

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-332
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

MELISSA K. FITTA,
Plaintiff,

v.

Onslow County
No. 08 CVS 1818

WILLIAM K. BURKE,
Defendant.

Appeal by plaintiff from order entered 9 December 2010 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 12 September 2011.

Collins, Maready & Surlles, PA, by Gearge L. Collins, Esq., for plaintiff-appellant.

Rose Rand Wallace Attorneys, P.A., by Thomas H. Morris and Kimberly Connor Benton, for defendant-appellee.

Bryant, Judge.

Because plaintiff failed to provide an objective basis upon which to premise a ground to vacate an arbitration award pursuant to N.C. Gen. Stat. § 1-569.23, we affirm the trial court's dismissal of plaintiff's motion.

On 29 April 2008, plaintiff Melissa Fitta filed a negligence complaint against defendant William Burke for damages

caused by a vehicle collision in the parking lot of a retail store in Jacksonville, North Carolina on 4 June 2005. Defendant answered the complaint, denying negligence, raising the defense of contributory negligence, and moving that the complaint be dismissed on the basis of Rule 12(b)(6), as well as for insufficiency of service of process. Unnamed defendant United Services Automobile Association also answered the complaint, denying responsibility for plaintiff's damages. The matter was assigned to arbitration.

On 25 August 2010, the matter was heard before a panel of three arbitrators. On 31 August 2010, the panel filed an arbitration decision finding that defendant did not proximately cause the injuries alleged by plaintiff. On 4 September 2010, plaintiff moved the arbitration panel to reopen the hearing on the basis of new evidence in the form of a repair bill. The discovery of the existence of the repair bill was not made in time to introduce it at the original hearing. The panel reopened the matter and, on 27 September 2010, entered another arbitration award again deciding that plaintiff was not injured as a result of defendant's negligence.

On 6 October 2010, in Onslow County Superior Court, plaintiff filed a motion to vacate the arbitration award.

Plaintiff alleged that there was evident partiality, misconduct, and that the arbitrators exceeded their power. Further, plaintiff moved the court to vacate the award on the basis of "manifest disregard of the law" On 25 October 2010, unnamed defendant moved to dismiss plaintiff's motion to vacate the arbitration award. Unnamed defendant asserted that plaintiff failed to meet any of the criteria set forth under N.C. Gen. Stat. § 1-569.23(a) "for vacating the award made by the three-person arbitration panel in this action" Unnamed defendant also filed a motion for sanctions pursuant to Rule 11.

On 8 November 2010, the trial court held a hearing on unnamed defendant's motion to dismiss plaintiff's motion to vacate the arbitration award, as well as, unnamed defendant's motion for sanctions pursuant to Rule 11.

On 10 November 2010, plaintiff filed a motion to compel arbitrators Sam Q. Carlisle, II, Donald W. Ennis, and A. Charles Ellis "to make themselves available for oral deposition" "Plaintiff shows the Court that she has filed a Motion to Vacate the arbitration award in this case pursuant to N.C.G.S. 1-569.23 et seq. and the Plaintiff must have answers from the arbitrators to certain questions in order to establish her claim under 1-569.23 et seq."

On 8 December 2010, the trial court granted the motion to dismiss plaintiff's motion to vacate the arbitration award but denied the motion for sanctions. The trial court further found that by granting the motion to dismiss, plaintiff's motion to compel the arbitrators to submit to a deposition became moot. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in granting unnamed defendant's motion to dismiss plaintiff's motion to vacate the arbitration award and in denying plaintiff's motion to compel the arbitrators to make themselves available for deposition. Plaintiff asserts that her motion to vacate the arbitration award was warranted and that her motion to compel the arbitrators to submit to oral deposition was filed for purposes of discovery. Plaintiff contends that the trial court's dismissal of her motions absent a hearing constituted error. We disagree.

"[A]n arbitration award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists." *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 572, 654 S.E.2d 47, 51

(2007) (citation and brackets omitted). Under N.C. Gen. Stat. § 1-569.23(a)(2), an arbitration award shall be vacated where there was "[e]vident partiality by an arbitrator appointed as a neutral arbitrator; [c]orruption by an arbitrator; or [m]isconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding" N.C. Gen. Stat. § 1-569.23(a)(2) (2009).

On 6 October 2010, plaintiff filed a "Motion to Vacate the Arbitration Award or Awards." Plaintiff stated that an arbitrator exhibited evident partiality and misconduct, a manifest disregard for the law, and, as a panel, the arbitrators exceeded their authority. Plaintiff's statement appears to be based on assertions in an affidavit by plaintiff's attorney alleging that "the neutral arbitrator . . . [committed] misconduct."¹ Plaintiff's statement in essence challenges the credibility of the evidence and the weight given to the evidence by the arbitrators. Such a challenge is not sufficient to show misconduct for purposes of setting aside an arbitration award. *See, e.g., Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E.2d 380 (1976) (*ex parte* investigation by

¹ While these and other specific allegations appear in the record, they are not otherwise referred to or argued in plaintiff's brief.

arbitrator); *Williams C. Vick Constr. v. N.C. Farm Bureau Fed'n*, 123 N.C. App. 97, 472 S.E.2d 346 (1996) (undisclosed relationship with counsel); and *Wildwoods of Lake Johnson Assoc. v. L.P. Cox Co.*, 88 N.C. App. 88, 362 S.E.2d 615 (1987) (hindering the presentation of evidence). Moreover, plaintiff's statement is unsupported in her argument on appeal. Therefore, because plaintiff gave no objective basis on which to support her misconduct allegations, she has failed to meet her burden of establishing a ground upon which to set aside the arbitration award.

Plaintiff also argues that the trial court erred in failing to grant her motion to compel. Plaintiff contends that by dismissing her motion to set aside the arbitration award without considering plaintiff's motion to compel depositions of the arbitrators amounted to a denial of plaintiff's opportunity for discovery.

"An arbitrator's deposition of misconduct may be allowed in evidence only when some objective basis exists for a reasonable belief that misconduct has occurred." *Carolina-Virginia Fashion Exhibitors, Inc.*, 291 N.C. at 218, 230 S.E.2d at 387 (emphasis omitted). "An arbitrator should not be called upon to give a reason for his decision. Inquisition of an arbitrator for the

purpose of determining the processes by which he arrives at an award, finds no sanction in law." *Id.* at 214, 230 S.E.2d at 385 (citation omitted).

Here, the arbitration decision provided answers to the following three questions:

1. Issue: Was the plaintiff injured by the negligence of the defendant?
2. Issue: Did the plaintiff by her own negligence contribute to her injury?
3. Issue: What amount, if any, is the plaintiff entitled to recover of the defendant?

The panel decided that the answer to the first question was that plaintiff was not injured by defendant's negligence. In an affidavit by plaintiff's counsel, accompanying plaintiff's motion to compel, it was stated that "[plaintiff's counsel] is informed and therefore believed that [Arbitrator] Ennis stated that issue number 1 should be answered 'yes' and that number 2 should be answered 'yes' but changed his mind on issue number 1 in order to get the desired result of awarding no damages to the Plaintiff."

Even presuming the accuracy of the affiant's proposition, by her motion, plaintiff seeks to inquire of the arbitrators the

reason for their decision. This is contrary to our law. See *id.* at 214, 230 S.E.2d at 385 ("An arbitrator should not be called upon to give a reason for his decision."). As there exists no objective basis on which to allege misconduct on the part of the arbitrators the trial court properly denied plaintiff's motion to compel. Accordingly, we overrule plaintiff's argument.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).