

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ENGENIUS, INC., and ENGENIUS-EU,  
LIMITED,

UNPUBLISHED  
July 29, 2010

Plaintiffs/Counterdefendants-  
Appellees,

v

FORD MOTOR COMPANY,

Defendant/Counterplaintiff-  
Appellant.

No. 290682  
Wayne Circuit Court  
LC No. 03-331133-CK

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Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant Ford Motor Company (Ford) appeals by right the trial court's order confirming an arbitration award in favor of plaintiffs EnGenius, Inc. (EnGenius) and EnGenius-EU, Ltd. (EEU) in the amount of \$22,689,898.43. For the reasons set forth in this opinion, we affirm.

I

EnGenius supplied Ford with engineering services for approximately 20 years. From 1992 through 1994, EnGenius worked to develop a comprehensive test system for Ford's assembly plants, which was referred to as the "FACTS" system. On June 30, 2000, Ford and EnGenius entered into a technical support agreement, by which EnGenius agreed to provide technical support for the FACTS system for the life of Ford's use of the system, and Ford agreed to compensate EnGenius at the rate of \$127,636.67 per month. This agreement, known as the "FACTS Contract," was found by the arbitration panel to be the sole and complete agreement between the parties with respect to the FACTS system. The panel further found that the FACTS Contract did not contain the Global Terms and Conditions (GTC), which were found to be mere proposals for additional terms, or Ford's Purchase Order form, which was simply a vehicle for payment.

Meanwhile, in 1999, Ford decided to replace the FACTS system with a system known as the "eCATS" system. On February 18, 2000, Ford and EnGenius entered into a written agreement known as the "eCATS Contract," which the panel found to be comprised of the Software Terms and Conditions, the GTC, and Ford's Purchase Order form. EnGenius alleges

that through the eCATS Contract, Ford agreed to pay EnGenius a yearly sum during the eCATS project, since funding the project was beyond EnGenius's financial resources. However, Ford argues that the eCATS Contract was a fixed-price contract, subject to periodic purchase orders, rather than an agreement guaranteeing fixed annual payments.

At Ford's request, EnGenius created a European affiliate known as EEU. The purpose of EEU was to support the eCATS system in Ford's European plants.

On January 2, 2001, EnGenius, with Ford's approval, successfully implemented and launched the eCATS system for the first time at Ford's Wayne Plant. Despite the success of eCATS, Ford fell behind on its yearly payments under the eCATS Contract. EnGenius argues that Ford's failure to make payments brought it to the brink of insolvency. Indeed, Ford's own representative stated in an e-mail that EnGenius had expended more than \$12 million during the development of the eCATS project, with little, if any, return from Ford. In August 2001, Ford personnel reviewed the eCATS system so as to potentially provide final approval, which would have resulted in full payment to EnGenius. But EnGenius alleges that Ford refused to approve the system without reason, and that when EnGenius asked for a written explanation of Ford's refusal, Ford ignored the requests and provided no explanation of its refusal to approve the system.

EnGenius further alleges that Ford purposely induced all EEU employees to leave EEU and work for a different company supported by Ford. This new company allegedly took all of EEU's business, and continued to provide services for Ford through the former EEU employees, who were working in the same roles as they had for EEU.

On September 17, 2003, plaintiffs filed a complaint in the Wayne Circuit Court asserting various breach-of-contract, tort, and quasi-contract claims against Ford. Thereafter, Ford filed a motion for summary disposition on the ground that all claims asserted in this matter must be resolved via arbitration, pursuant to a clause in the GTC document that gave Ford the right to initiate binding arbitration if plaintiffs initiated litigation. The trial court granted Ford's motion for summary disposition, ruling that the arbitration clause in the GTC document applied to all claims included in plaintiffs' complaint, and that the matter therefore had to be resolved via binding arbitration. Subsequently, the trial court entered a stipulated corrected order, reserving jurisdiction over any arbitration award pursuant to MCR 3.602.

After an unsuccessful mediation attempt, plaintiffs served Ford with their notice of arbitration. Arbitration proceedings took place from May 2004 through April 2008. EnGenius appointed attorney Sheldon Miller as its arbitrator, Ford appointed former Judge Norman Lippitt, and former Judge Barry Howard was chosen as the neutral arbitrator.

On November 20, 2008, the arbitration panel majority (composed of Arbitrators Howard and Miller) issued an interim opinion and award, awarding \$17,611,970 in favor of plaintiffs. This award was final in all respects except that it reserved ruling on plaintiffs' requests for attorney fees, arbitration fees, and costs and interest. Arbitrator Lippitt issued a dissenting opinion. The majority arbitrators' specific awards to EnGenius were: (1) \$1,239,885 in lost profits for Ford's breach of the FACTS contract, (2) \$14,425,954 for Ford's breach of the eCATS contract, and (3) \$1,946,131 for tortious interference.

At some point before the final arbitration award was issued, Howard, the neutral arbitrator, apparently requested that Lippitt, Ford's arbitrator, approach Ford and recommend a settlement offer of between \$10 and \$12 million. Lippitt relayed the settlement offer to Ford, which Ford rejected. Lippitt then informed Howard of Ford's rejection. Ford now argues that this series of settlement discussions constituted an improper ex parte communication.

On December 12, 2008, the arbitration panel issued its final opinion and award, which re-confirmed the interim award, denied the requests for attorney fees, arbitration fees, and costs, and referred the issue of statutory interest to the trial court. Plaintiffs filed a motion to confirm the award in the trial court.

On January 9, 2009, the trial court confirmed the final arbitration award and further awarded \$5,077,928.43 in statutory pre-judgment interest through January 9, 2009. Ford then moved to vacate the award. The trial court denied Ford's motion to vacate.

## II

The existence of a contract to arbitrate and its enforceability are judicial questions that this Court considers de novo on appeal. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). This Court also reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). This Court "review[s] the legal issues presented without extending any deference to the trial court." *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009).

However, with respect to the facts and the arbitrators' findings on the merits, this Court's review is much more limited. *Id.* Indeed, the standard of review for such matters is among the narrowest standards known to American law. *Id.* at 671 n 4. An arbitration panel's findings of fact and decisions on the merits are not judicially reviewable. *Id.* at 672; *Byron Ctr Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990). This Court's authority to vacate an arbitration award is generally limited to the four circumstances enumerated in MCR 3.602(J)(2), which provides that a court may vacate an arbitration award only if (1) "the award was procured by corruption, fraud, or other undue means," (2) "there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights," (3) "the arbitrator exceeded his or her powers," or (4) "the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights." Whether an arbitrator has exceeded his or her authority is reviewed de novo by this Court. *Washington*, 283 Mich App at 672.

A court may also vacate an arbitration award when the panel has committed an error of law that is evident on the face of the award itself. *Id.* But not all errors of law will warrant reversal of an arbitration award. *Id.* Instead, it must be affirmatively shown that, but for the arbitrators' error of law, the arbitration award would have been *substantially* different. *Id.* at 672-673; *Saveski v Tiseo Architects Inc*, 261 Mich App 553, 555; 682 NW2d 542 (2004). This Court will not review the arbitrators' thoughts or mental processes that have led to an award. *Washington*, 283 Mich App at 672.

### III

#### A

Ford first argues that the trial court erred by confirming the arbitration award and denying its motion to vacate because the majority arbitrators exceeded their jurisdiction and powers by holding that the arbitration clause giving them jurisdiction was not part of the FACTS Contract. However, when Ford filed its motion for summary disposition in the trial court, it actively sought to have *all* of plaintiffs' claims resolved via binding arbitration. Accordingly, Ford implicitly agreed to allow the arbitrators to decide the makeup of the FACTS Contract and adjudicate plaintiffs' claims arising thereunder.

