintiff claims that the trial court erred when it denied his motion to vacate the arbitrator's decision.[1] Specifically, plaintiff complains that, contrary to the parties' arbitration

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[1] "Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). We review de novo a trial court's decision whether to vacate or modify an (continued…)

agreement and former MCR 3.602(J)(1)(d), the arbitrator refused to consider evidence that he attempted to submit.[2]

The arbitration agreement states that the parties may submit documentary evidence and that the arbitrator would determine the weight and credibility of the evidence. When the arbitration occurred, MCR 3.602(J)(1)(d) provided that a circuit court may vacate an arbitration award if

> 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. [Emphasis added.]

According to defendants, plaintiff submitted 11 boxes of evidence during the course of the arbitration. The record reflects that plaintiff and his attorney also had the opportunity to submit evidence after the arbitration hearing, and plaintiff submitted additional evidence regarding his attorney fees. Though plaintiff claims that the arbitrator failed to accept a binder of evidence that he attempted to submit, he fails to identify the documents included in the binder, nor does he indicate whether the documents were previously submitted during the arbitration.

Plaintiff describes the documents in the binder as "evidence of [State Farm's] breach of its duty to defend, bad faith, fraud in the appraisal process, [State Farm's] letter denying liability, and attorney malpractice." However, plaintiff has not shown that the evidence was material to the controversy, as required for relief under former MCR 3.602(J)(1)(d). The arbitrator ruled that James Fowler, plaintiff's former attorney, did not commit malpractice because plaintiff's claims against State Farm were fully adjudicated in "State Farm II" and nothing supported plaintiff's argument that he would have received a better result had his claims instead been adjudicated in "State Farm I." Evidence allegedly showing fraud and bad faith by State Farm is not material to whether defendants committed malpractice. Further, while plaintiff claims to have proffered evidence involving "attorney malpractice" generally, he fails to identify or describe evidence that allegedly supports his malpractice claim. Accordingly, plaintiff has not shown that the evidence was material to the controversy within the meaning of MCR 3.602(J)(1)(d).

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(…continued)

arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). An arbitrator derives his authority from the parties' arbitration agreement and is bound to act within the terms of the agreement. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

[2] MCR 3.602(J) was amended, effective January 1, 2008, and the grounds for vacating an arbitration award are now provided in MCR 3.602(J)(2). Although plaintiff cites MCR 3.602(K), regarding modification or correction of an arbitration award in his statement of questions presented, he fails to present any argument or cite any authority regarding this subrule in either of his briefs on appeal. Accordingly, he has abandoned his argument regarding MCR 3.602(K). A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for a claim. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

We further observe that plaintiff's primary contention on appeal is that he should have recovered, as an element of damages, the attorney fees he paid during the years of litigation following the 1984 incident. However, plaintiff admits that the arbitrator specifically allowed him to submit evidence regarding his attorney fees after the arbitration hearing. Thus, the record reflects that plaintiff had an opportunity to submit evidence that the arbitrator deemed material to the controversy. This Court will not review an arbitrator's decision regarding the amount of consideration or weight accorded to the evidence. *Belen v Allstate Ins Co*, 173 Mich App 641, 646; 434 NW2d 203 (1988).

Plaintiff contends that if the arbitrator had considered evidence in the binder, he would have concluded that malpractice occurred and that plaintiff was entitled to damages. Plaintiff provides no reasoning in his brief to support this assertion. In any case, we will not speculate about what the arbitrator would have done had he reviewed unspecified evidence in the binder. See *Detroit Automobile Inter-Ins Exch v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). Moreover, claims that an arbitrator's factual findings are erroneous are beyond the scope of our review. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). For the reasons set forth above, the trial court did not err by denying plaintiff's motion to vacate the arbitrator's decision.

Plaintiff claims that the court further erred by granting defendants' motion for sanctions pursuant to MCR 2.114.[3] However, plaintiff has abandoned this claim because he fails to present any argument that the trial court should not have ordered sanctions. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned[.]" *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, the circuit court did not clearly err by imposing sanctions on plaintiff. Under MCR 2.114(D), an attorney or a party "is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). MCR 2.114(D) provides:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

[3] This Court reviews for clear error a trial court's determination whether to impose sanctions under MCR 2.114. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). A decision is clearly erroneous when, although there may exist evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id*.

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a document is signed in violation of MCR 2.114(D), the trial court "shall" impose sanctions on the party signing the document. MCR 2.114(E); *Guerrero, supra* at 678. Thus, sanctions are mandatory if a party violates MCR 2.114(D). *Id.*

Here, in the arbitration agreement, the parties agreed to dismiss the action with prejudice and the trial court retained jurisdiction "only to the extent necessary to enter an Order consistent with the arbitration result, and only then if the arbitration award (if any) is not satisfied within 30 days of the rendering of the award." Clearly, plaintiff's motion to vacate the arbitrator's decision does not comply with the dismissal order.

Further, plaintiff's motion to vacate the arbitrator's decision is essentially an attempt to appeal the decision, and thus circumvent the parties' agreement which precludes this appeal. Michigan courts have long recognized that "no appeal" provisions in contracts are valid and enforceable. See *Collier v Pruzinsky*, 477 Mich 1121; 730 NW2d 243 (2007). Pursuant to the arbitration agreement, the parties specifically agreed that neither party could appeal the arbitrator's decision and that such decision would be "binding and final." Plaintiff's motion to vacate the award contravened the parties' agreement and was an apparent attempt to continue this 24-year litigation. The court did not clearly err by granting defendants' motion for sanctions under MCR 2.114.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello