COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP763 **Cir. Ct. No. 2008CV2113**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LORRAINE A. BURROWS,

PLAINTIFF-APPELLANT,

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES AND KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

INVOLUNTARY PLAINTIFFS,

V.

PROGRESSIVE CLASSIC INSURANCE CO. AND GRACE M. KLING,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Lorraine A. Burrows appeals from a circuit court order denying her motions after verdict and granting a posttrial motion for summary judgment to Progressive Classic Insurance Co. (Progressive) and Grace M. Kling. For the reasons discussed below, we affirm.

¶2 On October 30, 2005, Burrows was injured in a motor vehicle accident when her vehicle was struck by a vehicle being operated by Kling. Kling was insured by Progressive at the time.

¶3 Burrows felt back pain at the scene of the accident and went to the emergency room (ER) later that evening. There, she had x-rays taken, was diagnosed with "acute low back pain status post motor vehicle crash," and advised to follow up with her primary care provider.

¶4 Progressive assigned a claims adjuster by the name of Kristy Berger to handle Burrows' claim. She contacted Burrows the day after the accident and took a recorded statement from her.

¶5 In her statement, Burrows related that all of her vehicle's occupants were injured "but not where we needed stiches or anything like that. We just all followed up with our doctors basically." She further related that she was experiencing pain, that she had had four prior back surgeries, and that her car was not drivable. After further discussion, Berger advised that she was going to do some follow-up investigation. She would then contact Burrows to "talk about rental car, repairs, as well as your injuries. I'm going to want to talk to you about your injuries and set up a time to meet with you to go over the injury process and everything like that." Later in the conversation, Burrows agreed that 3:00 p.m. the next day would be a "perfect" time to meet. Berger reiterated that they would be discussing the vehicle as well as the personal injury process.

¶6 When Berger met with Burrows on November 1, 2005, Burrows said she was nauseated and had a headache. At one point during Berger's visit, Burrows excused herself to vomit. Burrows later testified at her deposition that she was also experiencing burning in her neck and the back of her neck and believed she was suffering from a concussion.

¶7 At the meeting, Berger offered to pay Burrows past medical bills up to $1000, future medical bills incurred within 60 days up to $1000, and $500 for a full settlement of the personal injury claim. Berger did not have any medical records at the time she made the offer. In addition, Burrows had not raised any complaints of neck pain while in the ER. Thus, she had not received any diagnosis relating to her neck at that time.

¶8 Burrows accepted Berger's settlement offer and signed the release without reading it. The release was titled, "FULL RELEASE OF ALL CLAIMS WITH INDEMNITY" and expressly stated that the nature and extent of injury was doubtful and disputed, that recovery from any injuries was uncertain and indefinite, that it was not entered into in reliance upon any doctor's diagnosis, and that Burrows was relying wholly on her own judgment, belief and knowledge of the nature, extent, effect and duration of injuries. Burrows later testified at her deposition to her understanding and signing of the release as follows:

> [DEFENDANTS' COUNSEL]: Q … as you read this document, this document clearly tells you that you are releasing any and all claims of any nature whether you know or don't know about them, right?
>
> [PLAINTIFF'S COUNSEL]: If you know.
>
> THE WITNESS: Had I have—Let me put it this way, if I would have read this, there's no way I would have signed that.

> [DEFENDANTS' COUNSEL]: Q: Because you would have known—
>
> A: I would have understood what this meant, I would not have signed that. That would have been ridiculous.
>
> Q: Right, because if you read it, you would understand that you—
>
> A: I would have not signed that piece of paper, there's no way.
>
> Q: If you had read it, you would understand that any claims you wanted to make in the future were being released by this document, right? You're not going to be able to come back and say, oh, there's—
>
> A: Right.
>
> Q: … something else?
>
> A: I wouldn't have—No, I would not have signed it, no.
>
> Q: And you understood you would not—you would have understood that you—
>
> A: Right.
>
> Q: … can't come back, right?
>
> A: Right.
>
> ….
>
> Q: And the reason you didn't think it was you signing off on all of your claims was because you didn't read the release?
>
> A: Exactly.

¶9 Days after Burrows signed the release, she retained a law firm to represent her. When that law firm notified Progressive of its retainer, Progressive responded with a letter stating that the matter had been settled.

¶10 Approximately one year later, Burrows underwent an anterior cervical fusion performed by Dr. Yash S. Pannu. Pannu issued a report stating

that the October 30, 2005 motor vehicle accident was a substantial factor in necessitating the surgery.

¶11 When asked during her deposition whether she had contemplated the fact that Burrows may have a future neck surgery as part of the settlement, Berger responded:

> I—we decided—We agreed to this amount based on what we talked about. And I made it clear to her that we have 60 days of open treatment up to $1,000. And that's her decision if she's going to have surgery or not in the future. I did not force her to sign this. I gave her this option and she agreed to that.

¶12 Along the same lines, Berger was asked whether the possibility of surgeries and permanent injuries are "contemplated at the time you enter into the release two days after the accident." Berger responded:

> Well, they kind of are contemplated when you're doing a full and final release. People are signing a release, you know; you have to—you're giving up your rights to that kind of thing, to have that paid for. That's what a release is for.

¶13 On October 1, 2008, Burrows filed a complaint against Kling and Progressive seeking damages for personal injuries sustained in the October 30, 2005 motor vehicle accident. Progressive responded with a motion for summary judgment seeking dismissal of the complaint on the ground that Burrows had signed a release of her claims. Burrows opposed the motion arguing, among other things, that the release was unconscionable and entered into based upon a mutual mistake of fact.

¶14 The circuit court held a hearing on the matter following discovery. Based upon the undisputed facts, the court initially granted summary judgment in favor of Kling and Progressive. However, the court was troubled by a

November 2, 2005 ER record submitted by Burrows at the time of the hearing. That record, which was created after the release was signed, indicated that Burrows had complained of headache, nausea, dizziness, and vomiting, resulting in an impression of "concussive syndrome." Due to reservations the court had about this record, it qualified its ruling by allowing Burrows seven days to provide evidence showing the symptoms associated with "concussive syndrome."

¶15 Burrows submitted an affidavit incorporating various treatises discussing postconcussion syndrome. Ultimately, the circuit court issued an order stating that it had "reflected further on the decision to grant the defendants' motion for summary judgment in this case, and ha[d] concluded, without any reference to the materials filed after the hearing, that the motion should be denied." The court determined that Burrows might be "equitably entitled to seek rescission of the settlement agreement" based upon the doctrine of unilateral mistake as discussed in ***Miller v. Stanich***, 202 Wis. 539, 230 N.W. 47 (1930).

¶16 The circuit court articulated the essential elements of such relief as follows:

> (1) The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable. (2) The matter as to which the mistake was made must relate to a material feature of the contract. (3) Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake. (4) It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in [status] quo.

It went on to state that, "[i]t would appear that factual questions exist as to the true nature of [Burrows'] illness on that day, and as to whether she had exercised ordinary diligence to discover the information she needed to understand her

situation, her rights, her injuries and the effects of the settlement." As a result, the court denied Progressive's motion for summary judgment.

¶17 The case proceeded to a jury trial on the issue of unilateral mistake.[1] Burrows offered evidence designed to convince the jury that she had been suffering from symptoms of a concussion at the time she signed the release. Progressive, meanwhile, questioned the credibility of Burrows' account based on her actions at the accident scene and ER and her interactions with multiple health care providers following the accident. In her testimony, Burrows again conceded that she did not review the release before signing it.

¶18 Prior to closing arguments, the circuit court presented the parties with the special verdict and jury instructions that it intended to give. The court placed two questions on the verdict, the second of which addressed the issue of whether Burrows exercised ordinary diligence. The questions were as follows:

> QUESTION NO. 1:
>
> At the time of the meeting with Kristy Berger, did Lorraine Burrow, the plaintiff, misunderstand that the document which she was signing and the check that she was receiving constituted an agreement for the full settlement of her claims for bodily injury arising out of the collision with the defendant, Grace M. Kling?
>
> QUESTION NO. 2:
>
> Did Lorraine Burrows employ ordinary diligence in attempting to understand the agreement and in signing the document?

[1] The circuit court recognized that rescission based upon unilateral mistake is an equitable remedy. However, it determined that an advisory jury trial would still ensue on the question of whether Burrows had exercised ordinary diligence.

¶19 Meanwhile, the jury instructions associated with the special verdict were as follows:

> In this regard, you are instructed that ordinary diligence is the degree of care, attention, inquiry and responsibility which a reasonable person would exercise in similar circumstances to protect her own financial interests. Normally, one who has had the opportunity to read a contract but chooses not to do so; and who signs the contract which she has not read; and which she does not understand; and with whose contents she is not familiar; is failing to exercise ordinary diligence and is as bound to the contract as one who has taken the opportunity to read and to understand it fully. Under ordinary circumstances, just as one who chooses to read and understand a contract before signing it is bound to its terms, so also is one bound who was under no obligation to agree to the contract, and could have had read and understood its terms, but who instead chose to forego reading and understanding it, and nevertheless agreed to its terms.

¶20 Burrows objected to both the special verdict and jury instructions. The circuit court overruled Burrows' objection and proceeded with the special verdict and jury instructions that it had presented.

¶21 Ultimately, the jury returned a verdict answering "Yes" to the first question, but "No" to the second. In doing so, the jury determined Burrows had misunderstood the release she signed but had not exercised ordinary diligence in attempting to understand it and signing it.

¶22 Burrows subsequently filed motions after verdict seeking judgment notwithstanding the verdict on the same grounds as originally argued in her motion for summary judgment. Alternatively, Burrows sought a new trial on the ground that the circuit court's jury instructions were erroneous. Progressive responded by renewing its motion for summary judgment. Following a hearing on

the matter, the circuit court denied Burrows' motions and granted Progressive's motion for summary judgment. This appeal follows.

¶23 We review a grant of summary judgment using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[2]

¶24 Burrows raises several arguments on appeal. She first contends that the release signed by her was unconscionable and therefore unenforceable.

¶25 For a provision to be declared invalid as unconscionable, it must be both procedurally and substantively unconscionable. ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶29, 290 Wis. 2d 514, 714 N.W.2d 155. "Procedural unconscionability relates to factors bearing on the meeting of the minds of the contracting parties." ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis. 2d 83, 89-90, 483 N.W.2d 585 (Ct. App. 1992). "[S]ubstantive unconscionability pertains to the reasonableness of the contract terms themselves," ***id.*** at 90, and refers to whether they "lie outside the limits of what is reasonable or acceptable," ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶36. Determining unconscionability presents a question of law that we determine de novo on a case-by-case basis. *See* ***id.***, ¶¶25, 33.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶26 Here, Burrows maintains that the release signed by her satisfies the requirements of unconscionability. She submits that the release was procedurally unconscionable because there was no meeting of the minds of the contracting parties. In support of this argument, she cites her medical condition at the time of the meeting and the disparity in bargaining power, as reflected by her limited education and experience with the claims process.[3] Burrows further submits that the release was substantively unconscionable, as a $500 settlement is unreasonable given the fact that she eventually had to undergo an anterior cervical fusion.[4]

¶27 We conclude that the release signed by Burrows was not unconscionable under the facts of this case. As noted, Berger made the appointment to meet with Burrows at a time Burrows characterized as "perfect." During the meeting, Burrows told Berger about her claimed injuries and Berger made an offer to settle the personal injury portion of the case. Berger did not present Burrows with a "take-it-or-leave-it" offer or employ fraudulent or coercive techniques to secure her signature. If Burrows had reviewed the release, she would have understood what it meant, notwithstanding her limited education and experience with the claims process. The fact that Burrows chose not to review the release is not excused by her ill-defined medical condition. Likewise, absent

[3] Burrows did not complete high school and had never been through the claims process before.

[4] Burrows also submits that the release should be found unconscionable as a matter of public policy because it was signed less than seventy-two hours after the accident. According to Burrows, WIS. STAT. § 904.12(1) (2005-06), which limits the admissibility of certain statements taken from an injured person less than seventy-two hours after an accident, should be applied to void the release. This line of reasoning was rejected by our supreme court in ***Buckland v. Chicago, St. P., M. & O. R. Co.***, 160 Wis. 484, 486, 152 N.W. 289 (1915). We are bound by that decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

evidence of procedural unconscionability, it is not excused by the hindsight view that the agreed upon consideration was inadequate.

¶28 Burrows next contends that the release should be set aside because it was based on mutual mistake of fact. Specifically, she asserts that the extent of her neck injury was a fact unknown to either party at the time she signed the release.

¶29 A settlement agreement may be set aside for a mutual mistake of fact. ***Gielow v. Napiorkowski***, 2003 WI App 249, ¶22, 268 Wis. 2d 673, 673 N.W.2d 351. Mutual mistake exists where both parties are unaware of a fact material to their agreement. ***Id.*** (citing WIS JI—CIVIL 3072). This unawareness, "however, must arise from a lack of knowledge of the possibility that the fact may or may not exist." ***Id.***

¶30 On the basis of this record, we are not persuaded that the release signed by Burrows was the product of a mutual mistake of fact. To begin, Progressive did not rely on any medical records that could have created a mistake of fact regarding Burrows' medical condition. Moreover, as explained in Berger's deposition, the possibility of surgeries and permanent injuries were contemplated at the time the release was entered. Indeed, that was the purpose of the release: to settle the matter with knowledge that unforeseen complications, circumstances, and injuries that Burrows might want to assert could arise in the future. As a result, we conclude that the circuit court properly granted summary judgment in favor of Progressive on this issue.

¶31 Finally, Burrows contends that the circuit court erred in its instructions to the jury on the issue of ordinary diligence and unilateral mistake. Burrows complains that the instructions improperly directed the jury on what

answer to place on the second verdict question and improperly advised them of the legal effect of the verdict answers.

¶32 As noted, this case was tried with an advisory jury. A trial with an advisory jury is, for purposes of appellate review, the same as a trial to the court alone. ***Grams v. Melrose-Mindoro Joint Sch. Dist. No. 1***, 78 Wis. 2d 569, 576, 254 N.W.2d 730 (1977). The findings of the circuit court "will not be set aside unless they are contrary to the great weight and clear preponderance of the evidence." ***Id.***

¶33 Reviewing the jury instructions at issue, we conclude that they were not improper and do not undermine the findings of the circuit court. Again, the court merely informed the jury that the law does not ordinarily allow people to challenge a contract without demonstrating ordinary diligence and failure to read a contract is generally an indication of a failure to exercise ordinary diligence. The court's instructions were an accurate statement of the law. Moreover, the parties were allowed to argue the circumstances Burrows claimed to satisfy her obligation of ordinary diligence. That the jury and court both rejected her argument does not provide grounds for reversal.

¶34 For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.