# STATE OF MICHIGAN

# COURT OF APPEALS

DANIEL J. HEALEY and PAULA KAY CLUM,

Plaintiffs-Appellants,

v

PAUL C. SPOELSTRA,

Defendant-Appellee.

UNPUBLISHED
October 22, 2009

Nos. 281686 & 288223
Montcalm Circuit Court
LC No. 06-008293-CK

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

In Docket No. 281686, plaintiffs Daniel J. Healy and Paula Kay Clum appeal as of right the trial court's order affirming an arbitration award of $617,822 in favor of defendant Paul C. Spoelstra and dismissing plaintiffs' complaint to vacate the award. The arbitration award was entered by a unanimous National Association of Securities Dealers (NASD) Dispute Resolution arbitration panel on July 27, 2006. In Docket No. 288223, plaintiffs appeal as of right an order granting sanctions to defendant under MCL 600.2591 in the amount of $75,766.67. For the reasons set forth in this opinion, we affirm.

## I. Facts and Procedural History

In June 2005, defendant, a financial advisor who was a registered NASD representative, filed a statement of claim against plaintiffs with the NASD Dispute Resolution. At the time, the parties were all registered NASD financial representatives. Defendant had previously been affiliated with American Express Financial Advisors, Inc. (AEFA), and plaintiffs were affiliated with AEFA. The crux of the arbitration case concerned a dispute between the parties over clients. According to the statement of claim, plaintiff Healy and defendant entered into an agreement in January 2003, in which Healy agreed to pay defendant $21,170 for a portion of defendant's client base. The statement of claim alleged that the agreement provided that clients would be encouraged to remain with the assigned servicing advisor. Defendant resigned from the AEFA, and on May 13, 2003, AEFA notified defendant's clients of this fact. Defendant's statement of claim alleges that four days before AEFA sent the notification to defendant's clients, however, plaintiffs sent a card to defendant's entire client base informing the clients that defendant had "found greener pastures at a competitor" and had resigned from AEFA. The statement further claimed that plaintiffs had solicited defendant's clients. The statement contained claims for breach of contract, tortious interference with business relationships, and defamation and sought damages of $20,633.83 for amounts plaintiff Healy allegedly owed under

the agreement to purchase a portion of defendant's clients, as well as $433,420 for lost business as a result of plaintiffs' defamation of defendant and their solicitation of his customers.

The case was submitted to arbitration. The NASD sent the parties' counsel a list of proposed arbitrators with an Arbitrator Disclosure Report for each proposed arbitrator. Under NASD rules, the parties are permitted to strike arbitrators.[1] Based on the information in the proposed arbitrators' Arbitration Disclosure Reports, the parties selected Bruce F. Coleman, Edward M. Olson, and Jacqueline R. Fox as arbitrators in the case. Olson and Fox are attorneys, and Coleman was the industry arbitrator. Olson was the presiding chair. On July 27, 2006, the panel issued an award to defendant in the amount of $617,822. $602,822 of this amount was awarded against plaintiff Healy, and $15,000 was awarded against plaintiff Clum. There is evidence that the NASD faxed a copy of the award to counsel for plaintiffs and defendant the same day that the award was issued, although plaintiffs claim they did not receive delivery of the award until August 1, 2006.

Plaintiffs filed a complaint[2] seeking to vacate the arbitration award in the United States District Court for the Eastern District of Michigan on August 21, 2006. The federal district court dismissed the complaint for lack of diversity and subject matter jurisdiction on March 20, 2007. Shortly after they filed their complaint in federal court, plaintiffs filed a complaint in Montcalm Circuit Court seeking to vacate the arbitration award. The complaint was filed on September 21, 2006. In their complaint, plaintiffs alleged "[t]hat the arbitration award was obtained by misconduct constituting corruption, fraud, and undue means due to Defendant's misrepresentation to the arbitration panel of material facts" and "[t]hat the misconduct and misrepresentation . . . denied Plaintiffs a fair and unbiased panel of arbitrators." On November 1, 2006, defendant moved to dismiss the state complaint and affirm the arbitration award, arguing that plaintiffs' complaint was untimely under MCR 3.602(J)(2) because it was filed more than 21 days after the award was delivered to plaintiffs and that there were no legal grounds to vacate the award. The trial court held a hearing on the matter on March 1, 2007, and on April

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[1] NASD Rule 10308 permits parties to strike proposed arbitrators for any reason:

> **(c) Striking, Ranking, and Appointing Arbitrators on Lists**
>
> **(1) Striking and Ranking Arbitrators**
>
> (A) Striking An Arbitrator
>
> A party may strike one or more of the arbitrators from each list for any reason. [NASD Rule 10308(c)(1)(A).]

However, if parties strike all of the proposed arbitrators, then additional arbitrators will be rotationally selected to complete the panel.

[2] It is unclear if plaintiffs filed a motion or a complaint in federal court. For ease and consistency of reference, this opinion will refer to the federal court filing as a complaint.

25, 2007, the trial court granted defendant's motion to dismiss plaintiffs' complaint and confirm the arbitration award.

Thereafter, on April 30, 2007, plaintiffs moved for reconsideration, arguing, in relevant part, that arbitrators Olson and Coleman failed to disclose certain facts and circumstances and that their non-disclosures might create an impression of possible bias and therefore constituted grounds to vacate the arbitration award based on evident partiality, MCR 3.602(J)(1)(b). According to plaintiffs, the arbitrators' lack of full disclosure also deprived plaintiffs of the opportunity to make an informed selection of arbitrators. On August 30, 2007, defendant cross-moved for sanctions. In his brief opposing plaintiffs' motion for reconsideration and supporting his motion for sanctions, defendant argued that plaintiffs should be sanctioned for their frivolous complaint to vacate the arbitration award under MCL 600.2591 because plaintiffs' claim that defendant defrauded the arbitration panel regarding his compliance with the non-compete clause in his AEFA franchise agreement had already been ruled on by the arbitration panel and because the complaint was not timely filed under MCR 3.602(J)(2). On October 9, 2007, the trial court denied plaintiffs' motion for reconsideration. The trial court did not rule on defendant's motion for sanctions at this time, stating that is was reserving a ruling regarding sanctions to give plaintiffs an opportunity to respond. The trial court held a hearing regarding sanctions on October 26, 2007, ruling: "I will adopt by reference, the brief of the defendant regarding these sanctions and the arguments made by him here today. I do feel under the circumstances that under the Statute, sanctions are appropriate in this case based on what's set forth in the defendant's brief and his argument here today." On October 26, 2007, the trial court entered a written order awarding sanctions against plaintiffs and their attorneys "for the reasons set forth in Defendant's Briefs, which the Court herein adopts by reference[.]" Thereafter, the trial court held a hearing on sanctions on May 22, 2008. On September 23, 2008, the trial court issued an order awarding defendant sanctions in the amount of $75,766.67 from plaintiffs and their attorneys.

Plaintiffs were required to satisfy the arbitration award by August 29, 2006, but have not done so.

## II. Analysis

### A. Timeliness of the Complaint to Vacate

The first issue is whether the trial court erred in dismissing plaintiffs' complaint and confirming the arbitration award based on its ruling that plaintiffs' complaint to vacate the arbitration award was not timely filed under MCR 3.602.

"Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). "Generally, issues regarding an order to enforce, vacate, or modify an arbitration aware are reviewed de novo." *Saveski v Tiseo Architects, Inc.*, 261 Mich App 553, 544; 682 NW2d 542 (2004). Similarly, the interpretation and application of a court rule involves a question of law that this Court reviews de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

At the time plaintiffs moved to vacate the arbitration award, the court rules provided that "[a]n application to vacate an award must be made within 21 days after delivery of a copy of the

award to the applicant[.]" MCR 3.602(J)(2).[3] However, if the award was "predicated on corruption, fraud, or other undue means," the application had to "be made within 21 days after the grounds are known or should have been known." MCR 3.602(J)(2).

As stated above, the arbitration award was issued on July 27, 2006. The lower court record contains documentary evidence indicating that the same day the award was issued, the NASD faxed a copy of the award to counsel for plaintiffs and defendant, although plaintiffs assert that they did not receive a copy of the award until August 1, 2006. Plaintiffs filed a complaint seeking to vacate the award in the United States District Court for the Eastern District of Michigan on August 21, 2006. In order for the complaint to have been filed within 21 days as required by MCR 3.602(J)(2), it would have had to be made by August 17, 2006. The federal complaint was therefore filed about four days too late. The federal district court dismissed the complaint for lack of diversity and subject matter jurisdiction. Before the federal district court dismissed the complaint, however, plaintiffs filed a complaint to vacate the arbitration award in state court on about September 21, 2006, which was about 56 days following the issuance of the award and delivery of a copy of the award to the parties.

Defendant asserts that the arbitration award was faxed to the parties on July 27, 2006, and provided to the trial court a copy of the fax that was sent to his counsel and counsel for plaintiffs on July 27, 2006. The cover page to the fax has a date of July 27, 2006, and clearly identifies the NASD case number (05-2931) assigned to the case, the name of plaintiffs' attorney, Daniel Langdon, and the fax number for Langdon. Plaintiffs do not assert that the fax number for plaintiffs' counsel on the fax cover sheet is incorrect. However, plaintiffs assert that Langdon did not receive the arbitration award until August 1, 2006. Plaintiffs attached to their response to defendant's motion to dismiss and confirm the arbitration award an unsigned and undated affidavit purported to be that of attorney Langdon. In the unsigned affidavit, the following is asserted:

> 3. I first received the arbitration award in the National Association of Securities Dealers matter No. 05-02931 on August 1, 2006 by mail.
>
> 4. I did not receive the award by any other means of communication, such as fax or email.

At the hearing on defendant's motion to dismiss the complaint and confirm the arbitration award, plaintiffs' counsel asserted that there was a question of fact regarding when plaintiffs' counsel received the arbitration award despite the fact that the affidavit was unsigned and not dated:

> [W]e submit there are questions of fact which exist with respect to whether or not the plaintiff's [sic] move[d] to set aside the arbitration on a timely basis. We attached what turned out to be an unsigned, undated affidavit with our submission

[3] MCR 3.602 has since been amended.

to the Court in this matter. Mr. Langdon handled the arbitration—Attorney Langdon—handled the arbitration.

We were under the impression that he received the arbitration award on August 1, 2006. In fact, he told Mr. Healy as much. We were under the impression that he was going to sign the affidavit that we provided to him and which is in the court file, in our submission. He did not sign it.

When I spoke with him this morning he said that he had no recollection at all when he received the arbitration award but he clearly told Mr. Healy that the 21 day time period starts running on August 1. We submit that because of that fact, questions of fact exist as to whether or not it was timely.

The trial court rejected plaintiffs' reliance on the unsworn affidavit, and we do too. In light of plaintiffs' arbitration counsel's refusal to sign an affidavit stating that he received the award on August 1, 2006, and because the NASD fax cover form indicates that the NASD faxed a copy of the award to plaintiffs' counsel on July 27, 2006, and plaintiffs were unable to procure a signed affidavit from plaintiffs' arbitration counsel asserting that he did not receive a copy of the arbitration award until August 1, 2006, there is no genuine issue of material fact regarding this issue.

Because plaintiffs received the arbitration award on July 27, 2006, they had until August 17, 2006, to file an application to vacate the award. Plaintiffs' federal court complaint to vacate the award was not filed until August 21, 2006. Plaintiff's state complaint was not filed until September 21, 2006, which was well beyond the 21 day period in MCR 3.602(J)(2). Because plaintiffs' federal complaint was not timely filed, this Court need not address plaintiffs' claims that the filing of plaintiffs' complaint in federal court tolled the 21-day period in MCR 3.602(J)(2) and saved plaintiffs' state complaint to vacate the arbitration award.

As stated above, under MCR 3.602(J)(2) (as it existed at the time plaintiffs filed their complaints to vacate the arbitration award), an application that "is predicated on corruption, fraud, or other undue means . . . must be made within 21 days after the grounds are known or should have been known." MCR 3.602(J)(2). Plaintiffs argued before the trial court that the time to file their complaint should have been extended because defendant made misrepresentations to the arbitration panel regarding whether he contacted clients in violation of the non-compete agreement in his franchise agreement with AEFA. According to plaintiffs, defendant testified that he had complied with the non-compete agreement when he had not. The trial court ruled that the 21-day time period was not extended based on fraud, corruption or undue means, stating:

As far as the grounds for fraud and corruption, the plaintiffs' brief indicates these things were done by the defendant in the administrative hearing. So by the time the arbitration award was given, he knew those things and that is a basis for extending the Statute of Limitations 21 days past when you know it but it was brought up at the hearing itself and so I don't think they can possibly say they were not aware of it, because they are now saying it occurred during the hearing, they heard what was going on and knew about it. That would not extend the 21 days at all because they had knowledge of it at the time the hearing was

> taking place. In fact, it might even shorten the period of time. I guess the arbitration award took a while to get entered but it clearly was not extended past the 21 days.

On appeal, plaintiffs have not argued for an extension of the 21 days on this basis. Regardless, we find that even if defendant did, in fact, make misrepresentations at the arbitration hearing regarding his compliance with the non-compete clause of the franchise agreement, the trial court is correct that plaintiffs would have, or should have, known this at the time of the arbitration hearing. Therefore, this fact provides no justification for extending the 21-day time period in MCR 3.602(J)(2). The trial court therefore properly concluded that defendant's alleged misrepresentation regarding his compliance with the non-compete clause did not extend the time within which plaintiffs were required to file their complaint to vacate the arbitration award.

B. Sanctions

Plaintiffs argue that the trial court erred in ruling that their grounds for moving to vacate the arbitration award were frivolous and in granting sanctions to defendant under MCL 600.2591. Whether a claim is frivolous depends on the facts of the case; review of a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002); *BJ's & Sons Construction Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 203; 60 NW2d 364 (2002). If the court determines that a claim is frivolous, sanctions are mandatory, and the trial court does not have discretion to forego sanctions. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 267; 548 NW2d 698 (1996).

If a party is represented by an attorney, the attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal validity of a document before it is signed. MCR 2.114(D). MCR 2.625(A)(2) provides that "[i]n an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Under MCL 600.2591(3)(a), an action is "frivolous" if at least one of the following conditions is met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs & Attorney Fees (Powell Production, Inc v Jackhill Oil Co)*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The court must examine "the particular facts and circumstances of the claim involved." *Id.* at 95. "The purpose of imposing sanctions for asserting frivolous claims 'is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.'" *BJ's & Sons Construction Co*, *supra* at 405, quoting *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998).

The trial court held a hearing regarding sanctions on October 26, 2007, and ruled that sanctions against plaintiffs were appropriate. The trial court issued an order awarding defendant sanctions in the amount of $75,766.67 from plaintiffs and their attorneys. In granting defendant's motion for sanctions, the trial court specifically adopted by reference the arguments defendant asserted in his lower court briefs.

On appeal, plaintiffs do not challenge the amount of the sanctions imposed by the trial court. Instead, plaintiffs argue that the trial court failed to make factual or legal findings justifying the imposition of sanctions and failed to articulate whether sanctions were imposed under MCL 600.2591(3)(a)(i), (ii), or (iii). In fact, as stated above, the trial court specifically adopted defendant's briefs by reference in its October 26, 2007, and November 19, 2007, orders granting defendant's motion for sanctions. Defendant's briefs assert that sanctions were warranted under MCL 600.2591(3)(a)(ii) and (iii) and articulated which of plaintiffs' claims were frivolous and why. In their appellate brief, plaintiffs cite an unpublished opinion of this Court that stated that before imposing sanctions under MCL 600.2591, a trial court must evaluate claims, examine the particular facts and circumstances of the claims involved, and state under which subsection of MCL 600.2591(3)(a) sanctions are warranted. The unpublished case relied on by plaintiffs is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). Furthermore, the case does not explicitly preclude a trial court from adopting a party's brief in making a determination regarding the imposition of sanctions. To the extent that plaintiffs have failed to cite any cases that have specifically prohibited a trial court from adopting a party's brief in making a determination regarding the impositions of sanctions, this issue is waived. It is not enough for an appellant to simply announce a position or assert an error in a brief and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Although the parties make numerous detailed arguments on appeal regarding this issue, specifically regarding whether plaintiffs' grounds for seeking to vacate the arbitration award based on arbitrators Olson and Coleman's non-disclosures of certain information were frivolous, our focus is on the bases cited in defendant's briefs in support of his requests for sanctions, since the trial court specifically adopted the arguments in defendant's briefs in awarding sanctions.

The trial court expressly adopted defendant's assertion that plaintiffs' complaint to vacate the arbitration award based on defendant's alleged defrauding of the arbitration panel was frivolous. In moving to vacate the arbitration award, plaintiffs argued, in part, that "[t]he central issue in the NASD Arbitration was whether [defendant] misrepresented to the arbitrators that he had a duty to not compete and solicit clients both before his official resignation and for a one year period subsequent to his resignation." According to defendant's brief on appeal, plaintiffs failed to inform the trial court below and this Court on appeal, that they raised the issue of defendant's compliance with the franchise agreement by bringing a motion before the arbitration panel and that the arbitration panel denied plaintiffs' motion in the arbitration award. While the record of the arbitration proceedings is not a part of the lower court record in this case, defendant submitted the affidavit of Willard Knox, who represented defendant, along with attorney Anthony Paduano, in the arbitration proceedings below. In his affidavit, Knox averred that plaintiffs moved to continue or reopen the proceedings to address defendant's compliance with the AEFA franchise agreement and that the arbitration panel denied the motion. Defendant attached to Knox's affidavit the motion filed by plaintiffs in the arbitration seeking to continue or reopen the proceedings to address defendant's compliance with the AEFA franchise agreement, and the arbitration award itself states that the panel denied the motion. Because the arbitration panel had already rejected plaintiffs' argument in this regard, plaintiffs' argument to vacate the arbitration award on this basis had no legal merit. Therefore, the trial court properly awarded sanctions to defendant based on MCL 600.2591(3)(a)(iii).

Similarly, sanctions were also appropriate under MCL 600.2591(3)(a)(iii) based on the fact that plaintiffs' complaint was not timely filed under MCR 3.602(J)(2). As we stated previously, plaintiffs could not establish that their arbitration counsel did not receive delivery of the arbitration award on July 27, 2006, because the fax cover page indicated that the award was faxed to plaintiffs' arbitration counsel on July 27, 2006, and plaintiffs' arbitration counsel was unwilling to sign an affidavit stating that he did not receive delivery of the arbitration award until August 1, 2006. Therefore, plaintiffs' complaint to vacate the arbitration award in federal court, which was filed on August 21, 2006, was filed more than 21 days after delivery of the arbitration award to plaintiffs' counsel. Plaintiffs' complaint to vacate the arbitration award in state circuit court was also not timely under MCR 3.602(J)(2) because it was filed on September 21, 2006. Moreover, because the federal complaint was not timely filed, the filing of that complaint did not toll the 21-day time limit in MCR 3.602(J)(2) for the filing of the state complaint. For these reasons, plaintiffs' complaint to vacate the arbitration award was devoid of arguable legal merit and sanctions were proper under MCL 600.2591(3)(a)(iii).

## III. Holding

Because we find that the trial court properly dismissed plaintiffs' complaint to vacate the arbitration award based on plaintiffs' failure to file their complaint to vacate within the time frame required under MCR 3.602(J)(2), we need not address the parties' arguments regarding whether there were grounds to vacate the arbitration award under MCR 3.602(J)(1).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello