

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STATE FARM MUTUAL AUTOMOBILE	:	IN THE SUPERIOR COURT OF
INSURANCE COMPANY,	:	PENNSYLVANIA
	:	
Appellee	:	
	:	
v.	:	
	:	
BARISHA DILL,	:	
	:	
Appellant	:	No. 3120 EDA 2012

Appeal from the Judgment Entered December 19, 2012,
In the Court of Common Pleas of Philadelphia County,
Civil Division, at No. 1370, March Term, 2012.

BEFORE: SHOGAN, WECHT and COLVILLE*, JJ.

DISSENTING MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 18, 2013**

Although I appreciate the majority's concern that objections to the appointment of an arbitrator be timely raised, I cannot agree that waiver is appropriate under the facts of this case. Accordingly, I respectfully dissent.

As the record reflects, this matter stems from a 2003 automobile accident in which Appellant, then only eleven years old, was a passenger and suffered injuries. In 2005, Appellant filed suit against the driver of the other vehicle. The insurance carrier of the driver of the other vehicle referred the case to Attorney McNulty. It is undisputed that Attorney McNulty entered his appearance in the case and filed an answer and new matter on behalf of the defendant. Subsequently, Attorney McNulty

*Retired Senior Judge assigned to the Superior Court.

withdrew his appearance and another attorney defended the matter. The case ultimately settled for the policy limits in 2008.

Thereafter, Appellant, represented by a different attorney, filed an underinsured motorist ("UIM") claim against Appellee State Farm, the insurance carrier for the vehicle in which she was a passenger. Under the terms of the State Farm insurance policy, the UIM claim proceeded to arbitration. State Farm chose Attorney McNulty as its arbitrator. After an arbitration hearing, the panel rendered a decision in favor of State Farm. Appellant then filed the instant motion to strike and/or set aside arbitration award. There is no direct evidence in the record that Appellant knew of Attorney McNulty's prior involvement in this matter up until this time. The trial court denied Appellant's motion.

Chapter 73 of the Pennsylvania Judicial Code sets forth three types of arbitration: statutory arbitration (subchapter A - the Uniform Arbitration Act ("UAA")); common law arbitration (subchapter B); and judicial arbitration, which includes both compulsory arbitration and voluntary arbitration (subchapter C). 42 Pa.C.S.A. §§ 7301-7362.

Section 7314 addresses the vacating of an arbitration award by the court, in pertinent part, as follows:

§ 7314. Vacating award by court

(a) General rule.

(1) On application of a party, the court shall vacate an award where:

(i) the court would vacate the award under section 7341 (relating to common law arbitration) if this subchapter were not applicable;

42 Pa.C.S.A. § 7314(a)(1)(i). Section 7341 of the Judicial Code addresses common law arbitration as follows:

The award of an arbitrator in a nonjudicial arbitration which is not subject to Subchapter A (relating to statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified **unless it is clearly shown** that a party was denied a hearing or **that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.**

42 Pa.C.S.A. § 7341 (emphasis added). Similarly, section 7362(d) addresses appeals in matters of judicial arbitration, and provides as follows:

(d) Appeal.--Any party to a matter referred under this section shall have such rights of appeal, if any, as shall be prescribed by general rules. Where no right to appeal is prescribed by general rule, all parties shall be deemed to have waived any right to appeal which they might otherwise enjoy under the Constitution of Pennsylvania or otherwise in mutual consideration of an expeditious final disposition of the matter, but no such waiver shall apply if it is clearly shown that a party was denied a hearing or **that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.**

42 Pa.C.S.A. § 7362(d). Thus, regardless of the categorization of the arbitration proceeding as either statutory, common law or judicial, a matter

may be vacated where an irregularity caused the rendition of an unjust, inequitable or unconscionable award.

Also worthy of our consideration is Pennsylvania Rule of Civil Procedure 1302, which addresses the appointment of the board of arbitrators. Specifically, Rule 1302(e) provides as follows:

(e) A member of a board who would be disqualified for any reason that would disqualify a judge under the Code of Judicial Conduct **shall immediately withdraw** as an arbitrator.

Pa.R.C.P. 1302(e) (emphasis added). Canon 3 of the Code of Judicial Conduct expressly states, in relevant part, the following:

C. Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Pennsylvania Code of Judicial Conduct, Canon 3(C)(1)(a) and (b). I cannot accept the trial court's position that a distinction should be made between compulsory and voluntary arbitration in the application of this disqualification standard. Hence, I am of the opinion that the onus is upon

the arbitrator to withdraw when he or she previously served as a lawyer in the matter in controversy.

Upon review of the record, I am left to conclude that the selection of Attorney McNulty, a defense attorney who had represented one of the defendants in a matter involving the same plaintiff in the same automobile accident, and filed an answer and new matter to the original complaint, as an arbitrator in this proceeding is an irregularity requiring that the award be vacated. The duty to conduct a conflicts review and disclose his prior involvement in the matter was upon Attorney McNulty as an arbitrator. For this reason, I would reverse the decision of the trial court and vacate the arbitration award.