S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ROBERT SKARINA,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 19, 2005

No. 251191
Wayne Circuit Court
LC No. 02-225448-NF

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant. We affirm.

Plaintiff was injured in an automobile accident while a passenger in an uninsured motor vehicle, and his claim was assigned to defendant. Defendant paid approximately $175,000 to plaintiff on the claim. Plaintiff then filed a lawsuit against defendant, which was terminated when the parties signed a release on November 17, 1998, which provided in part:

> FOR THE SOLE CONSIDERATION OF THREE THOUSAND ($3,000.00) DOLLARS, the receipt of which is hereby acknowledged, I, ROBERT SKARINA, hereby release and discharge ALLSTATE INSURANCE COMPANY and the MICHIGAN DEPARTMENT OF STATE ASSIGNED CLAIMS FACILITY, their employees, agents, successors and assigns, from any and all (past, present and future) claims for survivor benefits, lost wages, mileage expenses, household replacement service expenses, attendant care, interest, attorney fees, as well as medical expenses incurred by me up to and including November 3, 1998, which I now have or may have resulting from an accident occurring on the 28th day of January, 1997, and, more importantly, from a lawsuit entitled *Robert Skarina v Allstate Insurance Company*, Wayne County Circuit Court Case Number 98-809334-NI.
>
> I agree that in making this RELEASE, I am relying on my own judgment, belief and knowledge as to all phases of my claims and that I am not relying on representations or statements made by any of the persons hereby released or anyone representing them or physicians or surgeons employed by them.

> I agree that payment of the above sum is not be [sic] construed as an admission of any liability whatsoever by or on behalf of the above-named parties by whom liability is expressly denied. I also agree that this settlement also includes all contractual obligations, except future medical expenses, of ALLSTATE INSURANCE COMPANY and the MICHIGAN DEPARTMENT OF STATE ASSIGNED CLAIMS FACILITY.
>
> It is agreed that this RELEASE and payment is a waiver and/or estoppel from any claim that I may have for future personal insurance protection no-fault benefits except for future medical expenses that I may incur for and after the date of this RELEASE.

Plaintiff filed this lawsuit on July 24, 2002, seeking reimbursement for attendant care costs he incurred as a result of the automobile accident. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), on the basis that the release barred plaintiff's claim. Defendant alternatively argued that it was entitled to summary disposition because plaintiff had not satisfied the prerequisites necessary to set aside the release, and because the one-year-back rule set out in MCL 500.3145 precluded plaintiff from recovering benefits predating July 24, 2001. We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

Plaintiff first argues that the release was ambiguous, and therefore unenforceable, because it does not clearly explain whether *all* items are released "up to and including November 3, 1998," or if that date only applies to medical expenses. Whether contract language is ambiguous is a question of law that we review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Similarly, the proper interpretation of a contract is also a question of law that we review de novo. *Id*. "The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "[T]he rule of contra proferentem," i.e., interpreting contractual language against its drafter, applies only after "all conventional means of contract interpretation" have been exhausted. *Id*. at 470-471. We find no ambiguity warranting application of the rule of contra proferentem.

Commas are used to separate elements in a series or list. However, "as well as" is a correlative conjunction, which is used to join grammatically equal elements in a sentence. The logical interpretation of the first paragraph of the release is that "medical expenses incurred by me up to and including November 3, 1998" is a separate clause from "any and all (past, present and future) claims for survivor benefits, lost wages, mileage expenses, household replacement service expenses, attendant care, interest, attorney fees." In other words, the sentence includes parallel but distinct complex elements: "any and all (past, present, and future) claims for" modifies "survivor benefits, lost wages, mileage expenses, household replacement service expenses, attendant care, interest, attorney fees," whereas "up to and including November 3, 1998" modifies "medical expenses incurred by me." It is a general rule of grammar that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Following these principles, we conclude that the release includes, among other things, all attendant care

related to the accident whenever incurred and all accident-related medical expenses incurred before November 4, 1998.

Further, in interpreting a contract, we read the agreement as a whole and attempt to apply the plain language of the contract itself. *Old Kent Bank*, *supra* at 63. The above conclusion is consistent with reading the release as a whole: the final two paragraphs both refer to an unconditional release except for future medical expenses. These two clauses would be inconsistent with only a partial release of other claims in the first paragraph. We find the release only susceptible to one interpretation: that it releases all accident-related claims by plaintiff against defendant except for medical expenses incurred on or after November 4, 1998. Therefore, it is not ambiguous. *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).

Plaintiff next argues that the consideration for the release was insufficient. We disagree. We generally do not inquire into the sufficiency of consideration. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002). A contract may only be cancelled for insufficient consideration if it is "so inadequate as to furnish convincing evidence of fraud" or "so grossly inadequate as to shock the conscience of the court." *Olson v Rasmussen*, 304 Mich 639, 643; 8 NW2d 668 (1943). Moreover, nominal consideration will not automatically invalidate a contract: "so long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant so that anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised." *General Motors Corp*, *supra* at 241 n 13, quoting 3 Williston, Contracts (4th ed), § 7:21, pp 383-386. Three thousand dollars is "valuable consideration that is worth far more than the legendary peppercorn." *Id*. at 241. Moreover, plaintiff received approximately $175,000 for his initial claim, in addition to the $3,000 for the release.

Plaintiff next argues that the release should be set aside on the ground of mutual mistake because the parties were unaware of the extent to which he would require attendant care. Under the facts of this case, we disagree. A releasor will not be bound to the terms of a release where both parties to the release believed the releasor was uninjured or had minor injuries, but where it was later discovered that the releasor's injuries were more serious. *Hall v Strom Constr Co*, 368 Mich 253, 257-259; 118 NW2d 281 (1962). Therefore, plaintiff would have a right to set aside the release if he had suffered an *injury* in the January 28, 1997 accident, but neither party was aware of the *injury* when the release was signed. Our Supreme Court expressly adopted a demarcation "between cases where the specific injury is known and the consequences thereof are either unknown or unexpected, and cases where the specific causative injury (usually internal and difficult of hurried diagnosis) is quite unknown." *Id*. at 258-259. Our Supreme Court emphasized that only the fact of injury was unknown, not the consequences. *Id*. at 255.

Indeed, the contractual defense of mutual mistake only applies "to a fact in existence at the time the contract is executed," i.e., "the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982). Here, the parties apparently were aware of all of plaintiff's injuries at the time the release was signed, less than two years after the accident. The fact that the parties were unaware that plaintiff's injuries would later result in a need for

attendant care is a later consequence, not a present fact on November 17, 1998. Therefore, there was no mutual mistake in signing the release.

Plaintiff next argues that attendant care is, or at least can be, a "medical expense" and therefore part of the exemption contained in the release. However, as set forth previously, "attendant care" is separated from "medical expenses" in the release at issue. Attendant care expenses are expressly released in their entirety. Plaintiff's argument is that attendant care can be one kind of medical expenses. Presuming that is true, "medical expenses" would constitute a general term encompassing, among other things, "attendant care." In construing contracts, general provisions will yield to specific provisions. *Haefele v Meijer, Inc*, 165 Mich App 485, 498; 418 NW2d 900 (1987). Accordingly, the waiver of all attendant care limits the exemption in the release for future medical expenses. Therefore, even if the attendant care expenses claimed by plaintiff are medical in nature, they are not recoverable.

Finally, "[i]t is a general and salutary rule that one repudiating or seeking to avoid a compromise settlement or release, and thereby revert to the original right of action, must place the other party in statu[s] quo, otherwise the very fact of payment, in consideration of the compromise or release, will likely operate as a confession of liability." *Kirl v Zinner*, 274 Mich 331, 335; 264 NW 391 (1936). This rule applies even if the release was made under duress or as a result of fraud. *Id*. Significantly, the tender must be made within a reasonable time of the release and before commencement of litigation. *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155, 176-177; 458 NW2d 56 (1990). Plaintiff's expressed willingness to make the tender in the future is irrelevant. Our Supreme Court has held that allowing a plaintiff a "grace period" in which to tender the consideration after filing a suit is impermissible and that "a plaintiff must, in all cases where a legal claim is raised in contravention of an agreement, tender the consideration recited in the agreement prior to or simultaneously with the filing of suit." *Id*. at 176-177. Because plaintiff failed to tender the $3,000 to defendant in this case "prior to or simultaneously with the filing of suit," his claim must be dismissed. *Id*. at 177-178.

In light of the above analysis, we need not consider defendant's alternative argument based on the one-year-back rule, MCL 500.3145(1).

We affirm.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello