COURT OF APPEALS DECISION DATED AND FILED

February 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2306

Cir. Ct. No. 01-CV-1456

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

WENDY E. OLSEN, AN INCOMPETENT BY HER LEGAL GUARDIAN SANDRA OLSEN, MARC OLSEN, A MINOR, AND DANIEL OLSEN, A MINOR, BY THEIR LEGAL GUARDIANS, BENJAMIN OLSEN AND SANDRA OLSEN,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Wendy Olsen and her sons, by their guardians, appeal an order awarding certain proceeds of a lawsuit to the Wisconsin Health

Care Liability Insurance Plan and the Wisconsin Patients Compensation Fund (collectively, the Fund). The dispositive issue is whether the Fund has an enforceable contractual right to the proceeds. We conclude that it does, and therefore affirm.

¶2 Wendy Olsen suffered permanent brain damage during the birth of her twin sons. She later sued the nurse who administered too much anesthesia during the birthing operation and the hospital where the birth took place. The Fund insured the defendants.

¶3 The suit was subsequently settled for 1.7 million dollars. The Olsens signed a "Pierringer Release and Assignment of Claim" releasing the defendants from any further liability, and assigned to the Fund all of the Olsens' claims against any other parties.

¶4 The Fund then sued Ohmeda Corporation, the maker of the anesthesia machine used when Wendy received the overdose. The Fund also joined the Olsens as co-plaintiffs. After the case transferred to federal court on diversity jurisdiction, the Olsens and the Fund endorsed a "litigation agreement," providing, in relevant part:

> In connection with a determination as to the net amount of any settlement or recovery by way of judgment and execution thereon, the "distributable amount" shall be that amount of money which is the gross recovery less all costs or disbursements of the action, including all payments of any sort to experts and consultants.
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> After deduction of the aforementioned costs, disbursements and other stated payments, the Fund-plaintiffs shall be entitled to the first $850,000 of the "distributable amount," which sum shall include the amount of any attorney's fees which the Fund-plaintiffs are obligated to pay to their attorneys.

> The next $850,000 of the "distributable amount" or lesser portion thereof, if the total distributable amount is less than $1,700,000, shall be apportioned between the Olsen-plaintiffs and the Fund-plaintiffs, with the Fund-plaintiffs receiving $850,000 or a lesser portion thereof, reduced by the percentage of causal negligence attributable to St. Luke's Memorial Hospital, Nancy Myers or any other agent or employee of the hospital or related parties thereto. The Olsen-plaintiffs shall receive the balance of the $850,000 or lesser portion thereof which was not distributable to the Fund-plaintiffs by reason of a finding or allocation of causal negligence as set forth in this paragraph. The "distributable amount(s)" under this paragraph shall include the amount of any attorney's fees which the respective plaintiffs are obligated to pay to their attorneys.
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> All "distributable amount(s)" above $1,700,000 compensatory damages, in addition to those provided for in paragraph c) [sic] above, shall be paid to the Olsen-plaintiffs.

¶5 The lawsuit against Ohmeda went to trial, where a jury found Ohmeda 55% responsible and the hospital and nurse anesthetist 45% responsible for Wendy's injury. The parties stipulated to damages of eight million dollars.

¶6 While motions after verdict were pending, Ohmeda settled with the Olsens for 2.5 million dollars. The settlement acknowledged that the Fund retained its claim against Ohmeda for up to 1.7 million dollars. The parties stipulated that if the court upheld the verdict, the Fund would receive judgment for $1,317,500 against Ohmeda, based on the litigation agreement and the jury's apportionment of negligence. The Olsens placed $1,317,500 from their Ohmeda settlement into escrow, in case the Fund failed to recover against Ohmeda and, instead, claimed the right to share in the Olsens' settlement under the litigation agreement.

¶7 The district court set aside the verdict and dismissed the complaint. The Fund ultimately lost on appeal, as well, leaving it with no recovery from Ohmeda.

¶8 As anticipated, the Fund claimed $850,000 from the escrowed sum, under the term of the litigation agreement entitling the Fund to the first $850,000, after costs, of any "distributable amount" recovered from Ohmeda. The Olsens resisted and, after arbitration failed to resolve the dispute, commenced this action for a judgment declaring their right to the $850,000 in dispute. The trial court declared that the money belonged to the Fund under the terms of the litigation agreement, resulting in this appeal.

¶9 The Fund's agreement with the Olsens plainly established its claim to an $850,000 share of the escrowed sum. If the terms of a contract are plain and unambiguous, we construe the contract as it stands and apply its literal meaning. *See* ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. Here, the Pierringer Release unequivocally assigned to the Fund all of the Olsens' claims against any other potential defendants, which undeniably included Ohmeda. In the ensuing litigation against Ohmeda, the parties agreed, in plain and unmistakable terms, that the Fund would receive the first $850,000, after costs are deducted, of any "distributable amount," from "any settlement." The Olsens fail to provide any persuasive reason to define "any settlement" in a manner that excludes the Olsens' settlement with Ohmeda. Although the Olsens rely on the terms of their agreement with Ohmeda to somehow void the litigation agreement, the Fund was not a party to that agreement. The modification of a contractual right is a nullity in respect to a non-consenting, or in this case non-participating, party. *See* ***Morley-Murphy Co. v. Van Vreede***, 223 Wis. 1, 6, 269 N.W. 664 (1936).

¶10 As best we can discern, the Olsens' main argument is as follows. The Fund paid the Olsens 1.7 million dollars for the Olsens' claim against Ohmeda Corporation and thereby acquired a claim that was worth up to, but no more than, 1.7 million dollars against Ohmeda Corporation. The Olsens acknowledge that they subsequently entered into a litigation agreement which, on its face, is an agreement to split "any settlement or recovery by way of judgment" and providing that the Fund would receive the first $850,000 of the "distributable amount." At the same time, the Olsens apparently contend that the litigation agreement logically does not apply to any of the amount the Olsens received in their settlement with Ohmeda Corporation because the litigation agreement applied only to the 1.7 million dollar claim owned by the Fund. In the Olsens' view, when the Fund chose to pursue its separate 1.7 million dollar claim against Ohmeda Corporation, rather than settle, the Fund gambled and lost its chance to recover any portion of the 1.7 million dollars covered by the litigation agreement.

¶11 The illogic of this argument is obvious. Nothing in the litigation agreement limits the source of the "distributable amount." Regardless whether the Olsens contemplated keeping their claim (any recovery exceeding 1.7 million dollars) against Ohmeda Corporation separate, the plain language of the litigation agreement does not support such a construction. Even if we have mischaracterized the Olsens' argument relating to the Fund's purchase of the claim, we cannot conceive how the prior agreement between the Olsens and the Fund undermines the plain language of the litigation agreement.

¶12 The Olsens also advance equitable and public policy reasons why the trial court should not have ruled for the Fund. We find no public policy or equitable grounds to void the parties' contracts. The Olsens freely bargained to assign the Fund their claim against Ohmeda, and freely entered into the litigation agreement to share any money recovered from Ohmeda.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).