STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MARK T. SARATE,

Plaintiff,

vs.

MARK E. AYERS and LAURA E. STANISZEWSKI, jointly and severally,

Defendants.
_____/

96-534814-NI

JUDGE ROBERT C. ANDERSON
SARATE.MARK vs AYERS.MARK

JOHN A. ZICK (P34305)
Attorney for Plaintiff
34705 W. Twelve Mile Road
Suite 311
Farmington Hills, MI 48331
(248) 489-1444
_____/

JEFFREY A. OAKES (P24306)
Attorney for Defendants
2000 N. Woodward Avenue
Suite 200
Bloomfield Hills, MI 48304
(248) 258-2206

ORDER FOR RECONSIDERATION OF ARBITRATION DECISION

At a session of said court held in the Courthouse, in the City of Pontiac, Oakland County, Michigan on

7-16-98

PRESENT: HON. J.P. Jourdan
Circuit Court Judge

The Plaintiff brought on a Motion to Vacate Arbitration Decision. The Defendants filed a response and the court heard the arguments of counsel;

IT IS ORDERED that the Arbitration Panel reconsider its Decision of March 24, 1998, in light of MCL 500.3135.

J.P. Jourdan
CIRCUIT COURT JUDGE

Approved as to form, only

JEFFREY A. OARES (P24306) JA2
Attorney for Defendants by consent

Order Prepared By:

JOHN A. ZICK (P34305)
Attorney for Plaintiff

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

96-534814-NI

MARK T. SARATE,

Plaintiff,

vs.

MARK E. AYERS and LAURA E. STANISZEWSKI, jointly and severally,

Defendants.

Case No. 96-534814-NI
Hon. Robert C. Anderson

JOHN A. ZICK (P34305)
Attorney for Plaintiff
34705 W. Twelve Mile Road
Suite 311
Farmington Hills, MI 48331
(248) 489-1444

JEFFREY A. OAKES (P24306)
Attorney for Defendants
2000 N. Woodward Avenue
Suite 200
Bloomfield Hills, MI 48304
(248) 258-2206

MOTION TO VACATE ARBITRATION DECISION

Pursuant to MCR 3.602(J), the Plaintiff moves this court to vacate the decision of the independent arbitration panel, stating as follows:

1. This automobile negligence action arises out of a collision of October 27, 1996. Plaintiff was the operator of a motorcycle and Defendant-Staniszewski was the operator of an automobile which collided at the intersection of Twelve Mile Road and Main Street in Royal Oak, Michigan. Mr. Sarate suffered injuries which necessitated spinal fusion surgery.

2. Suit was filed on December 4, 1996. Plaintiff alleged negligence on the part of Defendant-Staniszewski in driving while her ability was impaired due to the consumption of intoxicants, and driving the automobile in a left turn, into

the path of Plaintiff's oncoming motorcycle. Defendant alleged that Plaintiff was negligent due to his consumption of intoxicants and driving in excess of the speed limit.

3. The parties agreed to submit this matter to binding arbitration. Thereafter, the arbitration panel heard evidence on two occasions.

4. On March 24, 1998, the arbitration panel rendered its decision. By a vote of two to one, the arbitration panel found Plaintiff to be exactly 50 percent at fault in the happening of the collision. The majority also found MCL 600.2955(a) to be applicable, and to preclude any recovery for Plaintiff.

5. As shown in the accompanying brief, the application of MCL600.2955a to a third-party automobile negligence action constitutes clear error. Instead, comparative negligence in third-party automobile negligence cases is controlled by MCL 500.3135(2)(b). Under this statute, a plaintiff who is 50 percent negligent can still recover damages.

6. The two "tort reform" statutes at issue, MCL 600.2955a and 500.3135(2)(b), are unconstitutional in that they violate Article IV, Section 25 of the Michigan Constitution, as well as constitutional guarantees of equal protection.

7. MCR 3.602(J)(1)(c) empowers this court to vacate an arbitration award for an error of law as occurred here.

WHEREFORE, Mark T. Sarate requests that this court vacate the award of the arbitration panel and order a rehearing either

before a new arbitration panel or before the original panel, as the court deems appropriate.

JOHN A. ZICK (P34305)
Attorney for Plaintiff
34705 W. Twelve Mile Road
Suite 311
Farmington Hills, Michigan 48331
(248) 489-1444

Dated: April 9, 1998

BRIEF IN SUPPORT OF MOTION

Statement of Facts

Mark T. Sarate was seriously injured while operating a motorcycle westbound on Twelve Mile Road at Main Street in Royal Oak. Defendant-Staniszewski was driving a car which was owned by her boyfriend, Defendant-Ayers. Staniszewski was proceeding in an easterly direction on Twelve Mile Road and turned left onto Main Street, in the path of Plaintiff's oncoming motorcycle. A collision ensued.

Suit was filed on December 4, 1996. Thereafter, the parties agreed to submit this matter to independent, binding arbitration. A copy of the Arbitration Agreement is attached as Exhibit A. The three-member panel was comprised of one arbitrator selected by the Plaintiff, one arbitrator selected by the defense and a third arbitrator selected by the other two arbitrators. After two hearing sessions, the arbitration panel returned the non-unanimous decision which is attached as Exhibit B.

The majority of the arbitration panel found Plaintiff-Sarate to be exactly 50 percent at fault, based on his consumption of alcohol, his excessive speed and his alleged failure to observe the Defendant's turning car. Defendant-Staniszewski was also found to be 50 percent at fault, based on her consumption of alcohol, her failure to see the oncoming motorcycle and turning left in front of the oncoming vehicle. Finally, over the objection of Plaintiff and the dissenting arbitrator, the majority found that Mr. Sarate's 50 percent negligence operated to bar his recovery entirely, under MCL 600.2955a.

As shown below, MCL 600.2955a does not apply to third-party automobile negligence cases such as this one. Instead, comparative negligence in third-party automobile negligence cases is controlled by MCL 500.3135(2)(b). There is a crucial difference: While MCL 600.2955a bars recovery where Plaintiff's intoxication is 50 percent or more the cause of the accident, MCL 500.3135(2)(b) bars recovery only where Plaintiff's negligence is more than 50 percent. Thus, a plaintiff found exactly 50 percent negligent can still recover under MCL 500.3135(2)(b) but would be barred from recovery if MCL 600.2955a were applicable.

This Court Has Authority to Vacate the Arbitrators' Decision

Because the Arbitration Agreement provides that judgment may be entered on the arbitration award, it falls within the definition of a "statutory arbitration," DAIIE v Gavin, 416

Mich 407, 417 (1982). Therefore, MCR 3.602 provides this court with three options: The court may confirm, modify or correct, or vacate the award. Specifically, MCR 3.602(J) provides:

> **(1) On application of a party, the court shall vacate an award if:**
>
> (a) the award was procured by corruption, fraud or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> **(c) the arbitrator exceeded his or her powers . . .** (Emphasis added).

Michigan courts have held that an arbitration panel "exceeds its powers" when it decides a case contrary to controlling principles of law. The leading case in this regard is DAIIE v Gavin, supra. There, the supreme court set out the standard for judicial review of a statutory arbitration award in an automobile insurance case:

> Where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in 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. Id. at 443.

In Gavin, the arbitration award involved resolution of a question of law, i.e., Plaintiff's entitlement to "stack" uninsured motorist coverage under multiple insurance policies. The supreme court reasoned:

> Questions of law are not primarily or even ordinarily within the province of arbitration. For the most part, arbitrators are concerned with factfinding. Because a degree of efficiency can be attained by permitting arbitrators to decide legal questions, we do not expect them to refrain from making the attempt when required to do so by the case. **Nevertheless, just as a judge exceeds his power when he decides a case contrary to controlling principle of law, so does an arbitrator. Id. at 444.** (Emphasis added).

The fact that the issue of law is novel or that precedent is lacking does not excuse the error. The supreme court in Gavin also instructed:

> Reviewing courts should focus upon the materiality of the legal error to test whether judicial disapproval is warranted, and not upon the question whether the rule of law was so well settled, widely known, or easily understood that the arbitrators should have known of it. Arbitrators are not necessarily trained in the law and are men and women of varying ability and expertise. Id. at 443-444.

In DAIIE v Spafford, 76 Mich App 85 (1987), the court of appeals vacated an arbitration award in an automobile insurance case after finding that the arbitrator had made a clear error of law. There, the issue of law was whether plaintiff's snowmobile qualified as an "uninsured automobile," so as to entitle plaintiff to uninsured motorist benefits. The arbitrator answered this question in the affirmative and the circuit court affirmed. The court of appeals vacated the award after finding the arbitrator's determination to be a clear error of law.

In St. Bernard v DAIIE, 134 Mich App 178 (1984), the court of appeals also vacated an arbitration award after finding that the arbitrators had exceeded their powers by committing an error of law. Again, the legal issue involved interpretation of uninsured motorist protection, which issue was dispositive of the case.

The Arbitrators' Decision Should Be Vacated Due to an Error of Law

The opinion of the arbitration panel states clearly that the majority assessed 50 percent comparative negligence against Plaintiff-Sarate and 50 percent against Defendant-Staniszewski:

> Was the Defendant driver here negligent? Certainly. Was her negligence a proximate cause of the accident? Probably. But Plaintiff, too, was most certainly negligent and his negligence was also a proximate cause of his own injuries. **The majority of this arbitration panel believes that equal fault should be shared by Plaintiff and Defendant for causing this accident.** (Decision at pp. 3-4, emphasis added).

The majority's reliance on MCL 600.2955a is also stated clearly in the final paragraph of the Decision:

> Under MCLA 600.2955a, because Plaintiff's comparative negligence was 50 percent the cause of this accident and further because that 50 percent resulted from Plaintiff's impaired ability due to the ingestion of intoxicating liquor, Defendants are granted a no cause for action on the Plaintiff's claims against them. (Decision at p 4).

As shown below, MCL 600.2955a does not apply to automobile negligence actions. As a result, the majority's reliance on this statute constitutes an error of law sufficient to vacate the decision.

The Two Statutes At Issue

At issue are two statutes which were adopted as part of "tort reform" legislation in 1995. Both statutes limit a plaintiff's recovery where he is found to be at fault in the happening of his injury. MCL 600.2955a applies when plaintiff's ability to function is impaired by his use of alcohol or drugs:

> (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was **50 percent or more** the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50 percent the cause of the accident or event, an award of damages shall be reduced by that percentage. (Emphasis added).

This statute bars recovery by a plaintiff whose intoxication is found to be 50 percent or more the cause of the accident.

In the same legislative session, the Legislature amended the no-fault law to impose modified comparative negligence, rather than pure comparative negligence. MCL 500.3135 was amended to incorporate the following:

> (2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all of the following apply:

> (b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is **more than 50 percent** at fault . . .
>
> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by Section 3101 was in effect is abolished except as to:
>
> (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2). (Emphasis added).

Thus, this amendment to the no-fault law prohibits recovery of noneconomic damages by a plaintiff found to be more than 50 percent negligent. The issue then becomes, which of these two statutes controls in a third-party no-fault case such as this one?

The answer to this question is best explained in the Standard Jury Instructions and in particular, in the Introductory Directions to the Court:

> A question also currently exists whether certain portions of 1995 PA 161 and 249 (i.e., MCL 600.2955a) are applicable to third-party tort cases filed under the no-fault statute. Public Acts 161 and 249 were enacted during the same session the legislature enacted 1995 PA 222, which defines the no-fault threshold. Neither 1995 PA 161 nor 1995 PA 249 makes any reference to 1995 PA 222 or to the no-fault statute, and, similarly, 1995 PA 222 makes no reference to the other two public acts. **Moreover, in enacting MCLA 500.3135(3); MSA 24.13135(3), amended by 1995 PA 222, the legislature retained in the tort abrogation portion of that section prefatory language identical to that in the original no-fault statute**

> **that makes limitations on tort recovery stated in the no-fault statute applicable 'notwithstanding any other provision of law.' For these reasons, the Committee has not drafted any changes to the no-fault instructions or verdict forms in response to 1995 PA 161 or 249.** (Emphasis added). (Exhibit C).

Thus, SJI2d 36.15 (No-Fault Auto Negligence: Burden of Proof--Economic and/or Noneconomic Loss (Exhibit D) utilizes the "more than 50 percent negligent" language of the no-fault law--not the "50 percent or more" language of the general tort reform statute, MCL 600.2955a.

As reasoned in the Directions to the Court accompanying the Standard Jury Instructions, when MCL 500.3135 states the limitations on tort recovery in automobile accident cases "notwithstanding any other provision of law," there is no room for argument that another provision of law applies. The defense can still point to plaintiff's intoxication as a defense and can still reduce his recovery accordingly; this must be done, however, within the limitations of MCL 500.3135 and not "another provision of law," MCL 600.2955a.

