

STATE OF MICHIGAN
COURT OF APPEALS

J. L. JUDGE CONSTRUCTION SERVICES,

Plaintiff/Counter-Defendant-
Appellee,

V

TRINITY ELECTRIC, INC.,

Defendant/Counter-Plaintiff-
Appellant,

and

WESTFIELD INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

August 2, 2011

No. 295783

Wayne Circuit Court

LC No. 07-728849-CK

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendants, Trinity Electric, Inc., (Trinity) and Westfield Insurance Company (Westfield), appeal as of right from the trial court order denying their request for attorney fees and costs following entry of a judgment confirming an arbitration award. We affirm.

In 2007, plaintiff filed an action against defendants alleging breach of contract, promissory estoppel, and failure to pay a performance bond. In August 2008, the case was submitted to case evaluation where an award of \$100,000 in favor of plaintiff against defendant Trinity was rendered. Both parties rejected that award. With regard to defendant Westfield, an award of \$25,000 was recommended in favor of plaintiff, and the insurance company accepted the award, but plaintiff rejected it. On November 10, 2008, the trial court signed an order, stipulated by the parties, to submit the case to binding arbitration. According to the terms of the stipulation, the parties agreed “to resolve all of their disputes, claims, and counterclaims” pursuant to the terms contained in the stipulation. The parties also recognized that the private arbitration would be governed by the current American Arbitration Association (AAA) rules governing construction disputes. The parties also stipulated that strict adherence to the Michigan Rules of Evidence was unnecessary.

On October 23, 2009, arbitrator John Sier concluded that plaintiff had failed to demonstrate breach of contract or promissory estoppel and was not entitled to a performance bond. The arbitrator further concluded that defendant Trinity was entitled to recover \$1500 for work performed without a contract. The arbitrator ruled:

THE AWARD IS AS FOLLOWS:

[\$0] for [plaintiff] on its claims against [defendants].

\$1500.00 in favor of [defendant Trinity] on its claims against [plaintiff] together with interest pursuant to MCL 600.6013.

The parties shall each bear their own legal fees and shall share the costs of the arbitration as provided in the November 10, 2008 Order.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration.

All claims not expressly granted herein are hereby denied.

Following the arbitration, defendants filed a joint motion to confirm the arbitration award and for entry of judgment. However, defendants also filed a request for attorney fees and costs pursuant to MCR 2.403(O), the rule governing case evaluation sanctions, and MCR 2.313(C), the rule governing expenses for plaintiff's failure to respond to requests for admissions. The trial court confirmed the arbitration award, but denied defendants' motion premised on MCR 2.403(O) and MCR 2.313(C).

Defendants contend that the trial court erred in denying their request for attorney fees and costs because the court rules allow for recovery. Because the resolution of the attorney fee and cost issue was within the province of the arbitrator, we conclude that the trial court did not err in denying defendants' request.

The trial court's decision regarding a motion for case evaluation sanctions pursuant to MCR 2.403(O) is reviewed de novo, and the interpretation and application of a court rule is also subject to de novo review. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 356; 737 NW2d 807 (2007). When called upon to analyze a court rule, the appellate court uses the legal principles that govern the construction and application of statutes. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 669 (1989); *Amburgey v Sauder*, 238 Mich App 228, 231-232; 605 NW2d 84 (1999). Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *Certified Question*, 433 Mich at 722. The language of the statute expresses the legislative intent. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Id.* Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.* Our Supreme Court has the constitutional authority to promulgate rules governing the practice and procedure

in all courts in this state. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 581; 321 NW2d 653 (1982).

The trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). Arbitration awards are given great deference, and courts have stated unequivocally that they should not be lightly set aside. *Bell v Seabury*, 243 Mich App 413, 421-422; 622 NW2d 347 (2000). The court's role in reviewing an arbitrator's decision is limited, and we may vacate an award only under narrowly defined circumstances. *Id.* at 422 n 4. A court may not review an arbitrator's factual findings or the merits of the decision. *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986). A reviewing court cannot engage in contract interpretation because it is an issue for the arbitrator to resolve. *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). When the arbitration agreement does not expressly limit the arbitrator's power in some manner, courts are reluctant to vacate or modify the award. *Id.* Rather, the issue becomes whether the award was beyond the contractual authority of the arbitrator. *Id.* Any error of law must be discernible from the face of the award itself. *Id.* Judicial review effectively ceases if the arbitrator did not disregard the terms of his employment. *Id.*

The AAA rules in effect at the time of the arbitrator's decision provided that the award of the arbitrator may include "an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement[.]" Also, according to the AAA rules, the arbitrator was entitled to assess fees, expenses, and compensation and apportion those items among the parties as the arbitrator deemed appropriate.

In the present case, the arbitrator was authorized to award attorney fees and costs pursuant to the rules governing construction disputes. Further, an award of attorney fees and costs could be granted if authorized by law. Consequently, defendants could have submitted the issue of attorney fees and costs to the arbitrator. Despite the authority to grant such an award, the arbitrator declined to grant defendants this relief. Rather, the arbitrator expressly held that the parties were to bear their own legal fees.

Curiously, defendants filed a motion to confirm the arbitration award, but filed a separate joint motion for attorney fees and costs pursuant to MCR 2.403(O) and MCR 2.313(C). Technically however, defendants were not filing a motion to confirm the arbitration award in its entirety. Rather, defendants only sought to confirm the arbitration award to the extent that they succeeded on the merits against plaintiff's claims. By filing the motion to award costs and attorney fees pursuant to MCR 2.403(O) and MCR 2.313(C), defendants sought to vacate the arbitrator's conclusion that each party should bear their own legal fees. More importantly, the parties' stipulation to submit the case to arbitration expressly provided that the arbitration was governed by MCR 3.602 except where otherwise indicated. MCR 3.602(M) governs costs and provides:

The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action.

MCR 3.602 does not contain any provision for an award of costs and attorney fees and does not reference MCR 2.403 or MCR 2.313.

Defendants cannot selectively pick and choose at different stages of the litigation which court rules and rules of evidence are implicated. In the stipulation submitting this case to arbitration, the parties agreed to be bound by MCR 3.602 and that the rules of evidence were relaxed. The parties set forth no reservation regarding the ability to seek attorney fees and costs pursuant to MCR 2.403 and MCR 2.313, despite the fact that the AAA rules allowed the arbitrator to determine the propriety of attorney fees and costs as authorized by law. The party who seeks to exclude a matter from a general arbitration clause must do so expressly and explicitly and bears the burden of demonstrating this reservation of rights. *Kaleva-Norman-Dickson Sch Dist v Kaleva-Norman-Dickson Teachers' Ass'n*, 393 Mich 583, 595; 277 NW2d 500 (1975).

Accordingly, we need not examine the plain language of MCR 2.403(O) regarding the use of the term “verdict.” The issue of costs and attorney fees pursuant to MCR 2.403 and 2.313 could have been submitted to the arbitrator. The arbitrator declined to grant attorney fees and costs, and we cannot conclude that the arbitrator erred from the face of the award. *Ann Arbor*, 284 Mich App at 144.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood