

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE O'NEAL and HOWARD O'NEAL,
and MICHAEL GRAYSON and INDIA
GRAYSON, by their next of kin, MICHELLE
O'NEAL,

UNPUBLISHED
July 20, 2004

Plaintiffs-Appellants,

v

No. 246876
Wayne Circuit Court
LC No. 99-932093-NP

U-HAUL INTERNATIONAL, INC., and U-
HAUL COMPANY OF MICHIGAN, INC.,

Defendants-Appellees,

and

U-HAUL 7 MILE VAN DYKE, KIMBERLY
COLEMAN and JOHN DOE,

Defendants.

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment confirming an arbitration award in favor of defendants U-Haul International, Inc., and U-Haul Company of Michigan, Inc. ("defendants" herein).¹ We affirm.

This action arises from an automobile accident that occurred in Utah, while plaintiffs were en route to California. Plaintiff Howard O'Neal had rented a truck to assist his daughter, plaintiff Michelle O'Neal and her two children, who were moving from Detroit to California. Before leaving Detroit, plaintiffs brought the rental truck to one of defendants' Detroit dealerships to obtain a tow dolly in order to haul Michelle's Ford Taurus behind the truck. An employee at the dealership selected a tow dolly, attached it to the truck, and secured the Taurus

¹ The other defendants named in this case did not participate in the arbitration proceedings.

to the dolly. Plaintiffs were assured that the dolly was securely, safely and properly attached to the truck for the trip. Four days later, while driving through Utah, plaintiffs were involved in an accident when the dolly allegedly detached from the truck at the coupler, causing the truck to lose control and flip over.

Plaintiffs thereafter brought this action against defendants in circuit court, alleging that the accident was caused by a defective tow dolly. The parties subsequently agreed to submit the case to arbitration. The arbitrator entered an award in favor of defendants, stating:

The undersigned Arbitrator finds for the Defendant. The Plaintiff has been unable to sustain its [sic] burden of proving liability against the Defendant, U-Haul International. The Arbitrator does not find Plaintiff's expert, Dr. Fably, credible, nor has Plaintiff produced competent evidence to support its position as to how the accident occurred.

Plaintiffs thereafter filed a motion in circuit court to vacate the arbitration award and defendants asked the court to enter judgment based on the award. The circuit court declined to vacate the arbitration award and entered judgment in favor of defendants, consistent with the award.

On appeal, plaintiffs argue that the trial court erroneously denied their motion to vacate the arbitration award. "Generally, issues regarding an order to enforce, vacate, or modify an arbitration award are reviewed de novo." *Saveski v Tiseo Architects, Inc.*, ___ Mich App ___, ___ NW2d ___ (Docket No. 242610, issued April 13, 2004), slip op at 1; *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Our review of arbitration proceedings is necessarily limited, given the lack of formal requirements of procedure in arbitration proceedings and the absence of a written record. But we may review the arbitrator's award for errors of law apparent on the face of the award or errors that arise from the agreement to arbitrate. See *Detroit Automobile Inter-Ins Exchange v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982). Courts may not pass on the findings of fact or conclusions made by the arbitrator on the merits of the case. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986). "Claims that the arbitrator made a factual error are beyond the scope of appellate review." *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). Moreover, not all errors of law require vacating an arbitration award.

Where it clearly appears on the face of the award or in the reasons for the decision, 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. *Gavin, supra*, p 443. The character or seriousness of an error of law that will require a court of law to vacate an arbitration award must be so material or so substantial as to have governed the award, and the error must be one but for which the award would have been substantially otherwise. *Id.* [*Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).]

Plaintiffs first argue that the circuit court should have vacated the arbitration award because the arbitrator did not sanction defendants for failing to preserve the tow dolly as evidence.

A court has the authority to sanction a party that fails to preserve evidence that it knows or should know is relevant before litigation is commenced. *Bloemendaal v Town & Country Sports, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2003).² It is within the court's discretion, however, whether to impose a sanction for failing to preserve evidence and a reviewing court will only find error if there has been a clear abuse of discretion. *Id.*

Plaintiffs argued in the circuit court that the arbitrator should have sanctioned defendants by following SJI2d 6.01 and drawn adverse inferences from defendants' failure to preserve the tow dolly. The standard jury instruction provides that where a party in control of evidence fails to produce it for trial, the jury may infer that the evidence would have been adverse to the party who failed to produce it. *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 146; 640 NW2d 892 (2002). Any such inference is not mandatory, but permissive. *Id.* at 146-147.

In this case, it is not apparent from the face of the arbitration award that the arbitrator refused to sanction defendants for not preserving the tow dolly. Moreover, as indicated above, even if defendants failed to preserve the tow dolly, the arbitrator was not required to draw an adverse inference against defendants as a matter of law. Because the face of the award fails to support plaintiffs' claim that the arbitrator committed an error of law, we reject this claim of error. Plaintiffs have failed to show that the arbitrator "displayed a manifest disregard of the applicable law 'but for which the award would have been substantially otherwise.'" *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001), quoting *Gavin, supra* at 443.

Plaintiffs also argue that the arbitrator incorrectly ruled in favor of defendants on the basis that plaintiffs' expert was not credible. Plaintiffs argue that this was an improper basis upon which to rule in favor of defendants because a plaintiff in a products liability action is not required to present expert testimony to prove negligence.

Even if we accept plaintiffs' argument that they were not required to present expert testimony to prove that defendants' tow dolly was defective, the face of the arbitration award discloses that the arbitrator found both that plaintiffs' expert was not credible and that plaintiffs did not sustain their burden of proof. Thus, it is not apparent that the arbitrator relied solely on the lack of credible expert testimony in finding for defendants. Moreover, because plaintiffs chose to rely on an expert's testimony, the arbitrator properly could consider the veracity of that testimony in arriving at a decision. Also, there is nothing apparent on the face of the arbitration award to show that plaintiffs even argued at the arbitration proceeding that their claim was established based upon circumstantial evidence alone, without the need for expert testimony. Regardless, plaintiffs' argument requires this Court to delve into the arbitrator's mental process in arriving at the award, which is beyond this Court's scope of review. *Krist, supra* at 67.

² Under this rule, a court order to either preserve or produce the evidence is not necessary. See *Brenner v Kolk*, 226 Mich App 149, 156-158; 573 NW2d 65 (1997).

Accordingly, plaintiffs have failed to show that the arbitrator's award should be vacated on this basis.

Plaintiffs also argue that the arbitrator's award should be vacated because the arbitrator made various evidentiary rulings that were contrary to the Michigan Rules of Evidence. An arbitrator exceeds the scope of his authority whenever he acts beyond the material terms of the contract from which he derives his authority, or in contravention of controlling principles of law. *Collins v Blue Cross & Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998). The parties' agreement to arbitrate required the arbitrator to apply the Michigan Rules of Evidence. However, an error of law by the arbitrator must be apparent on the face of the award and "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991), quoting *Gavin*, *supra* at 443.

[A]n allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way. [*Gordon Sel-Way*, *supra*.]

In this case, it is not apparent from the face of the arbitration award that the arbitrator made an error of law in an evidentiary ruling, and the absence of a written record of the arbitration proceeding precludes relief on this basis.

Plaintiffs also argue that the arbitrator was biased against them. Although bias or partiality by an arbitrator is a proper basis for vacating an arbitration award, MCL 3.602(J)(1)(b), the principal basis for plaintiffs' claim of bias in this case is that the evidence did not support the arbitrator's decision in favor of defendants. Once again, it is not apparent on the face of the award that the arbitrator improperly found for defendants. Plaintiffs' argument requires this Court to consider how or why the arbitrator ruled as he did. As our Supreme Court explained in *Gavin*, *supra* at 429, that type of review is not possible in the typical arbitration case. Because there is no partiality or bias of the arbitrator apparent on the face of the award, plaintiffs are not entitled to relief. Moreover, we decline to vacate the award on the basis of plaintiffs' allegation that there was an improper relationship between the arbitrator and defense counsel. This argument was not raised or addressed in the circuit court and, therefore, is not preserved. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). In any event, there is nothing on the face of the arbitrator's award suggesting an improper prior relationship with defendants' counsel.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder