

STATE OF MICHIGAN
COURT OF APPEALS

STEVE SIPORIN, Guardian of LEONARD
SERAFIN,

UNPUBLISHED
February 8, 2007

Plaintiff-Appellee,

v

No. 271580
Washtenaw Circuit Court
LC No. 05-000616-NF

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

After this Court originally denied defendant's application for leave to appeal in Docket No. 269727, the Supreme Court remanded the case to this Court for consideration as on leave granted. Defendant challenges a circuit court order denying in part its motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm in part, reverse in part, and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

In 2002, Leonard Serafin brought an action against defendant in circuit court for no-fault benefits stemming from a 1998 pedestrian-automobile accident. The parties agreed to arbitrate the matter, and the circuit court action was dismissed. The arbitration panel awarded plaintiff \$43,600. The award stated in part, "It is the further determination of this panel that the Broe Rehabilitation bill was for treatment/attendant care unrelated to the motor vehicle accident of May 10, 1998." On March 22, 2004, in exchange for \$43,600, Serafin signed a release, which states in part:

I intend this document to release all of my claims for medical benefits from the date of loss through January 22, 2004,¹ including all past, present and future treatment provided by Broe Rehabilitation accruing as a result of said accident.

¹ Defendant indicates that the arbitration award was issued in January 2004.

In June 2005, plaintiff, as guardian for Serafin, brought this action for personal protection insurance benefits and a declaration concerning the enforceability of the release. The crux of the dispute concerned expenses incurred for treatment by Broe Rehabilitation after the arbitration award. With respect to the validity of the release, plaintiff alleged that Serafin suffered “a condition of mental derangement” that prevented him from comprehending his legal rights.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). The trial court granted defendant’s motion with respect to expenses incurred more than one year before the action was filed, MCL 500.3145(1), and that ruling has not been challenged on appeal. The court held, however, that a jury should resolve plaintiff’s contention that the release was invalid because Serafin was mentally incompetent at the time he executed it.

On appeal, defendant argues that it was entitled to summary disposition with respect to expenses for treatment and attendant care provided by Broe Rehabilitation Services because the issue of the causal relationship between those services and the accident was previously determined in the arbitration award, which stated that Serafin’s treatment at Broe Rehabilitation was unrelated to the accident. According to defendant, the issue of the causal relationship between Serafin’s injuries in the 1998 accident and the services provided by Broe Rehabilitation was fully and fairly litigated in the arbitration, and the panel resolved the issue against Serafin. Therefore, defendant argues, plaintiff is collaterally estopped from relitigating that issue.

Collateral estoppel is a basis for summary disposition pursuant to MCR 2.116(C)(7). *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 36 n 5; 620 NW2d 657 (2000). This Court reviews de novo a trial court’s ruling on a motion for summary disposition. *Id.*, p 34 n 3. The applicability of collateral estoppel to bar a particular claim is also a question of law that this Court reviews de novo. *Id.*, p 34.

Collateral estoppel generally requires three elements. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). A question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. *Id.* The same parties must have had a full and fair opportunity to litigate the issue. *Id.* Mutuality of estoppel is generally required, but there are exceptions to the mutuality requirement. *Id.*, pp 683-684, 687-692. Collateral estoppel applies to factual determinations made during arbitration proceedings. *Cole v West Side Auto Employees Fed Credit Union*, 229 Mich App 639, 645; 583 NW2d 226 (1998).

On appeal, plaintiff attacks the validity of the arbitration proceeding and the award by claiming that Serafin was incompetent to enter into the arbitration agreement. However, plaintiff’s position is inconsistent with his position at oral argument on defendant’s motion, where he indicated that his challenge was directed solely to the validity of the release and not the arbitration agreement. Because a party may not take a position in the trial court and then seek redress in the appellate court based on a contrary position, *Living Alternatives for the Developmentally Disabled, Inc v Dep’t of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994), we decline to evaluate the validity of the arbitration agreement and award in the context of analyzing defendant’s collateral estoppel argument.

However, defendant’s motion did not establish that collateral estoppel applied. The arbitrators decided the issue of the causal connection between the 1998 accident and the services

provided by Broe Rehabilitation up to the date of the arbitration proceeding; they did not resolve the causal connection between the accident and services rendered after the arbitration. For collateral estoppel to apply, the ultimate issue to be determined in the subsequent action “must be identical, and not merely similar” to that involved in the first action. *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). Defendant did not present any evidence concerning the Broe Rehabilitation services that were evaluated by the arbitration panel or the services provided after the arbitration to establish that the causal connection between the post-arbitration services and the accident was actually litigated and decided by the arbitrators. Thus, defendant failed to show that it was entitled to judgment as a matter of law.

Defendant also argues that plaintiff’s failure to tender back the consideration he received for the release bars him from challenging its validity.

A plaintiff must tender the recited consideration before there is a right to repudiate a release. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 165; 458 NW2d 56 (1990). The only exceptions to the rule that are recognized in Michigan are a waiver of the duty by the defendant and fraud in the execution. *Id.* Neither exception is present here. Plaintiff attempts to distinguish *Stefanac* by arguing that there was no consideration paid for a release of future benefits. Like the instant plaintiff, however, the plaintiff in *Stefanac* argued that the release was invalid because it lacked consideration. See *id.*, p 164. The Court’s decision indicates that it rejected lack of consideration as an exception to the tender-back rule. *Id.*, pp 165, 167.

In the absence of any valid argument why plaintiff was not required to tender back the consideration Serafin received for the release before challenging its validity, defendant was entitled to partial summary disposition with respect to plaintiff’s challenge to the validity of the release. However, this ruling does not preclude plaintiff from challenging whether the expenses incurred for services at Broe Rehabilitation Services after January 22, 2004, are outside the scope of the release. Because the scope and applicability of the release to the claimed expenses has not been litigated or briefed by the parties, we remand for consideration of that issue.

In sum, the trial court’s order is reversed to the extent that it denied defendant partial summary disposition concerning plaintiff’s challenge to the validity of the release, but is otherwise affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio