

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL B. WILSON and RIVERSBEND
REHABILITATION INC.,

UNPUBLISHED
November 19, 2020

Plaintiffs-Appellants,

v

LOUIS D. BUILDERS and LOUIS KACZYNSKI,

No. 351560
Bay Circuit Court
LC No. 18-003769-CZ

Defendants-Appellees.

Before: REDFORD, P.J., and RIORDAN and TUKEL, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court’s order granting summary disposition in favor of defendants pursuant to MCR 2.116(c)(10) (no genuine issue of material fact). We affirm.

I. FACTS & PROCEDURAL HISTORY

This case arises out of an arbitration proceeding. Plaintiff Michael Wilson hired defendant Louis Kaczynski and his company, defendant Louis D. Builders, to perform various remodeling and construction projects at his home and at his business Riversbend Rehabilitation Inc. Defendants performed some services, but Wilson refused to pay, citing the poor quality of defendants’ work.

Defendants filed a complaint in Bay Circuit Court alleging three counts of breach of contract. Plaintiffs filed a counterclaim alleging negligence and breach of contract. The parties agreed pursuant to the Uniform Arbitration Act, MCL 691.1681 *et seq.*, to submit the matter to a three-member arbitration panel. Defendants selected one member, plaintiffs selected another member, and the trial court selected the third member, William H. Darbee. The panel unanimously awarded plaintiffs \$146,642 of their requested \$850,000 in damages. Defendants received none of their requested \$43,526.

Plaintiffs then filed the instant complaint to vacate the arbitration award due to Darbee’s alleged bias toward Kaczynski and defendants’ attorney Richard Sheppard. Plaintiffs allege that over a course of years Darbee, Kaczynski, and Sheppard held public/municipal positions together,

worked on various township legal matters, and interacted socially. Plaintiffs assert that these interactions constituted substantial and material relationships which were not disclosed to the parties prior to the arbitration proceeding as required by MCL 691.1685.

Defendants moved for summary disposition pursuant to MCR 2.116(c)(6), (7), and (10) and submitted an affidavit by Darbee indicating that he knew Sheppard for more than 35 years, but had no business relationship or personal interest in the outcome of the arbitration proceeding, and that he had no relationship with Kaczynski. Defendants argued that Darbee and Sheppard practiced in similar areas of the law and would occasionally consult with each other, but that professional interactions did not constitute a partnership or association whereby Darbee would benefit from the outcome of the case. Defendants further argued that, in any event, the other two panel members who also voted for the award offset any bias by Darbee.

Plaintiffs moved for summary disposition pursuant to MCR 2.116(I)(2) and argued that Darbee's affidavit supported a finding of bias because Darbee admitted that he had a 35-year social relationship with Sheppard and had a relationship with defendants. Additionally, plaintiffs submitted Wilson's affidavit stating that Darbee, Sheppard, and Kaczynski held municipal positions together and interacted socially on a regular basis for a number of years. Wilson attested that this information was not disclosed to him before the arbitration proceedings, and that he would have requested a different arbitrator if he had known.

The trial court permitted the parties to take depositions and submit supplemental briefs. In Darbee's deposition, he testified that he had known Sheppard for nearly 25 years through the local bar association where they frequently engaged in group lunches and occasionally participated in social events such as golf outings. Darbee also testified that he and Sheppard were both invited by a local orthodontist to attend college basketball games two or three times over ten years. Occasionally, over the years, their paths crossed when Darbee worked on a municipal zoning board of appeals and Sheppard worked as a city attorney. In 2011, Darbee disputed his water bill and Darbee's attorney and law partner, Jim Hammond, told a newspaper reporter that the case was proceeding to a case evaluation (then called mediation), and Hammond had selected Sheppard as an evaluator. However, the case settled before an evaluation occurred. Darbee testified that he considered Sheppard a friend, but Darbee's family never interacted with Sheppard's family and their interactions were almost entirely through the local bar association. Darbee also testified that he had no personal interaction with defendants, but had "heard of him over the years as being a pretty good builder."

Sheppard testified in his deposition that he considered Darbee a friend and in the past ten years, he attended two college basketball games with Darbee, both as guests of a local orthodontist. Sheppard further testified that he was nominated by Hammond to serve as a neutral case evaluator in Darbee's water bill lawsuit.

Wilson testified in his deposition that he was not aware of any business or social relationship between Darbee and defendants, and his allegations of bias were limited to Darbee's alleged relationship with Sheppard. Wilson testified that during some part of the arbitration proceedings he was having an exchange with Sheppard when Darbee "jumped in very defensively, almost in attack mode, 'That will be enough of that crap, Mr. Wilson.'" Wilson testified that he then challenged Darbee, who said, "[k]eep going and you'll bury yourself." Wilson believed that

Darbee was taking Sheppard's side and "his body language was very angry[.]" During the proceedings, Wilson heard from one of the witnesses, Mike Gwizdala, that "they all went to lunch one day" where Darbee and Sheppard split a lunch. After the arbitration award was issued, Wilson began investigating and discovered a news article related to Darbee's water bill lawsuit and the Beaver Township municipal website which listed Kaczynski alongside Darbee's former law firm. Wilson then asked around, and was told by waitresses at various downtown restaurants that Darbee and Sheppard frequently had lunch together. Wilson stated that the waitresses did not want to be named or be involved in the lawsuit. Additionally, Wilson testified that he heard rumors around town that Darbee and Sheppard served on boards together and were both "involved in municipalities." Wilson further testified that if he had known about the friendship between Darbee and Sheppard, he would have requested a different arbitrator and that he believed Darbee could not be impartial because "friends supersede everything."

The parties submitted supplemental briefing to the trial court which included the deposition transcripts, an affidavit by the Beaver Township Clerk stating that there was no overlap between Kaczynski's service on the zoning board and the law firm of Darbee & Hammond, PC, representing the township, and the minutes from the Bay City Zoning Board of Appeals where Darbee was listed as chairman and Sheppard was listed as counsel for the city. The trial court granted summary disposition in defendants' favor and this appeal followed.

II. STANDARDS OF REVIEW

We review de novo questions of statutory interpretation, a circuit court's decision to enforce or vacate an arbitration award, and a trial court's grant or denial of a motion for summary disposition. *Bitterman v Vill of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015); *City of Ann Arbor v American Federation of State, Co & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009); *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

A motion for summary disposition under MCR 2.116(C)(10) should be granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law after a review of all the pleadings, admissions, and other evidence submitted by the parties, viewed in the light most favorable to the nonmoving party. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). There is a genuine issue of material fact when reasonable minds could differ on an issue. *Id.*

"The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Construction Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The burden is then shifted to the nonmoving party to demonstrate that a genuine issue of material fact exists. *Id.* The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012) (citation omitted). If the nonmoving party fails to establish the existence of a material factual dispute, the moving party's motion is properly granted. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001) (citation omitted). Summary disposition is properly granted to the opposing party if it appears to

the court that the opposing party, rather than the moving party, is entitled to judgment. MCR 2.116(I)(2).

III. ANALYSIS

Plaintiffs contend that the alleged social relationship between Darbee and Sheppard requires us to vacate the arbitration. We disagree.

The parties agreed to binding arbitration pursuant to MCR 3.602 and the Uniform Arbitration Act, MCL 691.1681 *et seq.*, via a stipulated order entered by the trial court. In relevant part, MCL 691.1703(1)(b) provides that the court shall vacate an arbitration award where there was (1) evident partiality by an arbitrator appointed as a neutral arbitrator, (2) corruption by an arbitrator, or (3) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.¹ Regarding the appointment of arbitrators, MCL 691.1691(2) prohibits an individual from serving as a neutral arbitrator when he or she has “a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party[.]” Additionally, MCL 691.1692 provides:

(1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including both of the following:

(a) A financial or personal interest in the outcome of the arbitration proceeding.

(b) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(2) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

(3) If an arbitrator discloses a fact required by subsection (1) or (2) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based on the fact disclosed, the objection may be a ground under section 23(1)(b)1 for vacating an award made by the arbitrator.

¹ Additionally, MCR 3.602(J)(b) provides that, upon the motion of a party, a trial court shall vacate an arbitration award where “there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights[.]”

(4) If the arbitrator did not disclose a fact as required by subsection (1) or (2), on timely objection by a party, the court under section 23(1)(b) may vacate an award.

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under section 23(1)(b).

(6) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 23(1)(b).

Contrary to plaintiffs' assertion, the trial court did not apply the incorrect legal standard when it determined that Darbee's relationship with Sheppard was not grounds for vacating the arbitration award. The trial court stated:

I'm familiar with the lunch get together that is, I suppose, not officially a sanctioned event of the bar association, but it's a -- I -- an event that has been and, kind of, an open table that's been in existence for-- for decades as far as I know, where any local lawyer, who wants to, can sit down at the table and have lunch and -- but we've got a record developed that -- that really speaks for itself, and I think that the key here is to look at the reasonable person standard as -- as has been pointed out to me in the statute, and whether or not a reasonable person in Mr. Darbee's position would think that at any of these -- any of his knowledge or relationship with any of the parties or attorneys; specifically, Mr. Sheppard, but others have been raised as well, would be likely to affect his impartiality, and I find that if he had, although unfamiliar with the particular details of the act revolving arbitration, he was aware of the necessity to be neutral and impartial, and that he saw nothing that would affect, in his opinion, his impartiality, and I think that a reasonable person could certainly, come to that conclusion, and I think he was justified in coming to that conclusion; that he had -- there's nothing about his relationships that would affect his ability to -- to be impartial.

This is a small community, and the lawyers rub shoulders and change sides on a daily basis, and they're professionals, however, and as such, they're able to maintain a separation between knowing a person on the other side or even liking the person or -- a liking to my case, I have a lawyer who lives next door to me. I'm able to sit on his cases, and I recognize the standard is different, and recognize the presumption pointed out to -- by the defense, but I think there's not nothing unreasonable about Mr. Darbee sitting as an arbitrator on this case. It -- he -- there's a reasonable person could easily conclude that there's nothing in his relationships that would likely affect his impartiality as a professional, and he's able to separate his professional work from his social life or his interactions with professionals on a social basis, and that's all we have here, and in a community as small as ours, it happens all the time and lawyers are trained, they're bound by rules of ethics and responsibility, and, in my experience, they're able to separate themselves and act

professionally and make professional decisions without being affected by personal relationships.

Here we see, with a small community of lawyers, they're butting heads all the time, and they might be against each other one day and on the same side of a case the next, and they just can't let it affect them.

And in this case, in particular, I find that a reasonable person could conclude that there's nothing about his relationships that affected his impartiality or would've been likely to affect it. I think that was a reasonable conclusion and, for that reason, I -- in -- including the -- in view of the light -- I have to view in the light most favorable to the non-moving party, to the plaintiff in this case, are -- are the facts, and there really isn't a dispute, when we sort through it all, as to what the facts are the -- Mr. Wilson had, through the deposition process, backed away from his claims of information that the -- he had that -- or that he thought he had from unknown persons, unknown to us, that had said things in regard to this matter, those have not been substantiated, so -- but I'll look at the facts in the light most favorable to the non-moving party; and, in doing that, I am still able to conclude that the motion should be granted.

It is clear from the trial court's statements that it properly applied the objective, reasonable person standard in this case, and determined that Darbee acted in conformity with that standard.

Additionally, the trial court properly applied the standard to the facts of this case. Darbee and Sheppard admitted that they often ate lunch at the same table for many years. However, as the trial court pointed out, this does not imply, or prove, that Darbee and Sheppard had an existing relationship requiring disclosure. Darbee and Sheppard admitted that they were friends, but did not visit each other's houses or families, or socialize outside of professional association events and infrequent sporting events with a mutual acquaintance. Thus, their admission of friendship is merely a reflection of their mutual professional respect and mild affinity for one another, rather than a declaration of unrelenting, reciprocal loyalty. The act does not define "relationship"² and *The American Heritage Dictionary of the English Language* (5th ed)³ defines the term as follows:

² See MCL 691.1681.

³ When a statute fails to define a term, "the dictionary is our first point of reference to determine the term's significance." *In re Estate of Erwin*, 503 Mich 1, 10; 921 NW2d 308 (2018), as mod on reh (Oct 5, 2018). "Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art." *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning. *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000). This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). "Most common English words have a number of dictionary definitions, some of them quite abstruse and rarely intended. One should assume the contextually

1. The condition or fact of being related; connection or association.
2. Connection by blood or marriage; kinship.
3. A particular type of connection existing between people related to or having dealings with each other: *has a close relationship with his siblings*.
4. A romantic or sexual involvement.

Although Darbee and Sheppard's association may fall under the first definition entry, arguably so would the association of all other attorneys who are members of the State Bar of Michigan or any attorneys who share a local bar association membership. Such a broad interpretation would prohibit most attorneys from acting as arbitrators and would discourage attorneys from participating in bar events. It is unlikely the Legislature intended this result. *Taylor v Lansing Board of Water and Light*, 272 Mich App 200, 725 NW2d 84 (2006). Moreover, subsection MCL 691.1692(a) indicates that the type of relationship contemplated by the statute is one implicating a personal or financial interest, rather than the loose professional association between Darbee and Sheppard. See *Sweatt v Dept of Corr*, 468 Mich 172, 179; 661 NW2d 201 (2003) (statutory provisions must be read in harmony with the whole of the statute and, under *noscitur a sociis*, a word is known by its associated words); *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (words grouped in a list should be given related meaning). The friendship at issue in this case is not the type of association that a reasonable person would expect to affect Darbee's impartiality. This is further evidenced by the fact that the parties, including Darbee and Sheppard, lunched together during the proceedings without any objection from any of the parties.

Additionally, MCL 691.1692(5) creates a presumption of partiality when a neutral arbitrator fails to disclose "a known existing, and substantial relationship *with a party*." (Emphasis added.) This presumption does not apply here where the allegation is limited to an alleged relationship with a party's attorney. This does not mean that plaintiffs could not otherwise demonstrate partiality, but as discussed above, plaintiffs do not present evidence which a reasonable person would consider likely to affect Darbee's impartiality.

Plaintiffs next argue that Darbee's impartiality was compromised due to his relationship with Kaczynski. Plaintiffs allege that Darbee and Kaczynski served on a municipal board together and submit as evidence a list of Beaver Township Board Positions which names Kaczynski as a member of the Planning Commission/Zoning Board and names Darbee & Hammond, PC as the city attorney. However, Darbee testified that he had no personal interaction with Kaczynski, and did not handle any of the Beaver Township matters, but that his former partner had done so. Defendants also submitted an affidavit by the Beaver Township Clerk stating that there was no overlap between Kaczynski's service and the representation by Darbee & Hammond, PC. Thus, the evidence plaintiffs offer is insufficient to demonstrate that there exists a "known, existing, and substantial relationship" between Darbee and Kaczynski sufficient to impute a presumption of

appropriate ordinary meaning unless there is reason to think otherwise." See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 70.

partiality pursuant to MCL 691.1692(5). Nor does it constitute a fact that a reasonable person would consider likely to affect Darbee's impartiality during the arbitration proceedings. Accordingly, there is no basis to vacate the arbitration award pursuant to MCL 691.1703 and summary disposition was properly granted in defendants' favor.

IV. CONCLUSION

Plaintiffs present no evidence to support vacating the arbitration award pursuant to MCL 691.1703. Thus, the trial court properly granted summary deposition in defendants' favor. Accordingly, we affirm.

/s/ James Robert Redford

/s/ Michael J. Riordan

/s/ Jonathan Tukel