The United States Supreme Court has recently held that, at least in the context of matters governed by the Federal Arbitration Act, 9 USC 1 *et seq.*, "courts must treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope '[u]nless the [validity] challenge is to the arbitration clause itself' or the party 'disputes the formation of [the] contract.'" *Granite Rock Co v Int'l Brotherhood of Teamsters*, \_\_\_ US \_\_\_; \_\_\_ S Ct \_\_\_; \_\_\_ L Ed 2d \_\_\_ (2010) (citations omitted). Similarly, Arbitration Rule 8.2 states that the

[t]ribunal shall have the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

We conclude that the arbitrators acted within their power in determining that the GTC and Purchase Order were not part of the FACTS Contract. In the present case, neither party challenges the validity of the GTC's arbitration clause itself; nor does either party dispute the actual formation of the FACTS Contract. See *Granite Rock Co*, \_\_\_ US at \_\_\_. Therefore, the arbitration panel did not err by treating the GTC's arbitration clause as separable from the remainder of the FACTS Contract, itself. See *id.*; see also Arbitration Rule 8.2.

Further, even if the arbitrators had somehow erred by determining that the GTC's arbitration clause was not part of the FACTS Contract, we find that Ford has waived its argument in this regard. We reiterate that Ford actively sought to submit this entire dispute to binding arbitration in accordance with the arbitration clause contained in the GTC. An appellant may not claim as error on appeal something to which it specifically consented in the trial court. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001); see also *Joba Constr Co, Inc v Burns & Roe Inc*, 121 Mich App 615, 629; 329 NW2d 760 (1982). It is well settled an appellant may not harbor error as an appellate parachute. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). We conclude that Ford has waived this argument by affirmatively agreeing to submit the entire dispute to arbitration. See *Hilgendorf*, 245 Mich App at 696.

Lastly, we conclude that Ford's argument lacks merit for two other reasons as well. First, the arbitrators made a factual finding that Ford's Purchase Order and GTC were not part of the FACTS Contract. Such findings of fact and decisions on the merits are not judicially reviewable. *Washington*, 283 Mich App at 672; see also *Byron Ctr Pub Schools*, 186 Mich App at 31. This

Court cannot now substitute its own judgment for that of the arbitrators concerning which documents did, or did not, make up the FACTS contract. See *Saginaw v Mich Law Enforcement Union, Teamsters Local 129*, 136 Mich App 542, 556-557; 358 NW2d 356 (1984). Second, once the trial court determined that there was a valid agreement to arbitrate, granted Ford's motion for summary disposition, and sent the entire dispute to arbitration, the arbitrators lacked the power to divest themselves of jurisdiction over the matter. See *Arrow Overall Supply Co v Pelouquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982) (holding that the existence of a contract to arbitrate and the enforceability of its terms must be determined by the court, and cannot be decided by the arbitrator). Accordingly, although the arbitrators ultimately concluded that the Purchase Order and GTC were not part of the FACTS Contract, this determination could not divest them of their authority to decide plaintiffs' claims arising under the FACTS agreement in the first instance. The trial court had already determined that a valid agreement to arbitrate existed with respect to the entire dispute,<sup>1</sup> and the arbitrators, themselves, could not later undo the court's earlier ruling on this issue. See *id.*

## B

Ford also argues that the trial court erred by confirming the arbitration award because the unambiguous terms of the eCATS Contract did not provide for "guaranteed annual payments," but the arbitrators awarded such payments anyway. However, contrary to Ford's argument, the arbitrators' award was not based upon a determination that the eCATS Contract called for guaranteed annual payments. Instead, it was based upon the arbitrators' determination that plaintiffs were entitled to compensation under the eCATS Contract for work that had already been completed. This determination by the arbitrators constituted a finding of fact, and is therefore not reviewable by this Court. *Washington*, 283 Mich App at 672; see also *Byron Ctr Pub Schools*, 186 Mich App at 31.

## C

Ford next argues that the trial court erred by confirming the arbitration award because the arbitrators exceeded their jurisdiction and powers by awarding damages for tortious interference. As Ford accurately argues, Michigan law states that a party cannot be liable for tortiously interfering with its own contractual or advantageous business relationships. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993) (stating that "[t]o maintain a cause of action for tortious interference, [a plaintiff] must establish that the defendant was a 'third party' to the contract or business relationship"); see also *Dzierwa v Mich Oil Co*, 152 Mich App 281, 287; 39 NW2d 610 (1986). However, in this situation, Ford did not interfere with its own contractual or business relationship with EEU. Instead, as the arbitrators found, Ford interfered with the existing contractual and business relationships between EEU and EEU's employees. There is nothing in Michigan law to suggest that a defendant like Ford may not be held liable for tortiously interfering with the existing contractual or business relationships

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<sup>1</sup> We note that Ford does not specifically challenge the trial court's determination that there was an enforceable agreement to arbitrate. Instead, Ford merely challenges the subsequent findings of the arbitrators.

between another company and that other company's employees. Nor does Ford attempt to argue that there was not a recognized and established contractual or business relationship between EEU and EEU's employees. This Court has specifically held that a defendant may tortiously interfere with the contractual and business relations between another company and that company's employees. See, e.g., *Prysak v R L Polk Co*, 193 Mich App 1, 12; 483 NW2d 629 (1992); *Feaheny v Caldwell*, 175 Mich App 291, 302-304; 437 NW2d 358 (1989). In short, contrary to Ford's arguments on appeal, a defendant in the position of Ford may be held liable in tort under Michigan law for its wrongful interference with such an employment relationship.

Moreover, the arbitrators made a factual determination that Ford's conduct satisfied all the elements of tortious interference with a contract or tortious interference with a business relationship. See *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (describing the elements of the two torts). This finding of fact by the arbitrators must remain undisturbed. *Washington*, 283 Mich App at 672; see also *Byron Ctr Pub Schools*, 186 Mich App at 31.

#### D

Lastly, Ford argues that the trial court erred by confirming the arbitration award because the arbitrators engaged in misconduct in the form of ex parte settlement discussions with Ford. Ford argues that Arbitrator Howard initiated these improper ex parte communications by requesting that Arbitrator Lippitt approach Ford and recommend a settlement offer of between \$10 and \$12 million. We disagree.

Although Howard apparently suggested that Lippitt should relay a potential settlement offer to Ford, it was Lippitt (Ford's own party-appointed arbitrator) who relayed the offer to Ford and therefore actually engaged in an ex parte communication. Ford did not raise any objections to the arbitrators' decision until January 29, 2009, approximately two months after receiving the interim award on November 20, 2008. Former Arbitration Rule 20<sup>2</sup> states that "[a] party knowing of a failure to comply with any provision of these Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto." By waiting nearly three months to raise this issue in the trial court, Ford has effectively waived any objection regarding the alleged ex parte communications. If the allegedly improper settlement offer was truly as detrimental to the arbitration process as Ford claims, Ford should have objected to the communication as soon as Lippitt first approached Ford with the offer.

It is well settled that a party cannot adopt a "wait and see" approach during arbitration by raising an issue for the first time only after receiving an unfavorable ruling. *Arrow Overall Supply Co*, 414 Mich at 99-100. By arguing that it is entitled to relief on the basis of its own allegedly improper discussion with its own party-appointed arbitrator, which took place between the issuance of the interim award and the unaffected, substantially similar final award, Ford is

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<sup>2</sup> Rule 20 has now been renumbered as Rule 21, but the text has remained substantially unchanged.

effectively manufacturing its own error for the purpose of creating a ground for appeal. As noted earlier, an appellant may not harbor error as an appellate parachute. *In re Gazella*, 264 Mich App at 679. The trial court properly rejected Ford's argument that there were impermissible ex parte communications in this case. We perceive no error requiring reversal.

Affirmed. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro

/s/ Kathleen Jansen

/s/ Pat M. Donofrio