

STATE OF MICHIGAN
COURT OF APPEALS

JASON J. ARMSTRONG, D.D.S. and JASON J.
ARMSTRONG, D.D.S., P.C.,

UNPUBLISHED
February 21, 2012

Plaintiffs-Appellants,

V

RONALD W. RAKECKY, D.D.S. and RONALD
W. RAKECKY, D.D.S., P.C.,

No. 301423
Wayne Circuit Court
LC No. 10-006162-CZ

Defendants-Appellees.

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order confirming an arbitration award. We affirm.

This case arises from a dispute following the sale of a dental practice. Plaintiff, Jason J. Armstrong, DDS, purchased the practice of defendant, Ronald W. Rakecky, DDS, and defendant worked in the practice as an independent contractor following the sale.¹ Defendant had a large patient base because of his unconventional business model. Specifically, he was active in the local community and offered discounts to particular groups, such as police officers, firefighters, and hockey players, in order to build his practice. Defendant gave his patients his home and cellular telephone numbers to allow them to reach him directly. Plaintiff acknowledged that he had never seen such a high patient volume when he explored the purchase of defendant's practice. Between 2004 and 2008, defendant worked in the practice as an independent contractor, but the number of days and hours that he worked declined over the years. Plaintiff asserted that defendant left one day and never returned to the practice, but defendant asserted that he was locked out of the practice.

¹ Although the individual dentists and their corporations are named as parties, the conduct at issue involves the individual dentists only. Consequently, the singular "plaintiff" references Dr. Armstrong, and the singular "defendant" references Dr. Rakecky.

In August 2008, defendant filed a claim for arbitration, and plaintiff filed a counterclaim. Issues surrounding the asset purchase agreement, the non-compete agreement, and the transfer of goodwill were submitted to the arbitrator. Ultimately, the arbitrator dismissed each party's respective claims and did not render an award in favor of either party. Plaintiffs filed an action in circuit court to vacate the arbitrator's award to the extent it denied their claims and sought to affirm the arbitrator's dismissal of defendants' claims. After the parties filed motions challenging the arbitrator's decision, the circuit court affirmed the arbitrator's award in its entirety. Plaintiffs appeal as of right.

"A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo." *Nordlund & Assocs v Village of Herperia*, 288 Mich App 222, 226; 792 NW2d 59 (2010). This Court's review of the enforcement of an arbitration award is narrowly circumscribed. *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002). 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. *City of 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.* Instead, the court may only address whether the arbitration award "draws its essence" from the contract. *City of Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). Any error at law must be discernible from the face of the award itself. *Ann Arbor*, 284 Mich App at 144. The fact that an arbitrator's interpretation of the party's contract is wrong is irrelevant. *Mich State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 584; 444 NW2d 207 (1989).

If, in granting the award, the arbitrator did not disregard the terms of his or her employment and the scope of his or her authority as expressly circumscribed in the contract, judicial review effectively ceases. Thus, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error. [*Ann Arbor*, 284 Mich App at 144 (citations and quotations omitted.)]

Courts are reluctant to vacate or modify an arbitration award because of the difficulty or impossibility of determining the cause for the arbitrator's ruling. *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). The absence of a complete record and formal factual findings render it "virtually impossible to discern the mental path leading to an award." *Id.*

Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable ... In many

cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law". In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. [*Id.*]

The allegation that the arbitrator exceeded his power must be carefully reviewed in order to ensure that the assertion is not merely a ruse to induce the court to review the merits of the decision. *Gordon Sel-way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Plaintiffs first allege that the arbitrator committed an error at law when he failed to address the parties' agreement regarding preservation of the practice and failed to properly apply controlling principles of contract law to the factual findings. We disagree. A review of the arbitration award reveals that, although the arbitrator did not specifically mention section 6.1, the arbitrator addressed whether a breach of the patient base was established. We cannot engage in contract interpretation because it presents an issue for the arbitrator to resolve. *Ann Arbor*, 284 Mich App at 126. Additionally, any alleged error at law must be discernible from the face of the award, *id.*, and we cannot review the arbitrator's factual findings or the merits of the decision. *Port Huron*, 426 Mich at 150. In the present case, a legal error is not discernible from the face of the award. The arbitrator noted that defendant's business model was the reason for his large volume practice. Plaintiff disapproved of this business model and chose to apply a system of payment plans instead. Despite this change in approach, the arbitrator noted that plaintiff's business improved following the sale. Whether a substantial breach of contract occurred presented a question of fact for the arbitrator. *State-William Partnership v Gale*, 169 Mich App 170, 176; 425 NW2d 756 (1988). Additionally, whether plaintiff mitigated his damages also presented a contractual issue for the arbitrator to resolve. *Beebe v Cullinane*, 214 Mich 37, 40-41; 181 NW 1016 (1921). Plaintiff was aware of defendant's conduct, but chose to allow him to continue his employment for four years after the sale despite this knowledge. In light of the arbitrator's interpretation of the contract and his factual findings as applied to the law, this claim of error is without merit.

Next, plaintiffs contend that the arbitrator exceeded his powers and committed legal error when he determined that defendant did not have a continuing obligation to transition the goodwill to plaintiff and did not violate the non-compete clause. We disagree. As previously stated, the issue of the interpretation of the contract rests with the arbitrator, *Ann Arbor*, 284 Mich App at 144, and the factual findings rendered by the arbitrator are not reviewable, *Port Huron*, 426 Mich at 150. Although plaintiffs characterize the arbitrator's decision as legal error discernible from the face of the award, a review of the arbitrator's award demonstrates that it was premised on the factual findings. The arbitrator examined the exhibits, including the patient referrals and revenue generated, and did not find a violation of the goodwill obligation, irrespective of its duration. Additionally, the arbitrator did not find that defendant's conduct violated the non-compete agreement, irrespective of any payment of compensation. Although plaintiffs assert that the arbitrator exceeded his authority, the essential basis for the arbitrator's decision involved the factual findings which are unreviewable. *DAIIE*, 416 Mich at 429.

Affirmed. Defendants may tax costs, MCR 7.219, having prevailed in full.

/s/ Henry William Saad

/s/ Kirsten Frank Kelly

/s/ Michael J. Kelly