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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-775**

Twin City Yellow Taxi, Inc.,
Appellant,

vs.

Farm Bureau Mutual Insurance Company,
Respondent.

**Filed December 28, 2010
Affirmed
Toussaint, Judge**

Hennepin County District Court
File No. 27-CV-09-14966

Peter J. Nickitas, Peter J. Nickitas Law Office, LLC, Minneapolis, Minnesota (for
appellant)

Michele D. Hurley, Yost & Baill LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Toussaint, Presiding Judge; Johnson, Chief Judge; and
Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

TOUSSAINT, Judge

Appellant Twin City Yellow Taxi, Inc. challenges an order confirming an arbitration award and denying appellant's motion to vacate or modify the award. Because appellant failed to present evidence supporting its claim that the arbitrator exceeded her powers, because appellant has not shown that the district court's findings of no improper ex parte communications and waiver of a defense are clearly erroneous, and because the evidence supports the award of costs and attorney fees under Minn. Stat. § 549.211 (2008), we affirm.

FACTS

As members of Arbitration Forums, Inc., appellant and respondent Farm Bureau Mutual Insurance Company submitted a claim arising out of an automobile accident to arbitration. Appellant pleaded bailment as an affirmative defense, claiming that the agreement between appellant and the taxi driver created a bailment relationship. The arbitrator found that comparative negligence applied but did not address bailment.

Appellant filed a motion in district court to vacate the arbitration award or, alternatively, modify the award by applying bailment law and awarding appellant all damages sustained. Respondent moved the district court for attorney fees and costs. The district court denied appellant's motion and, based on appellant's failure to provide evidence supporting its claim that the arbitrator exceeded her powers by failing to apply bailment law, awarded respondent \$2,240 in attorney fees and \$477 in costs.

Appellant filed an appeal challenging the denial of its motion to vacate and the award of attorney fees. This court dismissed the appeal as taken from nonappealable orders and remanded to the district court for issuance of an order confirming the arbitration award. Appellant filed an amended motion to vacate that asserted additional grounds—the Graves Amendment and allegedly improper ex parte communications between respondent and the arbitrator—for vacating the arbitration award. The district court issued an order denying appellant’s motion and confirming the arbitration award.

DECISION

I.

Arbitration awards are highly favored in Minnesota, and our standard of review is “extremely narrow.” *Hunter, Keith Indus. v. Piper Capital Mgmt.*, 575 N.W.2d 850, 854 (Minn. App. 1998). We “must exercise every reasonable presumption in favor of the award’s finality and validity.” *Id.* (quotation omitted). Whether the record supports the arbitrator’s findings is not an issue for this court’s review, and we “may not examine the underlying evidence and record, or otherwise delve into the merits of the award.” *Liberty Mut. Ins. Co. v. Sankey*, 605 N.W.2d 411, 414 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000). The arbitrator is the “final judge of both law and fact.” *Cournoyer v. Am. Television & Radio Co.*, 249 Minn. 577, 580, 83 N.W.2d 409, 411 (1957).

An arbitration award “will be vacated only upon proof of one or more of the grounds stated in Minn. Stat. § 572.19.” *AFSCME Council 96 v. Arrowhead Reg’l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984). The district court shall vacate an arbitration award if the arbitrator exceeded her powers. Minn. Stat. § 572.19, subd. 1(3) (2008).

The party seeking to vacate the award has the burden of proving that the award is invalid. *Nat'l Indem. Co. v. Farm Bureau Mut. Ins. Co.*, 348 N.W.2d 748, 750 (Minn. 1984).

Appellant argues that the arbitrator exceeded her powers by failing to apply bailment law. Courts in other jurisdictions have recognized the manifest-injustice-of-the-law doctrine, which has been described as an arbitrator understanding the governing legal principle but choosing to ignore it, as a basis for vacating an arbitration award. *Hunter, Keith Indus.*, 575 N.W.2d at 855. The *Hunter, Keith Indus.* court did not reach the issue of whether to apply the manifest-injustice standard, and we do not construe the opinion as requiring the application of a more lenient standard. *See id.* at 855-56 (stating in parenthetical that “Minnesota law favors arbitration awards and by statute severely limits the grounds upon which a reviewing court may vacate an award” and “view[ing] as significant the fact that very few of the federal circuit courts that have recognized the manifest disregard doctrine have vacated an arbitration award on that basis”).

In any event, apart from the issue of whether the manifest-injustice or some other standard applies, we must consider what evidence appellant presented to support its claim that the arbitrator exceeded her powers by failing to apply bailment law. *See id.* at 856 (rejecting argument that arbitrators manifestly disregarded the law when record showed that, “[a]t worst, the arbitrators may have misinterpreted ERISA’s highly complex preemption and remedies provisions”). To support the claim of a bailment relationship, appellant presented a copy of the agreement between it and the taxi driver. The agreement is labeled “Bailment Agreement” and states that the driver is an independent taxi operator and not an employee of appellant or a party to any joint venture. The

agreement, however, is insufficient to conclusively establish the existence of a bailment relationship. See *Lowry v. Kneeland*, 263 Minn. 537, 542, 117 N.W.2d 207, 211 (1962) (stating that what distinguishes bailment from employment relationship “is the distinction between a mere permissive use and a use which is subject to the control of the master and connected with his affairs” (quotation omitted)); cf. *Blue & White Taxi v. Carlson*, 496 N.W.2d 826, 827-29 (Minn. App. 1993) (upholding determination that employment relationship existed between driver and cab company in the unemployment-benefit context when agreement stated that taxi company reserved no right to direct or control driver and that taxi company was not driver’s employer). Thus, the arbitrator’s application of comparative negligence could mean that the arbitrator determined appellant failed to prove its claim of bailment. Because appellant has not presented sufficient evidence to even show that the arbitrator incorrectly applied the law, the district court properly determined that appellant failed to show that the arbitrator exceeded her powers.

II.

The district court shall vacate an arbitration award when the “award was procured by corruption, fraud or other undue means” or “[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.” Minn. Stat. § 572.19, subd. 1(1), (2) (2008).

Appellant argues that it is entitled to vacation of the arbitration award under Minn. Stat. § 572.19, subd. 1(1), (2), because respondent engaged in improper ex parte communications with the arbitrator. In support of the claim of improper ex parte

communications, appellant cites evidence of a relationship between Arbitration Forums and respondent's counsel, which appellant claims financially benefits both entities. Regarding ex parte communications, the district court found that Arbitration Forums' employees are permitted to communicate with a party as part of Arbitration Forums' role as administrator of arbitration proceedings. Regarding the claim of an ongoing pecuniary relationship between Arbitration Forums and respondent's counsel, the district court found: "Although both companies are members of the same non-profit organization there is no evidence of partiality. Arbitration Forums' arbitrators are volunteers and arbitrators have independence over their decisions."

This court will not overturn a district court's findings of fact unless they are clearly erroneous. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007). Because appellant has not shown that the district court's findings on the ex parte communications and relationship between Arbitration Forums and respondent's counsel are clearly erroneous, appellant is not entitled to reversal based on any ex parte communications. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, an appellant must show both error and that the error caused prejudice).

III.

In the context of whether a party waived the right to demand arbitration by initiating a lawsuit, this court has stated: "Waiver of a contractual right to arbitration is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court." *Fedie v. Mid-Century Ins. Co.*,

631 N.W.2d 815, 819 (Minn. App. 2001) (quotation and citations omitted), *review denied* (Minn. Oct. 16, 2001).

The district court found that appellant waived the right to assert the Graves Amendment as a defense by failing to raise the issue before the arbitrator. *See Meyer v. Nwokedi*, 777 N.W.2d 218, 222-23 (Minn. 2010) (explaining that the Graves Amendment, 49 U.S.C. § 30106 (2006), preempts state laws that impose vicarious liability on owners of lease or rental vehicles unless the savings clause applies). The rules of Arbitration Forums require a party to raise any affirmative defenses in the mandatory “contentions sheet” and support the claim that the affirmative defenses apply. Appellant cites to nothing in the record showing that it raised the Graves Amendment defense before the arbitrator as required by Arbitration Forums’ rules. The district court, therefore, did not err by finding that appellant waived the defense.

IV.

The district court awarded respondent attorney fees and costs under Minn. Stat. § 549.211. Minn. Stat. § 549.211, subd. 2(2), recognizes that an attorney may make good-faith arguments for the “extension, modification, or reversal of existing law.” But Minn. Stat. § 549.211, subd. 2(3), requires that “allegations and other factual contentions have evidentiary support.” We review a district court’s decision to award attorney fees and costs for abuse of discretion. *Whalen v. Whalen*, 594 N.W.2d 277, 281-82 (Minn. App. 1999).

Appellant argues that the district court erred by awarding costs and attorney fees to respondent because there is legal support for appellant’s argument that a bailment

existed. But the district court imposed sanctions based on appellant's failure to provide factual support for its legal arguments. The district court, therefore, did not abuse its discretion by awarding costs and attorney fees.

Affirmed.