# STATE OF MICHIGAN

# COURT OF APPEALS

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TODD DEVOY, a/k/a TODD MALINOWSKI, a minor, by his next friend, BOBBIE ANN DEVOY,

Plaintiff-Appellant,

v

HUTZEL HOSPITAL, a Michigan Non-Profit Corporation, DEXTER ARRINGTON, M.D., and YOLANDA RENFROE, M.D. jointly and severally,

Defendants-Appellants.

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UNPUBLISHED

December 6, 1996

No. 181868
LC No. 94-402118-NH

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiff Todd Devoy, a minor, by his next friend and mother, Bobbie Ann Devoy, appeals as of right an order granting defendants' motion to dismiss plaintiff's medical malpractice claim, and to compel arbitration of that claim pursuant to a June 16, 1992 arbitration agreement signed pursuant to the medical malpractice arbitration act (MMAA), MCL 600.5040 *et seq.*; MSA 27a.5040 *et seq.*, repealed by 1993 PA 78. We reverse.

Plaintiff's mother and defendant hospital's admitting interviewer signed the arbitration agreement under dispute. This agreement identified the patient whose claims plaintiff's mother agreed to submit to arbitration only as "Devoy Baby" and "Minor." Plaintiff's mother then proceeded to deliver twins, one of whom is plaintiff.

An evidentiary hearing was held below. See MCR 2.116(I)(3). Thus, on appeal, we will not set aside the trial court's factual findings unless they are clearly erroneous. MCR 2.613(C).

Plaintiff argues that the trial court erred in granting defendants' motion to dismiss and to compel arbitration. In this case, the trial court found that the arbitration agreement conformed to the statutory

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* Circuit judge, sitting on the Court of Appeals by assignment.

requirements of the MMAA. See, generally, *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). This finding is not clearly erroneous. *Id*. at 188. Thus, the agreement is presumed valid. *Id*. at 181. This presumption will stand unless rebutted by evidence demonstrating one or more defenses, such as coercion, mistake, duress or fraud. *Id*.

Plaintiff argues that the arbitration agreement purporting to bind "Devoy Baby" and "Minor" is invalid because of coercion or mutual mistake. We disagree. Plaintiff has failed to adequately address his defense of coercion on appeal. Thus, we deem this issue abandoned. *Singerman v Municipal Service Bureau, Inc*, 211 Mich App 678, 684; 536 NW2d 547 (1995). In addition, the trial court did not clearly err in finding that plaintiff failed to establish the defense of mutual mistake. Plaintiff alleges no mutual mistake, but rather alleges different mistakes committed by his mother and the admitting interviewer in executing the arbitration agreement. See *Gortney v Norfolk & W R Co*, 216 Mich App 535, 542; 549 NW2d 612 (1996). Moreover, the conduct alleged by plaintiff as constituting his mother's mistake does not constitute a mistake, but rather simply constitutes a failure to read the arbitration agreement she was signing on plaintiff's behalf. A party to a contract is precluded from avoiding the enforcement of a contract based upon his failure to read the contract. *Nieves v Bell Inds, Inc*, 204 Mich App 459, 463; 517 NW2d 235 (1994).

Plaintiff further argues that the terms "Devoy Baby" and "Minor" render the agreement ambiguous concerning which twin the parties intended to be covered by the agreement. Although plaintiff raised the issue of ambiguity below, the trial court did not specifically address this issue. Rather, after finding that the arbitration agreement conformed to the statutory requirements of the MMAA and rejecting plaintiff's defense of mutual mistake, the trial court stated as follows:

> And the fact that it says baby, as Ms Hobbs [defendants' counsel] points out, she knew she was in there for multiple births. I find that the arbitration agreement is valid, not only as to her but as to the two minor children.

Defendants rely on the principle that "arbitration clauses should be liberally construed with all doubts about the arbitrability of an issue to be resolved in favor of arbitration." *Ewald v Pontiac General Hosp*, 121 Mich App 793, 797; 329 NW2d 495 (1982). However, although compliance with the statutory requirements raises a presumption that the arbitration agreement in this case is valid, we believe that the relevant question is not "the arbitrability of a particular issue where a concededly binding contract between the parties to arbitrate exists. Instead we are confronted with the problem of whether an arbitration contract even exists with respect to" plaintiff. *Brown v Considine*, 108 Mich App 504, 510; 310 NW2d 441 (1981).

As stated in *Horn v Cooke*, 118 Mich App 740; 325 NW2d 558 (1982):

> An arbitration agreement is a contract whereby all the parties thereto agree to forego their rights to proceed with a court and, instead, to submit their disputes to a panel of arbiters. . . . The first inquiry into the arbitrability of a dispute is to determine whether an arbitration agreement has been reached by the parties. . . . No contract to

> arbitrate can arise except upon the expressed mutual assent of the parties. . . . A party cannot be required to arbitrate an issue he has not agree to submit to arbitration. . . .
>
> The determination of whether an arbitration contract exists is for the courts to decide, applying general contract principles. . . . [*Id*. at 744-745 (citations omitted).]

And, as stated in *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812; 428 NW2d 784 (1988):

> In order to form a valid contract, there must be a meeting of the minds on all the material facts. . . . A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [*Id*. at 818 (citations omitted).]

If contract language is clear and unambiguous, its construction is a question of law and the parties' intent will be ascertained according to the plain sense and meaning of the language. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309; 550 NW2d 228 (1996); *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991).

If contract language is subject to two or more reasonable interpretations or is inconsistent on its face, the contract is ambiguous. *Port Huron, supra*; *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). The fact that the parties dispute the meaning of a contract does not, in itself, establish an ambiguity. *Gortney, supra* at 540. The initial question whether contract language is ambiguous is a question of law.. *Port Huron, supra*. If the contract is ambiguous, factual development is necessary to determine the intent of the parties. *Id. Petovello, supra*.

In support of their argument that the arbitration agreement is binding on plaintiff, defendants rely on *McKinstry, supra*. However, unlike this case, the arbitration agreement at issue in *McKinstry* stated "Baby or babies McKinstry." Defendants also rely on *Crown v Shafadeh*, 157 Mich App 177; 403 NW2d 465 (1986), in which this Court held that an arbitration agreement was enforceable against the minor plaintiff even though the agreement did not specifically identify the minor because the minor's mother knew the form related to the minor and admitted signing the agreement on the minor's behalf, and the minor's name and patient number were stamped across the top of the agreement. However, in *Crown*, only one child was admitted to the hospital. Therefore, when the child's mother signed the arbitration agreement it could only have applied to this child.

In this case, the only language identifying the patient to be bound by the arbitration agreement was presented in the singular terms "Devoy baby" and "Minor." The agreement does not clearly imply or suggest that a reference to "babies" was omitted. Thus, we will not supply such a term by construction. *North West Michigan Construction, Inc v Stroud*, 185 Mich App 649, 653; 462 NW2d 804 (1990). Accordingly, on its face, the plain sense and meaning of the agreement's language is a reference to one baby. However, this language becomes susceptible to more than one interpretation, and, therefore, ambiguous, when applied to the facts of this case, i.e., the agreements refers to one Devoy baby but two Devoy babies were born.[1]

If the language of a contract is ambiguous, the court's duty is to look beyond the language of the contract to determine its meaning. *Stine v Continental Casualty Co*, 419 Mich 89, 112; 349 NW2d 127 (1984). Extrinsic evidence is admissible to clarify the meaning of the contract. *Id*. Ambiguity in a contract focuses and intensifies the court's duty to ascertain the intent of the parties in order that the agreement be carried out. *Id.* In no case is ambiguity, patent or latent, to result in a declaration that the contract is void. *Id*. Where a contract is prepared on behalf of one of the parties, any ambiguity therein will be strictly construed against that party. *Brown, supra* at 508. In this case, the arbitration agreement was a form document supplied by defendant hospital with the terms "Devoy baby" and "Minor" added by defendant hospital's admitting interviewer. Where the language contained in a contract raises doubt or uncertainty in construing a contractual provision, the parties' interpretation is given great, if not controlling weight. *North West, supra*. The promise must be interpreted in the sense in which the promisee knew or had reason to know that the promisor understood it. *Redinger v Standard Oil Co*, 6 Mich App 74, 79; 148 NW2d 225 (1967). A party will be held to that meaning which he knew the other party to the contract supposed the words to bear. *Ardis v Grand Rapids & I R Co*, 200 Mich 400, 414; 167 NW 5 (1918).

In this case, the record reveals that plaintiff's mother knew she was carrying twins as early as November 1991. Beginning in January 1992, plaintiff's mother visited defendant hospital several times before plaintiff's birth and signed arbitration agreements each time. These agreements were similar or identical to the agreement at issue in this case. However, the only patient identified on these agreements was plaintiff's mother. Plaintiff's mother did not recall signing on June 16, 1992, the arbitration agreement identifying a patient with the terms "Devoy baby" and "Minor."

Defendant hospital's admitting interviewer testified at the evidentiary hearing that she did not remember plaintiff's mother. The admitting interview testified that upon observing a pregnant patient her habit was to offer one arbitration agreement for the mother and one arbitration agreement for the baby. The admitting interviewer testified that when she received information either from the mother or the triage nurse that the mother was expecting twins she provided separate arbitration agreements for each of the unborn children. The admitting interviewer testified that it was not her habit to ask the mother whether the mother was expecting twins. The admitting interviewer testified that the arbitration agreement containing the terms "Devoy baby" and "Minor" concerned an arbitration agreement for one child. When asked whether "[a]s of June 16 of 1991 [sic 1992], had anyone at the hospital told you that by utilizing the term 'baby minor' or Baby Devoy/minor, that this was to bind twins who may be born from a mother who is admitted to the hospital?", the admitting interviewer answered "No, it would have – it would say twins. Twin A, Twin B."

In analyzing these facts, we note that, although plaintiff's mother did not recall signing the agreement on plaintiff's behalf, plaintiff's mother is presumed to have understood that she was signing an agreement to arbitrate any claims of a patient identified as "Devoy baby" and "Minor." *McKinstry, supra* at 184. Plaintiff's mother knew that she was pregnant with twins. However, the promise must be interpreted in the sense in which the promisee (the admitting interviewer) knew or had reason to know that the promisor (plaintiff's mother) understood the promise. *Redinger, supra*. In this case, the

admitting interviewer had no reason to know that plaintiff's mother understood the sense of the promise to arbitrate as other than a promise to arbitrate the claims of a single child.

In addition, a party will be held to that meaning which he knew the other party to the contract supposed the words to bear. *Ardis, supra*. In this case, although knowing that she was pregnant with twins, we cannot say that plaintiff's mother knew that the admitting interviewer supposed that the disputed language referred to multiple babies. Moreover, even if we make this assumption, and therefore hold plaintiff's mother to this meaning, the same cannot be said of the admitting interviewer, i.e., it cannot be said that the admitting interviewer knew that plaintiff's mother supposed the disputed language to refer to multiple babies. Thus, defendant hospital will not be held to this meaning. Moreover, the admitting interviewer's own interpretation of the agreement's language was that but a single baby was bound by the agreement.

Thus, in objectively viewing the express words of the parties as well as their visible acts, we can conclude only that the parties intended to submit the claims of *a baby* but not *this plaintiff* to arbitration. "The rule that there must be a meeting of the minds to form a contract involves a common understanding of the identities of the parties." 17A Am Jur 2d, Contracts, § 22, p 50. "To constitute a valid contract, the minds of the parties must have met on the identity of the persons with whom they are dealing." Am Jur, § 70, p 95.

Accordingly, we conclude that the trial court erred in enforcing the arbitration agreement and dismissing plaintiff's claim. Therefore, we reverse and remand. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Richard R. Lamb

[1] This case appears to presents an example of a latent ambiguity. See Black's Law Dictionary (6th ed), defining "latent ambiguity," in part, as follows:

> That species of uncertainty or ambiguity in an instrument which is not apparent from a reading of it but which is revealed when the terms of the instrument are applied or made operative; *e.g.* in a bill of lading goods are to be delivered at "Essex Railroad Wharf", and there are two such wharfs with the same name.

See also Calamari & Perillo, Contracts (3d ed), § 3-11, p 169, discussing as a good example of latent ambiguity a case in which the seller agreed to sell cotton to the buyer, with shipment to be made from Bombay on the ship Peerless. However, there were two ships named Peerless, one to sale from Bombay in October, the other in December. Our Supreme Court has noted that the distinction between latent and patent ambiguity is "fast fading and now observed by few courts." *Stine v Continental Casualty Co*, 419 Mich 89, 112, n 7; 349 NW2d 127 (1984).