STATE OF MICHIGAN

COURT OF APPEALS

BARBARA WAYLAND, as Guardian of THELMA JOHNSON, an Incapacitated Individual,

Plaintiff-Appellant,

v

NEW LIGHT NURSING HOME CORPORATION, d/b/a NEW LIGHT NURSING HOME,

Defendant-Appellee.

UNPUBLISHED
September 20, 2007

No. 271821
Wayne Circuit Court
LC No. 02-2311290-NM

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting judgment for plaintiff. For the reasons set forth in this opinion, we reverse.

This case arises from the residence of plaintiff's mother, Thelma Johnson, a legally incapacitated individual, at defendant nursing home. Plaintiff alleged that defendant negligently failed to train and supervise its employees and provide for the safety of her mother. She alleged that, as a result of defendant's negligence, her mother sustained a chronic subdural hematoma on September 6, 2000, when another resident threatened her mother, causing her to fall. Plaintiff's mother resided at defendant nursing home from March 28, 2000, until September 14, 2000. During this period, defendant held two different insurance policies. Prior to July 2, 2000, defendant was insured by Admiral Insurance Company ("Admiral"). Beginning July 2, 2000, defendant was insured by Legion Insurance Company ("Legion").

On September 5, 2000, someone at the nursing home informed plaintiff that another resident had struck her mother. On September 6, 2000, plaintiff discovered that her mother had fallen. When plaintiff arrived at the nursing home and made an inquiry about what had caused her mother to fall, her mother told her that "this women" got in front of her with her hands in a fist. Ms. Johnson then told her daughter that when she tried to get away from the woman, she fell. Ms. Johnson allegedly suffered injuries as a result of the two incidents.

After the pleadings and several motions had been filed in this case, plaintiff, defendant, and Admiral entered into a "Release and Indemnity Agreement," in which plaintiff agreed, in return for a payment of $27,500 by Admiral on behalf of defendant, to release defendant and

Admiral from "any and all" claims and causes of action, "which accrued prior to July 2, 2000 and which are covered by the police of insurance issued by Admiral Insurance Company." Subsequently, plaintiff and defendant entered into an arbitration agreement, giving the arbitrators "full powers to make a determination as to any and all claims" of plaintiff against defendant. The arbitration panel awarded plaintiff $125,000. Pursuant to defendant's motion, the trial court found that defendant was entitled to set off the $27,500 settlement from the arbitration award. Accordingly, the court entered judgment for plaintiff in the amount of $96,700 (an additional $800, which is not in dispute, was also deducted from plaintiff's award).

Plaintiff argues on appeal that the trial court erred in setting off the amount of the settlement agreement from the arbitration award because the settlement and the arbitration award did not constitute double recovery. Contract interpretation involves questions of law, which we review de novo. *Sands Appliance Services*, 463 Mich 231, 238; 615 NW2d 241 (2000); *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249; 660 NW2d 344 (2003). We also review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award, *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003), and a trial court's decision to grant a setoff, *Grace v Grace*, 253 Mich App 357, 368; 655 NW2d 595 (2002).

As the trial court recognized, the principle of one recovery and the common law rule of setoff are still the law in Michigan. In *Grace*, *supra* at 357, the plaintiff sought damages from the defendant, her ex-husband, for fraudulently concealing certain marital assets and for failing to disclose the true value of others. She also brought a legal malpractice claim against her divorce attorney seeking damages for his alleged failure to discover the assets that defendant had concealed, and for failing to determine the true value of the disclosed assets. Plaintiff settled the legal malpractice action. The claim against her ex-husband went to trial and the jury awarded the plaintiff about half the value of the marital estate at the time of the divorce. After noting that, "[g]enerally, under Michigan law, only one recovery is allowed for an injury," this Court found that the "plaintiff ha[d] sought to recover damages for an injury identical in nature, time, and place against both defendant and her divorce attorney." It found that the jury's award constituted the whole amount of plaintiff's injury, and therefore, concluded that the trial court did not err in setting off the settlement amount from the jury verdict. *Id*. at 368-370. See also *Markley*, *supra* at 257 (holding that the defendant nursing home was entitled to set off plaintiff's $220,000 settlement with the hospital against the $300,000 the jury verdict against the nursing home, where the hospital and nursing home were jointly and severally liable for wrongful death).

"To determine whether double recovery has occurred, this Court must ascertain what injury is sought to be compensated. Thus, where a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award." *Grace*, *supra* at 368-369. In this case, plaintiff claimed only one injury—the chronic subdural hematoma her mother allegedly sustained in September 2000. Since plaintiff alleges no separate injury that occurred prior to July 2, 2000, it initially appears as if the settlement and the arbitration award are both compensation for this single injury.

The release was limited to any actions or incidents "which accrued prior to July 2, 2000," thereby serving not as a means to compensate plaintiff for specific injury, but rather, the avenue chosen by Admiral Insurance Company to release itself from any potential liability which may have occurred prior to July 2, 2000. Furthermore, the settlement agreement specifically left open

the ability for the plaintiff to pursue actions against Legion Insurance Company by stating that the release did not include any causes of action covered by Legion. Plaintiff received the settlement amount of $27,500 in exchange for releasing defendant and Admiral from "*any* and all claims," that accrued prior to July 2, 2000. It operated to "terminate all claims for *both known and unknown injuries*, wrongful death and damages of whatever nature, including *all future developments* thereof, in any way growing out of or connected with or which may hereafter grow out of or be connected with The Releasees." Therefore, by entering into the settlement agreement, plaintiff agreed not to investigate or seek discovery with respect to injuries that may have occurred prior to July 2, 2000. Defendant and Admiral compensated plaintiff for taking a risk that, had she investigated and pursued such potential injuries, she would have found a valuable claim. Defendant and Admiral, on the other hand, took the risk that no such claim existed and Admiral was paying $27,500 for a non-existent claim. In sum, defendant and Admiral paid plaintiff $27,500 for any undiscovered claims that accrued prior to July 2, 2000, and not for the chronic subdural hematoma her mother allegedly sustained in September 2000.

We turn now to the meaning of the arbitration agreement in light of the release agreement. The first paragraph of the arbitration agreement states,"[t]he parties wish to resolve any and all disputed issues between them." The arbitration agreement does not mention the release agreement or restrict the subject matter of the arbitration to specific dates. Rather, it gives the arbitrators "full powers to make a determination as to any and all claims" of plaintiff against defendant. This language seems to encompass all potential claims of plaintiff against defendant, including those covered by the release agreement. It suggests that, had plaintiff discovered an injury sustained by her mother prior to July 2, 2000, she could have raised it during the arbitration proceedings.

However, the release agreement would have precluded this. Even if the arbitration agreement, as a subsequent inconsistent agreement, would otherwise supercede and rescind the release agreement, see, e.g., *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 347; 561 NW2d 138 (1997), it cannot do so here because Admiral is not a party to the arbitration agreement. Admiral paid plaintiff $27,500 not to pursue claims that would have been covered by the policy it issued to defendant. Plaintiff and defendant were not empowered to rescind that agreement. Therefore, because plaintiff could not, under the terms of the release agreement, have raised a claim that accrued prior to July 2, 2000, during arbitration proceedings, the arbitration award cannot have compensated her for those potential claims. Conversely, as discussed, *supra*, the settlement agreement did not purport to compensate plaintiff for the injury her mother allegedly suffered in September 2000. Accordingly, the settlement and the arbitration award do not constitute double recovery.

Reversed. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen