STATE OF MICHIGAN

COURT OF APPEALS

TOMI VULAJ,

Plaintiff-Appellant,

v

KATRINA VULAJ,

Defendant-Appellee.

UNPUBLISHED
November 19, 2009

No. 286634
Oakland Circuit Court
LC No. 2006-728814-DM

Before: Hoekstra, P.J., and Murray and M.J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the divorce judgment's provisions regarding spousal support, alimony in gross, child support and parenting time. As discussed in detail below, we hold that plaintiff has waived the ability to pursue his argument that the arbitrator failed to comply with the Domestic Relations Arbitration Act, MCL 600.5070 *et seq*.

I. Basic Facts

The parties, married in 1990, are the parents of six children. Plaintiff filed for divorce in December 2006. In September 2007, the trial court signed an order for binding arbitration that had been stipulated to by the parties. The issues submitted to arbitration included child custody and parenting time, child support, spousal support, and division of real and personal property.

On March 25, 2008, the arbitrator issued his binding arbitration report and award. After the issuance of that report and award, defendant requested clarification on certain matters, which resulted in an April 22, 2008, amended binding arbitration report and award. The parties agreed to keep the status quo with respect to custody of the six children; thus, the arbitrator awarded the parties joint legal and physical custody of the children, with plaintiff receiving primary physical custody of the three oldest children and defendant receiving primary physical custody of the three youngest children. Reasonable parenting time was awarded to the parties. The arbitrator ordered plaintiff to pay $843.35 a month in child support. The amount was based on the arbitrator's findings that defendant had an income of $15,000 and that plaintiff had an imputed income of approximately $50,000. The arbitrator awarded defendant $160,000 in spousal support in gross, which plaintiff was to pay in monthly installments of $1,200. In determining the amount of spousal support in gross, the arbitrator took into consideration defendant's right to spousal support, the parties' interest in plaintiff's Coney Island restaurant, plaintiff's interest in

the Waterford property, the loss of defendant's jewelry, and the personal property awarded to plaintiff.

Plaintiff took no action with respect to the original or amended report and award, despite his obligation to do so under MCL 600.5079(2). Consequently, defendant filed a motion for entry of a judgment, which was brought before the trial court on June 25, 2008. At the hearing, plaintiff's counsel initially noted to the court that "we're not objecting to the entry of the judgment." Later on, during that same hearing, plaintiff's counsel remarked as follows during the course of a discussion on defendant's request for attorney fees for having to bring the motion for entry of the judgment:

> Mr. Malleis: Well, first to start out, my client just didn't like the arbitration, and so then - -
>
> The Court: He didn't like it?
>
> Mr. Malleis: He didn't and we didn't - - I didn't find it to – to happily. So it did take a little bit longer for us to go over it. Nevertheless, we are not objecting to the entry of that.

In light of plaintiff's affirmative statement that he was not objecting to entry of the judgment proposed by plaintiff, the trial court (after swearing in and receiving certain testimony from the parties), signed the judgment of divorce.

II. Analysis

Now, for the first time in this case, plaintiff argues both that the arbitrator violated that portion of the DRAA that requires transcription of the hearing during which child support and parenting time were addressed, MCL 600.5077(2), and that the arbitrator erred in his spousal support and alimony in gross award. Plaintiff argues that these issues are properly preserved for appellate review because they involve questions of law and because a trial court has an independent obligation to vacate or modify an arbitration award that is not in the best interests of the children, *Harvey v Harvey*, 470 Mich 186, 192-194; 680 NW2d 835 (2004). In our view, however, the procedural circumstances involved in *Harvey*, as well as in *Kirby v Vance*, 481 Mich 889; 749 NW2d 741 (2008), were significantly different than what is presented to us in this appeal.

There can hardly be any doubt that plaintiff's representations to the court at the hearing on entry of the divorce judgment constitute a waiver of any objection to the judgment. Waiver is the intentional relinquishment or abandonment of a known right. *Cadle Co v City of Kentwood*, ___ Mich App ___, ___; ___ NW2d ___ (2009), slip op at 9; *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). One who waives his rights may not seek appellate review for deprivation of those rights, for waiver extinguishes any error. *Carter*, *supra* at 215. Here, plaintiff's counsel specifically indicated that he and his client had gone over each issue in the arbitration award and, though not pleased with the award, did not object to entry of the judgment in conformity with that award. This could be nothing other than a waiver of a known right. And, contrary to plaintiff's argument, neither *Harvey* nor *Kirby* requires granting the relief plaintiff requests on appeal.

In *Harvey*, for example, although the parties had agreed in writing not to appeal to the circuit court a Friend of the Court referee decision (they still preserved appellate rights to the Court of Appeals and Supreme Court), after the report and recommendation from the Friend of the Court was received, plaintiff filed timely written objections to the circuit court. *Harvey*, *supra* at 189. Thus, the issues of whether the Friend of the Court recommendation should be adopted, and whether the parties had stipulated away the power of the circuit court to review the Friend of the Court recommendation, were presented to the circuit court. *Id*. Likewise, in *Kirby* the plaintiff objected to the arbitrator about certain provisions of the award, but did not challenge the factual findings of the arbitrator. After not receiving the relief she sought from the arbitrator, plaintiff filed a motion for de novo review, and for an evidentiary hearing on custody and parenting time, before the circuit court. See *Kirby v Vance*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2008 (Docket No. 278731), slip at 3, rev'd 481 Mich 889 (2008). When she was in front of the circuit court, plaintiff argued that the arbitrator had failed to transcribe certain testimony at the arbitration hearing, which was in violation of MCL 600.5077(2). Our Court concluded that because plaintiff had not raised these issues before the arbitrator, she had waived the issues. *Id*., slip op at 4. The Supreme Court peremptorily reversed the majority opinion in *Kirby*, concluding that "[t]he circuit court erred when it failed to remedy the arbitrator's error by conducting its own evidentiary hearing . . . ." *Kirby*, *supra* at 889.

Hence, in both *Harvey* and *Kirby*, the party challenging the arbitration award for failure to comply with the DRAA *had raised the issue before the circuit court*, but either the circuit court or this Court concluded that a waiver occurred. In both those cases the Supreme Court concluded that a waiver could not preclude the circuit court from properly addressing the issue presented to it. In our case, the opposite has occurred. At no time did plaintiff present any issue to the circuit court,[1] let alone the issue of noncompliance with the DRAA now presented to our Court. Thus, the circuit court could not have erred, *Kirby*, *supra* at 889, because the issue was never presented to the court. Instead, this is a classic case of a party raising an issue as an "appellate parachute" by seeking to reverse a circuit court decision based upon an issue never raised before that court. We have never condoned this practice in our appellate courts, and there is no reason to do so in this case. In *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987), our Supreme Court provided an excellent explanation for our use of preservation rules:

> A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal. See *Spencer v Black*, 232 Mich 675; 206 NW 493 (1925) (issue raised for the first time on appeal not properly before the Court); *Molitor v Burns*, 318 Mich 261, 263-265; 28 NW2d 106 (1947) (failure to renew motion for directed verdict at close of defendant's case waived any error). Generally, to preserve an issue for appellate review, it must be properly raised at trial. *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891) ("[p]arties cannot

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[1] Importantly, plaintiff had a statutory duty to submit a proposed judgment to the circuit court that was in compliance with the arbitration award. MCL 600.5079(2). He did not do so. Additionally, plaintiff had 91 days in which to challenge the award by moving to vacate or modify, which he did not do. MCR 3.602(K)(1)(2); *Vyletel-Rivard v Rivard*, ___ Mich App ___; ___ NW2d ___ (2009), slip op at 7.

remain silent, and thereby lie in wait to ground error, after the trial is over, upon a *neglect* of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases"); *Moden v Superintendents of the Poor*, 183 Mich 120, 125-126; 149 NW 1064 (1914) (absent proper motion for a directed verdict of negligence as a matter of law, the question cannot be raised on appeal); *Taylor v Lowe*, 372 Mich 282, 284; 126 NW2d 104 (1964) ("counsel may not stand by, electing as we must assume to 'take his chances on the verdict of the jury' [citation omitted] and then *raise* questions which could and should have been raised in time for corrective judicial action"). The rule is based upon the nature of the adversary process and the need for judicial efficiency. 3 LaFave & Israel, Criminal Procedure, § 26.5(c), pp 251-252, summarizes the basis for this rule:

> "There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal." [Quoting *State v Applegate*, 39 Or App 17, 21; 591 P2d 371 (1979).] [Emphasis supplied.]

Although preservation rules are essentially discretionary, they are much more often than not applied to cases like this. For if raising an issue for the first time on appeal is sanctioned in this case, there is nothing to stop trial lawyers from either holding back on issues for use in a subsequent appellate attack on an unfavorable judgment, or to stop newly retained appellate counsel from sifting through the record and presenting issues to our Court for the first time.[2] Under either approach, not only will there be a limited finality to any judgment of divorce entered after an arbitration award, which is certainly something the Legislature has sought to

[2] Or, for that matter, what would preclude plaintiff from raising this issue for the first time in an application for leave to appeal to the Supreme Court?

avoid by sanctioning the use of arbitration, but it will also result in unfettered gamesmanship in our appellate courts.

Certainly the Supreme Court in both *Harvey* and *Kirby* has stated that the parties cannot waive away the authority of the circuit court to ensure a custody or child support decision is in the best interest of the child. Here, however, the circuit court did all that it was asked – taking testimony on one limited issue, and signing and entering the judgment. And, by signing it after hearing from the parties, the court's signature reflects that it exercised the required reflection and deliberation. See *Harvey*, *supra* at 194.

III. Conclusion

Accordingly, we hold that plaintiff has waived all issues presented to this Court because of his affirmative statement to the trial court that he did not oppose entry of the judgment of divorce that he now challenges on appeal.

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly