

STATE OF MICHIGAN  
COURT OF APPEALS

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CRISTINA MCCARTHY FOSTER,  
Plaintiff-Appellee,

UNPUBLISHED  
July 24, 2012

v

SCOTT JAMES FOSTER,  
Defendant-Appellant.

No. 302287  
Oakland Circuit Court  
LC No. 2008-748211-DM

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Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce entered following arbitration pursuant to the domestic relations arbitration act (“DRAA”), MCL 600.5070 *et seq.* Because the trial court properly denied defendant’s motion to vacate the arbitration award, the arbitrator acted within the scope of his authority by awarding plaintiff attorney fees, the arbitrator did not evidence bias in favor of plaintiff, and defendant’s other challenges to the arbitration lack merit, we affirm.

The parties were married in November 1993 and thereafter had three children. Plaintiff filed her complaint for divorce on June 26, 2008, and, on June 9, 2009, the parties entered into binding arbitration under the DRAA. On December 8, 2010, following arbitration, the trial court entered a judgment of divorce. On the same day, defendant filed a motion to vacate the arbitration award, which the trial court denied. He now appeals.

Defendant first argues that his motion to vacate the arbitration award should have been considered timely because the arbitrator failed to conduct the arbitration within the principles of law governing the manner in which arbitrations must be conducted. “This Court reviews de novo a circuit court’s decision to enforce, vacate, or modify an arbitration award.” *Cipriano v Cipriano*, 289 Mich App 361, 368; 808 NW2d 230 (2010).

Defendant contends that by ruling on the issues piecemeal and issuing several arbitration awards, the arbitrator failed to comply with the standard set forth in *Vyletel-Rivard v Rivard*, 286 Mich App 13; 777 NW2d 722 (2009). Defendant’s argument lacks merit, and his reliance on *Vyletel-Rivard* is misplaced. In that case, the parties entered into a domestic relations arbitration agreement, and, on November 13, 2007, the arbitrator awarded the plaintiff \$210,000 as alimony in gross. *Id.* at 15-16. On November 27, 2007, the defendant filed a motion to correct errors or omissions, challenging the award. In a December 7, 2007, letter, the arbitrator rejected the

defendant's challenge and upheld the award. *Id.* at 16. On December 18, 2007, the defendant filed a motion to correct errors or omissions with respect to the December 7, 2007, award. *Id.* at 16-17. After further communication between the parties, the arbitrator issued his last dispositive award on March 24, 2008. It did not appear that the arbitrator addressed the defendant's argument asserted in his December 18, 2007, motion or the plaintiff's argument in response to the motion. *Id.* at 17-18.

On March 28, 2008, the defendant filed a motion to vacate the November 13, 2007, and December 7, 2007, arbitration awards. *Id.* at 18. In response, the plaintiff argued that the defendant's motion should be denied because it was not timely filed within 21 days after the December 7, 2007, award. *Id.* The defendant, on the other hand, asserted that his motion was timely because it was filed within 21 days of "the arbitrator's final modification of the arbitration award." The defendant contended that an arbitration award is not final until all issues are addressed and that no authority suggests that a party is required to file piecemeal motions to vacate awards. The trial court denied the defendant's motion on the basis that it was untimely. *Id.* at 19.

On appeal, this Court affirmed. *Id.* at 25. This Court looked to the language of MCR 3.602(J)(3), which provides that "[a] motion to vacate an award in a domestic relations case must be filed within 21 days after the date of the award." *Id.* at 20-21. The Court noted that, although that language was added to the court rule by virtue of an October 2007 amendment that did not become effective until January 1, 2008, before the amendment MCR 3.602(J)(2) 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 . . . ." *Id.* at 21. As such, the defendant did not dispute that his motion was required to be filed within 21 days after delivery of the award in order to be timely. The defendant argued, however, that the term "award" in MCR 3.602(J)(2) referred to the "final" arbitration award issued on March 24, 2008. In response, the plaintiff contended that because no language modified the term "award," it pertained to the arbitrator's initial award. *Id.* at 21.

This Court opined that, although MCR 3.602(J)(2) on its face appeared to provide an unambiguous, 21-day time limit, considering the language of MCL 600.5078, the date that the time period began to run was ambiguous to the extent that the court rule pertained to the DRAA. *Id.* at 22. MCL 600.5078 provides:

(1) Unless otherwise agreed by the parties and arbitrator in writing or on the record, the arbitrator shall issue the written award on each issue within 60 days after either the end of the hearing or, if requested by the arbitrator, after receipt of proposed findings of fact and conclusions of law.

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(3) An arbitrator under this chapter retains jurisdiction to correct errors or omissions in an award until the court confirms the award. Within 14 days after the award is issued, a party to the arbitration may file a motion to correct errors or omissions. The other party to the arbitration may respond to such a motion within 14 days after the motion is filed. The arbitrator shall issue a decision on the motion within 14 days after receipt of a response to the motion or, if a response is

not filed, within 14 days after expiration of the response period. [See also *id.* at 22-23.]

This Court interpreted MCR 3.602(J)(2) in conjunction with MCL 600.5078 as follows:

By allowing a party, upon receiving the written award, to file a motion to correct errors or omissions, the statute clearly contemplates that the written award issued by the arbitrator may be modified. Thus, MCL 600.5078 implicitly contemplates two awards: (1) the initial written award, and (2) the initial award as modified by any decision on a motion to correct errors or omissions. The term “award” in MCR 3.602(J)(2) could refer, with equal susceptibility, to either of the two awards contemplated by MCL 600.5078. Consequently, it is ambiguous whether the 21-day period of MCR 3.602(J)(2) begins when the initial written award is delivered to the party or when the decision on the motion to correct errors or omissions is delivered.

Guided by the fact that the Legislature has authorized a party to a domestic relations arbitration to file a motion to correct errors or omissions, we hold that the date the 21-day period of MCR 3.602(J)(2) begins is dependent on whether a motion to correct errors or omissions is filed. If a motion to correct errors or omissions is not filed, then the 21-day period begins on the date the initial written award is delivered. However, if a motion to correct errors or omissions is filed, then the 21-day period begins on the date the arbitrator’s decision on the motion is delivered. This construction of MCR 3.602(J)(2) recognizes that the initial written arbitration award may be modified, and it does not require a party to move to vacate the arbitration award until such modifications are, in fact, made or denied.

In this case, after the arbitrator issued the initial written arbitration award on November 13, 2007, plaintiff filed a request for clarifications and defendant filed a motion to correct errors or omissions. The arbitrator issued his decision on the clarification requests and the motion to correct errors or omissions on December 7, 2007. Thus, pursuant to MCR 3.602(J)(2) and our above holding, defendant was required to file his motion to vacate within 21 days of delivery of a copy of the December 7, 2007, decision. [*Id.* at 23-24.]

Defendant in the present case erroneously cites *Vyletel-Rivard* for the proposition that an arbitrator may not address issues separately over the course of an arbitration, thereby issuing multiple awards. This was not the holding in *Vyletel-Rivard*. Defendant also erroneously contends that, pursuant to *Vyletel-Rivard*, a party is permitted to file only one motion to correct errors or omissions in an arbitration. Again, this was not this Court’s holding. Rather, a party may file a motion to correct errors or omissions after an arbitrator issues an award, regardless of whether the award addresses all issues in the case, addresses only one particular issue, or whether the award is issued at the conclusion of the case. *Id.* at 24-25.

Here, the arbitrator issued his eleventh and final award on October 14, 2010.<sup>1</sup> Defendant filed his motion to vacate the arbitration award on December 8, 2010. Pursuant to MCR 3.602(J)(3)<sup>2</sup> and *Vyletel-Rivard*, defendant was required to file his motion within 21 days after the date of the award unless he filed a motion to correct errors or omissions within 14 days pursuant to MCL 600.5078. As the trial court determined, defendant's October 28, 2010, e-mail to the arbitrator stating his disagreement with certain provisions of the award did not constitute a motion to correct errors or omissions. Therefore, defendant was required to file his motion to vacate the arbitration award within 21 days after the October 14, 2010, arbitration award. Because he failed to do so, the trial court properly denied his motion.

Defendant raises several other challenges to the arbitration, including that the arbitration lasted 18 months and contravened the procedure set forth in *Vyletel-Rivard*, the arbitrator decided many issues via conference calls and letters with the parties' attorneys, the arbitrator called his eighth award his "final" award although it was not in fact the final award, the arbitrator did not respond to some of the parties' requests for relief, and no record was made of the child support proceedings. Defendant also argues that the property distribution was disproportionate, the spousal support award was inequitable, the arbitrator improperly awarded plaintiff attorney fees, and the arbitrator evidenced bias in favor of plaintiff. "Judicial review of arbitration awards is . . . extremely limited[.]" *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). We review de novo whether an arbitrator exceeded his authority. *Id.* at 672. This Court may not review an arbitrator's findings of fact. *Id.* Further, "any error of law must be discernable on the face of the award itself[.]" *Id.* "[I]n order to vacate an arbitration award, any error of law must be so substantial that, but for the error, the award would have been substantially different." *Id.* (quotation marks and citations omitted).

Defendant's challenges to the arbitrator's property distribution and spousal support award are not reviewable because this Court may not review an arbitrator's factual determinations and "[c]ourts will not engage in a review of an arbitrator's mental path leading to [an] award." *Id.* (quotation marks, citations, and brackets omitted). In addition, defendant's challenge to the attorney fee award lacks merit. The arbitration agreement specifically authorized the arbitrator to decide issues involving "[c]osts, expenses, attorney fees and arbitration fees[.]" Thus, the attorney fee award was within the scope of the arbitrator's authority set forth in the agreement. See *Gorden-Sel Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). The award also involved the arbitrator's factual determination that attorney fees were warranted because of defendant's conduct that needlessly prolonged the arbitration, including repeatedly changing attorneys, often just before scheduled hearings that had to be adjourned, and his procrastination or refusal to comply with prior arbitration awards. This Court will not review an arbitrator's factual determinations. *Washington*, 283 Mich App at 672.

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<sup>1</sup> Although defendant argues that the October 14, 2010, award was not actually the "final" award, it was the last award that the arbitrator issued before the trial court entered the judgment of divorce.

<sup>2</sup> As previously discussed, MCR 3.602(J)(3) provides the same 21-time limit previously set forth in MCR 3.602(J)(2), which this Court discussed in *Vyletel-Rivard*.

Defendant's challenges to the manner in which the arbitrator conducted the arbitration likewise lack merit. As previously discussed, the procedure utilized did not contravene the procedure set forth in *Vyletel-Rivard*. Moreover, the arbitration agreement conferred upon the arbitrator the discretion to determine the format for the arbitration. We can discern no error of law on the face of the arbitration awards, let alone an error so substantial that, but for the error, the result would have been substantially different. *Washington*, 283 Mich App at 672.

Defendant also challenges the arbitrator's failure to make a record of the proceedings pertaining to child support. Pursuant to MCL 600.5077(2) of the DRAA, "[a] record shall be made of that portion of a hearing that concerns child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition." Notably, MCL 600.5077(2) does not require an arbitrator to hold a hearing. Rather, the provision states that the portion of a hearing that pertains to the matters identified in the statute must be recorded.

Here, it appears that there was no hearing involving child support. The arbitrator's sixth interim award directed the parties to submit proposed findings of fact, conclusions of law, and final awards to the arbitrator. Thereafter, the arbitrator issued his eighth award, which addressed and determined child support. It does not appear that the arbitrator held a hearing pertaining to child support before issuing the eighth award. Further, although defendant argues that this Court should remand this case in order for a record to be made regarding the child support calculation, an evidentiary hearing was held in March 2012 pursuant to both parties' postjudgment motions to modify child support. The referee determined that the income levels that the arbitrator attributed to the parties to establish child support were appropriate. In addition, the trial court denied defendant's objections to the referee's recommendation. Therefore, defendant is entitled to no relief.

Finally, defendant argues that the arbitrator evidenced bias in favor of plaintiff because of defendant's repeated requests that the trial court step in and take control of the arbitration. Defendant's claim of bias is also based on his assertion that the arbitrator previously represented the ex-wife of defendant's brother. In order to overturn an arbitration award on the basis of the arbitrator's partiality or bias, such partiality or bias "must be certain and direct, not remote, uncertain or speculative." *Bayati v Bayati*, 264 Mich App 595, 601; 691 NW2d 812 (2004), quoting *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988). Here, defendant's claims of bias are merely speculative. Nothing indicates that the arbitrator was in fact biased in favor of plaintiff. Further, it is noteworthy that defendant did not raise this argument until after the arbitrator issued his final award, which defendant now challenges.

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

/s/ Pat M. Donofrio  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra