

STATE OF MICHIGAN
COURT OF APPEALS

DAVID GREENWALD, Personal Representative
of the Estate of SHIRLEY GREENWALD,
Decedent, and JACK GREENWALD,

UNPUBLISHED
December 19, 2006

Plaintiffs-Appellants,

v

No. 264511
Oakland Circuit Court
LC No. 2002-042470-NI

LISA J. HOOE and KLAUS M. MEIER,

Defendants,

and

ANTHONY W. ECHOLS and MARIJATA
COLLEY DANIEL-ECHOLS,

Defendants-Appellees.

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court judgment denying their motion to vacate an arbitration award. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs argue that the arbitration award should be vacated because it contravenes controlling principles of law by failing to apply the assured clear distance statute, MCL 257.627(1).

This Court reviews de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). Pursuant to MCR 3.602(J)(1)(c), an arbitration award may be vacated if the arbitrator exceeded his or her powers. *Dohanyos v Detrex Corp*, 217 Mich App 171, 174-175; 550 NW2d 608 (1996). "[A]rbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

“[W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.” [*Id.* at 443 (citation omitted).]

The Supreme Court has held that violation of the assured clear distance statute, MCL 257.627(1), constitutes “negligence per se.” *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). “Negligence per se” does not denote strict liability. See *Zeni v Anderson*, 397 Mich 117, 131-133; 243 NW2d 270 (1976). Rather, “the rule is that evidence of violation of a penal statute creates a rebuttable presumption of negligence.” *Klanseck v Anderson Sales & Service, Inc.*, 426 Mich 78, 86; 393 NW2d 356 (1986). The assured clear distance statute must be reasonably construed and is subject to qualification. *Vander Laan, supra*. For example, the statute is inapplicable “when a collision is shown to have occurred as the result of a sudden emergency not of the defendants’ own making.” *Id.*

Plaintiffs have failed to demonstrate that the decision of the majority of the arbitrators was in contravention of controlling principles of law. The majority of the arbitrators agreed with defendants that “any alleged failure on the part of Anthony Echols to stop his vehicle within the assured clear distance ahead was a direct result of the sudden emergency situation which presented itself through no fault of Anthony Echols.” Plaintiffs do not address the sudden emergency doctrine. They have not shown that the arbitration decision was affected by an error of law that led to a wrong conclusion.

Plaintiffs also argue that the award should be vacated because of misconduct by the two arbitrators in excluding the arbitrator selected by plaintiffs from deliberations.

MCR 3.602(J)(1)(b) provides that a court shall vacate an arbitration award if there was “misconduct prejudicing a party’s rights” Interpreting the former court rule, GCR 1963, 769.9(1)(b), this Court has held that “anything short of actual exclusion from deliberations does not constitute ‘misconduct’” *Bradley v Allstate Ins Co*, 133 Mich App 116; 348 NW2d 51 (1984). Once there has been tripartite discussion following the hearing, further tripartite discussion is not a prerequisite to a valid award. *Id.* at 121.

In the present case, there is no dispute that all three arbitrators conducted the arbitration hearing and that the three arbitrators deliberated as a group following the hearing. The absence of subsequent tripartite discussions does not establish “misconduct.” This view is consistent with MCR 3.602(H), which provides that where there is a panel of arbitrators, the hearing must be conducted by all of them, “but a majority may decide any question and render a final award unless the concurrence of all of the arbitrators is expressly required” by the arbitration agreement.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly