

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOSEPH C. BIRD,

Plaintiff-Appellant,

v

RANDY Z. ORAM,

Defendant-Appellee.

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UNPUBLISHED  
September 27, 2011

No. 298288  
Oakland Circuit Court  
LC No. 2010-106922-AA

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying plaintiff's motion to vacate the arbitrator's award in favor of defendant. For the reasons set forth in this opinion, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff is an attorney and is licensed in the State of Michigan. Defendant is the owner and president of Transit Advertising Group LLC (TAG). On October 16, 2006, plaintiff and defendant entered into a two-year employment agreement in which plaintiff was to serve as executive corporate counsel for TAG. Plaintiff's base salary was \$95,000 for the first year and \$100,000 for the second year, with a stay bonus of \$15,000 if plaintiff remained employed by TAG for the full two-year term of the employment agreement. The employment agreement required plaintiff "to devote your full business time and best efforts" to TAG and defendant and specifically prohibited plaintiff from engaging "in an outside legal practice of any nature absent the written consent of" defendant. The employment agreement also contained a liquidated damages provision as well as a provision that any dispute or claim arising under the agreement "shall exclusively be resolved through final and binding arbitration through the American Arbitration Association . . . ."

The employment agreement permitted defendant to terminate plaintiff immediately for material breach of the agreement. Pursuant to this provision, on September 10, 2008, defendant wrote plaintiff a letter terminating plaintiff's employment as TAG's executive corporate counsel immediately. The termination letter asserted that plaintiff materially breached the employment agreement by threatening to withdraw and filing a motion to withdraw as counsel in the case of

*Oram v Oram*<sup>1</sup> in Oakland Circuit Court unless defendant paid him the \$15,000 stay bonus, which was not yet payable under the employment agreement, ordering payroll to increase his annual salary without authorization, engaging in unprofessional behavior, refusing to follow defendant's directives, and engaging in outside legal practice without defendant's written consent.

Plaintiff filed a claim for arbitration, asserting numerous claims, including a claim for breach of contract. Defendant counter-claimed, claiming, in part, that plaintiff breached the contract by withdrawing as counsel in *Oram v Oram* and conducting an outside legal practice. James K. Fett was appointed to be the arbitrator. On November 16, 2009, the arbitrator issued his ruling and award. The arbitrator rejected all of plaintiff's claims and agreed with defendant that plaintiff breached the employment agreement by attempting to coerce defendant to pay him the stay bonus before it was due by threatening to withdraw and then actually withdrawing from his representation of defendant in the *Oram v Oram* case. The arbitrator ordered plaintiff to pay defendant breach of contract damages in the amount of \$55,538.46, which included liquidated damages. The arbitrator also found that plaintiff breached the employment agreement by engaging in outside legal practice.

Plaintiff filed both a motion and a complaint in Oakland Circuit Court seeking to vacate the arbitration award. In relevant part, plaintiff sought vacation of the award based on the arbitrator's bias and evident partiality. Plaintiff also asserted that the arbitrator concluded, without addressing the issue, that the liquidated damages provision was valid and not a penalty. Defendant moved to confirm the award.

Plaintiff's claim that there was evident partiality on the part of the arbitrator was based on the fact that the arbitrator previously represented a client, Eric Humphrey, in a retaliatory termination lawsuit against Geoffrey Fieger's law firm. Plaintiff also worked for Fieger's law firm at the time. The trial court noted that the arbitrator failed to disclose his representation of Humphrey before the proceedings commenced, but rejected plaintiff's claim that the arbitrator demonstrated evident partiality:

In this case, Plaintiff has not come close to demonstrating certain and direct partiality or bias. Specifically, Plaintiff has not adequately explained why the interests of the arbitrator's client in the preceding matter were adverse to Plaintiff in a meaningful way, much less how the arbitrator would have acquired unfavorable opinions regarding Plaintiff as a result of that representation. Rather, any bias on the part of the arbitrator could only be based on speculation or conjecture, and at the very least would be remote and uncertain. Therefore, Plaintiff is not entitled to relief on this basis.

The trial court also ruled that the liquidated damages provision of the employment agreement did not constitute a penalty, stating: "Finally, the arbitrator was correct regarding the

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<sup>1</sup> This lawsuit involved a dispute between defendant and his brothers over the operation of the family business.

enforceability of the liquidated damages clause, and this Court sees no reason to believe that it would constitute an unenforceable penalty.”

Plaintiff appeals as of right, challenging the neutrality of the arbitrator and the enforcement of the liquidated damages provision of the employment agreement.

## II. STANDARD OF REVIEW

Judicial review of arbitration awards is usually extremely limited. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). This Court reviews de novo a trial court’s ruling on a motion to vacate or modify an arbitration award. *Id.* De novo review means that this Court reviews the legal issues without any deference to the trial court. *Id.*

The issue whether a liquidated damages provision is valid and enforceable is a matter of law that this Court also reviews de novo. *St Clair Med, PC v Borgiel*, 270 Mich App 260, 270; 715 NW2d 914 (2006).

## III. ANALYSIS

### A. NEUTRALITY OF THE ARBITRATOR

Plaintiff argues that the trial court should have vacated the arbitrator’s award because the arbitrator failed to disclose his representation of Humphrey in a civil matter against Fieger’s law firm, where both plaintiff and Humphrey formerly worked. Plaintiff also argues that the arbitration award should have been set aside because of the arbitrator’s evident partiality, which was demonstrated by pejorative comments that the arbitrator made in his written opinion and by the fact that the arbitrator acted beyond his jurisdiction in concluding that some of plaintiff’s behavior was unethical.

As noted above, James K. Fett was appointed as arbitrator in the present case. On March 8, 2009, plaintiff sent a case manager for the American Arbitration Association an e-mail informing her that the arbitrator had represented Humphrey in a civil case against Fieger’s law firm. Plaintiff was concerned that the arbitrator’s “rulings may be influenced by his relationship to the Fieger firm and Mr. Humphries [sic]. I feel this should have been disclosed at a minimum.” Plaintiff asked the case manager to “address this issue through the appropriate AAA reporting and decision system.” Thereafter, the case manager sent the parties an e-mail informing them that Fett had made a disclosure regarding his representation of Humphrey. The e-mail advised the parties that they should make any objections on or before March 24, 2009. Plaintiff objected to Fett continuing to act as arbitrator, stating: “I object to his continued service based on this disclosure. The Humphries [sic] case and Mr. Humphries’ [sic] actions in allowing me to be blamed for the Fieger prosecution while represented by Fett is unsettling.” Plaintiff also objected because he was “concerned about the reaction of the arbitrator to my request for a disclosure.” After considering plaintiff’s objections, the case manager sent the parties an e-mail stating: “After careful consideration of the parties’ contentions, the Association has determined that James K. Fett will be reaffirmed as an arbitrator . . . .”

According to plaintiff, the arbitrator’s failure to disclose his representation of Humphrey itself mandates vacation of the arbitration award, regardless of the existence of actual bias or

partiality. In support of his argument, plaintiff cites two cases from other jurisdictions, which both held that evident partiality can be based on an arbitrator's failure to disclose conflict, even if the nondisclosed information does not establish evident partiality or bias. See *Thomas v City of North Las Vegas*, 127 P3d 1057, 1068 (Nev, 2006); *Burlington Northern RR Co v Tuco Inc*, 960 SW2d 629, 636 (Tex, 1997). This Court, however, has specifically rejected the notion that an arbitrator's nondisclosure automatically mandates vacation of an arbitration award: "the failure to disclose does not per se require that the [arbitration] award be vacated." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 120; 440 NW2d 907 (1989), rev'd in part on other grounds 483 Mich 488 (1991).

The seminal "evident partiality" case is *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145; 21 L Ed 2d 301; 89 S Ct 337 (1968). In that case, the claimant learned of an arbitrator's business relationship with the other arbitrating party after the arbitrator issued a ruling adverse to the claimant. *Commonwealth*, 393 US at 146. The Court imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. Although the Court noted that there was no evidence of actual bias in the case before it, the arbitrator's failure to disclose his business relationship with the other arbitrating party constituted evident partiality justifying vacation of the award. *Id.* at 147-148.

In *Albion Public Schools v Albion Ed Ass'n/MEA/NEA*, 130 Mich App 698, 701; 344 NW2d 55 (1983), this Court adopted the rule of *Commonwealth*:

In [*Commonwealth*,] the arbitrator had failed to disclose that he had in the past performed services as a consultant for one of the arbitrating parties. The Supreme Court vacated the arbitration award based on that failure to disclose, stating that:

"We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth, supra*, p 149; 89 S Ct 339; 21 L Ed 2d 305.

In *North American Steel Corp v Siderius, Inc*, 75 Mich App 391; 254 NW2d 899 (1977), this Court addressed the question of whether a failure to disclose would constitute grounds for vacating an arbitration award. While the Court did not cite *Commonwealth*, it appears that it adopted the same rule:

"Thus, while it is conceded that arbitrators must disclose to the parties any dealings that might create an *impression of possible bias*, the impression must be a reasonable one." 75 Mich App 404. (Emphasis supplied.) See also Rule 17 of the Voluntary Labor Arbitration Rules of the American Arbitration Association.

We adopt the rule of *Commonwealth*, as did the trial court, and as this Court apparently did in *North American Steel Corp*, and hold that a failure to

disclose certain facts which might reasonably lead to an impression or appearance of bias constitutes grounds for vacating an arbitration award.

We conclude that the arbitrator in this case made the disclosure required under *Commonwealth*. Although the arbitrator did not disclose his representation of Humphrey before his appointment as arbitrator, plaintiff discovered an e-mail that alerted him of the arbitrator's representation of Humphrey in the civil matter against Fieger, and the arbitrator then disclosed his representation of Humphrey before he rendered his opinion and award. Furthermore, plaintiff had the opportunity to, and did, object to the arbitrator's continued appointment based on his representation of Humphrey before the arbitrator rendered his opinion and award. As Justice White stated in his concurring opinion in *Commonwealth*:

[I]t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. [*Commonwealth*, 393 US at 151 (White, J., concurring).]

Plaintiff's contention that the arbitrator's failure to disclose his representation of Humphrey itself mandates per se vacation of the arbitration award is without merit. First, as observed above, this Court has specifically held that "the failure to disclose does not per se require that the [arbitration] award be vacated." *Gordon Sel-Way, Inc*, 177 Mich App at 120. Second, the arbitrator did, in fact, disclose his representation of Humphrey before he issued his opinion and award in this case.

Third, an arbitrator's failure to disclose facts constitutes grounds for vacating an arbitration award only if the nondisclosure "might reasonably lead to an impression or appearance of bias . . ." *Albion Public Schools*, 130 Mich App at 701. The crux of plaintiff's bias and partiality argument is that the arbitrator's representation of Humphrey in a civil matter against Fieger's law firm caused the arbitrator to be biased against him. The alleged bias stems from the fact that both plaintiff and Humphrey worked for Fieger's law firm at the time Fieger solicited political contributions from employees of the firm to John Edwards' 2004 presidential campaign. According to plaintiff, he and his wife made contributions in the amount of \$4,000 to Edwards' campaign, while Humphrey refused to contribute and objected to the solicitations. Plaintiff asserts that after the firm terminated Humphrey's employment, Humphrey immediately contacted the FBI and blew the whistle on what he considered to be the firm's illegal campaign activities. The FBI investigated, and Fieger was indicted but ultimately acquitted of violating federal campaign finance laws. According to plaintiff, Fieger believed that plaintiff, not Humphrey, caused or initiated the FBI investigation and blamed plaintiff publicly in the media during interviews and press conferences. Plaintiff claims that both Humphrey and the arbitrator remained silent when Fieger publicly blamed plaintiff for initiating the FBI investigation even though they knew that Humphrey was the whistleblower. Plaintiff asserts that the arbitrator filed a civil action against Fieger on behalf of Humphrey, alleging that Fieger terminated Humphrey in retaliation for Humphrey's opposition to Fieger's solicitation of campaign contributions to Edwards' campaign. According to plaintiff, the arbitrator "logically was disposed to regard [plaintiff] adversely, both philosophically opposed to his views (or those of his client) and as

someone who cost him and his client money by not testifying at the Fieger [criminal] trial and securing a conviction that would have given him enormous leverage in settlement discussions” for Humphrey’s civil lawsuit against Fieger.

We conclude that the arbitrator’s nondisclosure of his representation of Humphrey would not reasonably lead to an impression or appearance of bias. Humphrey is not a party in the present case, and there is no indication from the record that plaintiff was called as a witness or otherwise involved in Humphrey’s civil suit against Fieger. While Geoffrey Fieger is a well-known, successful and controversial trial and defense lawyer in Michigan, we cannot conceive how the arbitrator’s representation of an individual in a civil retaliatory termination lawsuit against Fieger translates into bias against another individual who worked for Fieger. The fact that plaintiff and Humphrey had different opinions regarding the propriety of Fieger’s solicitation of political contributions for Edwards’ presidential campaign and that the arbitrator represented Humphrey in a civil case against Fieger does not lead to an impression or appearance of bias against plaintiff. An attorney’s obligation in representing a client is to advance the client’s legitimate interests with fidelity and diligence. *State Bar of Michigan v Daggs*, 384 Mich 729, 732; 187 NW2d 227 (1971). The attorney must act in a spirit of loyalty to the client, assuming a position of the highest trust and confidence. *Kukla v Perry*, 361 Mich 311, 316; 105 NW2d 176 (1960). The attorney’s duty of loyalty and diligence does not require the attorney to possess or adopt the same views or opinions as those of his or her client on all matters related to or concerning the representation, however, and the fact that the arbitrator represented Humphrey does not necessarily mean they share the same views regarding the propriety of Fieger’s conduct in soliciting campaign contributions for Edwards. In any event, even if the arbitrator and plaintiff disagree regarding the propriety of Fieger’s conduct in soliciting campaign contributions for Edwards, it does not follow that the arbitrator would be biased against plaintiff because of any disagreement in this regard. To suggest that such a disagreement would result in bias against plaintiff in the present case is a stretch and purely speculative and uncertain. For these reasons, we find that the arbitrator’s nondisclosure of his representation of Humphrey does not reasonably lead to an impression or appearance of bias.

For the same reasons, we conclude that the arbitrator was not evidently partial under MCR 3.602(J)(2)(b). MCR 3.602(J)(2)(b) provides that a trial court shall vacate an arbitration award if “there was evident partiality by an arbitrator . . . .” However, “to overturn the arbitration award, the partiality or bias must be certain and direct, not remote, uncertain or speculative.” *Gordon Sel-Way*, 177 Mich App at 120-121. As we stated above, it is speculative to suggest that the arbitrator would be biased against plaintiff simply because the arbitrator once represented an individual who disagreed with plaintiff regarding the propriety of Fieger’s solicitation of campaign contributions for John Edwards.

Plaintiff also contends that the arbitrator was evidently partial because the arbitrator knew that plaintiff had challenged his ability to serve as a neutral arbitrator in the case. Plaintiff’s contention that the arbitrator’s partiality would be affected by his knowledge that plaintiff had challenged his ability to serve as a neutral arbitrator is also speculative. Moreover, plaintiff cites no authority to sustain his contention that evident partiality exists when an arbitrator is aware that a party has challenged the arbitrator’s ability to serve as a neutral arbitrator. It is not enough for an appellant to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, unravel and elaborate for him his arguments,

and then search for authority either to sustain or reject his position. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Thus, plaintiff has abandoned any argument that the arbitrator's knowledge that plaintiff challenged his ability to serve as a neutral arbitrator establishes bias or evident partiality. *Id.*

Plaintiff also asserts that the arbitrator's opinion and award itself is evidence of the arbitrator's bias or partiality because it contains unnecessary and pejorative remarks and rulings. According to plaintiff, "[t]he award itself reveals the arbitrator's personal animus and antagonism towards [plaintiff], evidencing a decision fraught with personal bias."

Plaintiff asserts that the arbitrator found that plaintiff left defendant "high and dry" by withdrawing from the *Oram v Oram* case when defendant refused to pay plaintiff's \$15,000 stay bonus. This is simply not the type of comment that is so certain and direct as to constitute evident partiality. Moreover, the statement is supported by the evidence, which suggests that plaintiff demanded the stay bonus early and then withdrew as counsel when he did not receive it, forcing defendant to seek and retain new representation in the matter.

Plaintiff also asserts that the arbitrator acted beyond his jurisdiction in addressing ethical issues. According to plaintiff, the arbitrator "acted as a case investigator and panelist for the Michigan Attorney Grievance Commission when he had no jurisdiction" to do so and had "no authority to make decisions about rules of professional conduct." This argument is meritless. Plaintiff acknowledges in his brief on appeal that "[t]he Trial Court's Opinion and Order avoids mention of the MRPC . . . ." The arbitrator's opinion and award does not include any findings or conclusions regarding whether plaintiff violated the rules of professional conduct. Moreover, to the extent that the opinion and award refers to some of plaintiff's conduct as unethical, we find that that such findings were incidental to the arbitrator's decisions regarding whether plaintiff breached the contract by withdrawing from his representation of defendant in the *Oram v Oram* case and whether plaintiff committed legal malpractice.

Furthermore, the employment agreement contains a provision regarding plaintiff's ethical obligations to defendant: "This Agreement does not diminish your ethical obligations to the Clients under the applicable rules of professional conduct." Arbitration is a matter of contract, and the agreement dictates the authority of the arbitrator. *Miller v Miller*, 474 Mich 27, 32; 707 NW2d 341 (2005). Because the employment contract addresses plaintiff's ethical obligations to defendant under the applicable rules of professional conduct, it was not improper for the arbitrator to comment on plaintiff's ethics in addressing plaintiff's conduct in dealing with defendant concerning matters governed under the employment agreement.

## B. LIQUIDATED DAMAGES

Plaintiff next argues that the trial court erred in affirming the arbitrator's award of damages under the liquidated damages provision of the employment agreement because the provision constitutes an unenforceable penalty clause.

The employment agreement contained the following liquidated damages provision:

**15. Liquidated Damages.** You acknowledge that if you engage in an outside legal practice in breach of Section 4(a) and/or if you breach Sections 10-

13, Clients will incur damages which are difficult to ascertain. Accordingly, you agree that in the event of such breach, you will repay any Severance you have received and you will pay a sum equivalent to twice your current monthly salary for a period of three months to Clients as liquidated damages, being a good faith estimate of actual damages, and not as a penalty.

The arbitrator awarded defendant damages in the amount of \$55,538.46 for breach of contract; this figure included liquidated damages. Plaintiff asserts that he raised the issue of the enforceability of the liquidated damages clause during the arbitration proceedings, but the arbitrator never explicitly addressed it. The arbitrator's award implicitly approved the liquidated damages clause, however, and the trial court affirmed the arbitrator's award, stating that "the arbitrator was correct regarding the enforceability of the liquidated damages clause, and this Court sees no reason to believe that it would constitute an unenforceable penalty."

In *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998), this court explained:

A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach. *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986). Whether such a provision is valid and enforceable or invalid as a penalty is a question of law. *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982). The courts are to sustain such provisions if the amount is "reasonable with relation to the possible injury suffered" and not "unconscionable or excessive."

Because whether the liquidated damages provision is valid and enforceable or invalid as a penalty is a question of law, *Moore*, 120 Mich App at 339, this Court can decide this issue notwithstanding the arbitrator's failure to explicitly determine whether the provision was valid and enforceable or an invalid penalty.

The liquidated damages provision provides for liquidated damages in the event that plaintiff breached the agreement by violating specific sections of the employment agreement, including the section prohibiting plaintiff from engaging in the outside practice of law of any nature without defendant's written consent. In the event of such a breach, plaintiff would be required to repay any severance received and pay twice his monthly salary for three months. This formula appears to be reasonable in relation to defendant's potential injury from plaintiff's breach of the employment agreement by engaging in the outside practice of law without defendant's consent and in light of the difficulty of proving the amount of loss or damages resulting from such a breach. A liquidated damages provision is particularly appropriate when actual damages are uncertain and difficult to ascertain. *St Clair Med*, 270 Mich App at 271.

Moreover, the amount of liquidated damages is not unconscionable or excessive. Requiring plaintiff to return any severance received in the event of plaintiff's breach of the employment agreement as outlined above is not unconscionable, and the formula used to calculate the remainder of the liquidated damages does not yield an unconscionable or excessive amount of damages. The language of the liquidated damages clause provides that plaintiff "will pay a sum equivalent to twice your current monthly salary for a period of three months . . . ."



Calculating the liquidated damages amount using plaintiff's second year salary of \$100,000, the amount of liquidated damages is \$50,000. This amount is not so substantial as to be unconscionable or unreasonable given the difficulty of proving specific damages in the event of plaintiff's breach of the employment agreement in the ways described in the liquidated damages provision. Moreover, the provision is narrowly tailored and does not apply to every breach of the employment agreement by plaintiff. To the contrary, it only applies in the event that plaintiff breached the employment agreement in specific ways in which it would be difficult to calculate damages with certainty, such as by engaging in outside legal practice. Thus, the formula is reasonable in relation to defendants' potential injury and is not an invalid penalty.

Affirmed.

/s/ Michael J. Kelly

/s/ Donald S. Owens

/s/ Stephen L. Borrello