The language of the no-fault law clearly evidences a legislative intent that the Michigan automobile reparations system is a separate, self-contained system that is controlled by a single omnibus-type statute (MCL 500.3101 et seq.) and therefore, cannot be altered unless that specific statute is amended. Changes in automobile tort liability law cannot be inferred simply because the Legislature enacts changes in other areas of tort liability, unless the tort liability provisions

of the Michigan no-fault statute are specifically amended in the process. This did not happen with the new "impairment defense" established in MCL 600.2955a.

The Legislature's use of the "more than 50 percent negligent" standard in the no-fault law was a considered decision which should not be disturbed through the application of another statute's "50 percent or more" standard. When originally introduced, the amendment to the no-fault law would have barred recovery by a party who was 50 percent or more at fault. (Exhibit E, House Legislative Analysis of House Bill 4341 as introduced.) After negotiation and debate, however, the Legislature rejected "50 percent or more" and instead adopted the "more than 50 percent" standard now found in MCL 500.3135(2)(b). This legislative decision should not be preempted through the application of the impairment statute, MCL 600.2955a.

Constitutional Deficiencies

The two "tort reform" statutes at issue, MCL 600.2955a and MCL 500.31352b, are constitutionally deficient for several reasons. First, to the extent that a court might find MCL 600.2955a to be applicable to a third-party no-fault case, this would be violative of the Michigan Constitution. Article IV, Section 25 of the 1963 Michigan Constitution states that "No law shall be revised, altered or amended by reference to its title only." The Constitution further states that the "section or sections of the Act altered or amended shall be reenacted

and shall be published at length." Thus, if the Legislature intends to amend a previous law, it must do so in conformity with Article IV, Section 25. In light of the fact that 1995 PA 249 (containing MCL 600.2955a) does not specifically reference the no-fault statute, cases controlled by the latter statute cannot be affected by MCL 600.2955a.

The Fourteenth Amendment to the United States Constitution prohibits any state from denying to any person within its jurisdiction the equal protection of the laws. The Michigan Constitution contains a similar provision stating that no person shall be denied the equal protection of the laws. The new comparative fault rules violate equal protection by treating auto accident plaintiffs more severely than auto accident defendants. If an auto accident plaintiff who is more than 50 percent at fault is barred from recovering any noneconomic damages, it is not constitutionally permissible to allow an auto accident defendant who is more than 50 percent at fault to utilize the defense of comparative negligence to diminish liability for noneconomic damages.

Plaintiff Preserved This Issue of Law

The Arbitrators' Decision expressly notes Plaintiff's objection to the application of MCL 600.2955a. Further, upon receipt of the Arbitrators' Decision, Plaintiff's counsel advised the arbitrators of this error of law and requested its correction. (Exhibit F). Because the arbitrators have not corrected the error, this court is empowered to do so.

Conclusion

Given the arbitration panel's clear error on a controlling legal issue, the award should be vacated and remanded for a new hearing either before the same panel of arbitrators or a new panel, as the court directs.

JOHN A. ZICK (P34305)
Attorney for Plaintiff
34705 W. Twelve Mile Road
Suite 311
Farmington Hills, Michigan 48331
(248) 489-1444

Dated: April 9, 1998

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

JOHN A. ZICK, being first duly sworn, deposes and says that he has prepared the motion which this affidavit supports and that the contents thereof are true, except as to those matters which are stated to be upon information and belief, and as to those matters, he believes them to be true.

Further, Affiant sayeth not.

JOHN A. ZICK

Subscribed and sworn to before me
this 9th day of April, 1998

Kathleen A. Csatari, Notary Public Wayne
County, MI (Acting in Oakland County)

My commission expires: 3/17/99

NOTICE OF HEARING

TO: JEFFREY A. OAKES, ESQ.

PLEASE TAKE NOTICE that Plaintiff's Motion to Vacate Arbitration Decision will be brought on for hearing before the Honorable Robert C. Anderson on Wednesday, April 29, 1998 at 8:30 a.m., or as soon thereafter as counsel may be heard.

JOHN A. ZICK (P34305)
Attorney for Plaintiff
34705 W. Twelve Mile Road
Suite 311
Farmington Hills, Michigan 48331
(248) 489-1444

Dated: April 9, 1998

PROOF OF SERVICE

I hereby certify that on April 9, 1998, I served a copy of Motion to Vacate Arbitration Decision upon Jeffrey A. Oakes, Esq., by U.S. mail addressed to his business address of record.

I declare that the statement above is true to the best of my information, knowledge and belief.

KATHLEEN A. CSATARI

Dated: April 9, 1998