COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP364 **Cir. Ct. No. 2008CV16389**

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

BRUCE REBHOLZ AND JANET REBHOLZ,

PLAINTIFFS-APPELLANTS,

UNITED HEALTHCARE C/O INGENIX SUBROGATION,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

MEDICARE/MEDICAID C/O U. W. ATTORNEY'S OFFICE,

INVOLUNTARY-PLAINTIFF,

V.

LAKELAND LEISURE CORPORATION,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

CLUB CAR AND TIZIANI GOLF CAR,

DEFENDANTS-RESPONDENTS-CROSS-RESPONDENTS,

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

DEFENDANT-CROSS-RESPONDENT,

V.

MARK DARKOW AND
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

THIRD-PARTY
DEFENDANTS-RESPONDENTS-CROSS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Bruce Rebholz and Janet Rebholz (collectively "Rebholz") appeal an order granting Club Car, Tiziani Golf Car, Lakeland Leisure Corporation, and State Farm Mutual Automobile Insurance Company ("State Farm Auto") summary judgment on all claims that Rebholz asserted against them. Rebholz argues that summary judgment was inappropriate in this case because—contrary to the trial court's determination—the release his guardian signed was not a general release discharging all potential tortfeasors from liability, but was instead only meant to release Darkow and State Farm Auto from liability. Specifically, Rebholz contends that: (1) extrinsic evidence of the parties' intent shows that the release was not a general release; and (2) the fact that he was not fully compensated for his injuries provides evidence of ambiguity in the release, giving rise to a jury question. We disagree. The release, by its clear, unambiguous language, is a general release discharging all potential tortfeasors from liability. We therefore affirm the trial court's order granting summary judgment.

I. BACKGROUND.

¶2 Rebholz's claim arises from an accident that occurred on May 20, 2007. On that date, Rebholz, who was riding as a passenger in a motorized golf cart driven by Darkow, was thrown from the cart and consequently sustained severe personal injuries.

¶3 Following the accident, Rebholz—along with his wife, Janet Rebholz, and his son, Aaron Rebholz—negotiated a settlement with Darkow's insurer, State Farm Auto. Pursuant to that settlement, Rebholz's guardian signed a release on his behalf discharging Darkow and State Farm Auto from liability. The release was entitled: "RELEASE – IN FULL OF ALL CLAIMS (EXCEPT THOSE EXPRESSLY RESERVED HEREIN)." (Some punctuation added.) This release provided, in pertinent part:

> In consideration of the payment of two hundred fifty thousand dollars … to us in hand paid by State Farm Mutual Automobile Insurance Company, except insofar as expressly stated in the reservation of rights appearing below, Bruce Rebholz (by his guardian), Janet Rebholz, and Aaron Rebholz (hereinafter "the undersigned") do hereby release and forever discharge Mark Darkow … and State Farm Mutual Auto Insurance Company, and their heirs, representatives, successors, assigns, and all other persons, firms, and corporations, from any and all liability, actions, causes of action, claims and demands known or unknown, upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained by Bruce Rebholz, as a result of a golf cart accident which occurred on or about the 20th day of May, 2007, at or near the Lakeland Campground in Milton, Wisconsin. This release is for, and relates only to, claims against Mark Darkow … and State Farm Mutual Auto Insurance Company, upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained by Bruce Rebholz, as a result of a golf cart accident which occurred on or about the 20th of day of May, 2007, at or near the Lakeland Campground in Milton, Wisconsin. This release does not relate to any claims

> against Mark Darkow … and State Farm Mutual Auto Insurance Company upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained directly by Aaron Rebholz, as a result of a golf cart accident which occurred on or about the 20th day of May, 2007, except that this release does release and forever discharge Aaron Rebholz's derivative claims, and Aaron Rebholz's bystander emotional distress claims … if any, as a result of a golf cart accident which occurred on or about the 20th day of May, 2007, at or near the Lakeland Campground in Milton, Wisconsin….
>
> Reservation of Rights (of the undersigned): This release expressly reserves any and all rights of the undersigned to claims, actions, causes of action, and demands against State Farm Mutual Auto Insurance Company, and its heirs, representatives, successors, assigns, associated companies, or affiliated companies, insofar as such claims, actions, causes of action, and demands related to coverage, if any, that may still exist under the State Farm Mutual Auto Insurance Company Policy … after exhaustion … of the $250,000.00 per person limit of third-party coverage afforded by such policy, and this release expressly reserves any and all rights of the undersigned to claims, actions, causes of action, and demands against State Farm Mutual Auto Insurance Company, and its heirs, representatives, successors, assigns, associated companies, or affiliated companies, insofar as such claims, actions, causes of action, and demands related to coverage, if any, that may still exist under any other policy issued by State Farm Mutual Auto Insurance Company, or its heirs, representatives, successors, assigns, associated companies, or affiliated companies….
>
> The undersigned hereby declare that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making, except as reserved above, a full and final compromise, adjustment, and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid incident.

(Some capitalization and punctuation omitted.) Subsequently, State Farm Auto issued a check for $250,000.00.

¶4 Nearly one year after executing the release, Rebholz sued Club Car, Lakeland Leisure, and Tiziani Golf Car, as well as Darkow's homeowner's insurer, State Farm Fire and Casualty Company.

¶5 All defendants answered the complaint and denied liability. Lakeland Leisure filed a third-party complaint against Darkow and State Farm Auto, seeking a declaratory judgment that the release signed by Rebholz was a general release, or if not, that Lakeland Leisure was entitled to contribution and/or indemnification from Darkow and State Farm Auto. After the third-party complaint was filed and answered, Tiziani Golf Car and Club Car filed a counterclaim and cross-claims against Rebholz and the third-party defendants seeking declaratory judgment that the release signed by Rebholz was a general release.

¶6 Additionally, Club Car, Tiziani Golf Car, Lakeland Leisure, Darkow and State Farm Auto all filed motions for summary judgment on the grounds that the release signed by Rebholz was a general release such that Rebholz was precluded from recovery against any other tortfeasors. State Farm Fire and Casualty Company moved for declaratory and summary judgment based on a policy exclusion.

¶7 The trial court granted the motions for summary judgment, and Rebholz now appeals.

II. ANALYSIS.

¶8 On appeal, Rebholz asks us to review the trial court's grant of summary judgment dismissing his claims against Club Car, Tiziani Golf Car, Lakeland Leisure, and State Farm Auto. We review *de novo* the grant or denial of

summary judgment, employing the same methodology as the circuit court. *See* ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We view the inferences drawn from the underlying facts in the light most favorable to the party opposing the motion—in this case, Rebholz. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. Thus, if there is any reasonable doubt regarding whether there exists a genuine issue of material fact, we must resolve that doubt in Rebholz's favor. *See* ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294.

¶9 This case requires that we analyze the language of the release, an instrument we construe as a contract. *See* ***Gielow v. Napiorkowski***, 2003 WI App 249, ¶14, 268 Wis. 2d 673, 673 N.W.2d 351; *see also* ***Fleming v. Threshermen's Mut. Ins. Co.***, 131 Wis. 2d 123, 132, 388 N.W.2d 908 (1986). Our goal in doing so "'is to ascertain the true intentions of the parties as expressed by the contractual language.'" *See* ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (citation omitted). "[T]he best indication of the parties' intent is the language of the [release] itself," ***id.***, which we construe according to its plain or ordinary meaning, *see* ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. Yet we consider not only the language of the release, *see* ***Brown v. Hammermill Paper Co.***, 88 Wis. 2d 224, 233-34, 276 N.W.2d 709 (1979) (requiring courts to consider a release in its entirety), but also "the surrounding conditions and circumstances," *see* ***id.*** at 234. For example, we may consider factors such as whether Rebholz has received "'full satisfaction, or that which the law must consider as such,'" in determining the nature and scope of

the release. *See* ***id.*** (citation omitted). In other words, the difference between the amount of damages Rebholz actually sustained and the sum paid by State Farm under the terms of the release is relevant to determine whether the amount received was intended to be and was in fact received in full satisfaction of the wrong. *See* ***id.*** We may also consider whether the release specifically named or referred to parties other than the original obligor and whether the consideration "was accepted as a compromise and final settlement of all claims between the parties rather than as full compensation for all injuries." *See* ***id.*** at 234-35; *see also* ***Krenz v. Medical Protective Co. of Fort Wayne, Indiana***, 57 Wis. 2d 387, 401-02, 204 N.W.2d 663 (1973).

¶10 Although the parties' intent and the scope of the release is generally a question for the trier of fact, *see* ***Brown***, 88 Wis. 2d at 234, summary judgment is appropriate "even when intent is at issue," "if all facts and reasonable inferences from the facts lead to only one conclusion," ***H & R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶34, 307 Wis. 2d 390, 745 N.W.2d 421. "If the [release] is unambiguous, our attempt to determine the parties' intent ends with the four corners of the [release], without consideration of extrinsic evidence." *See* ***Huml***, 293 Wis. 2d 169, ¶52. Only if the release is ambiguous—meaning that it is susceptible to more than one reasonable interpretation—may we look beyond the face of the release and consider extrinsic evidence. *See* ***Town Bank***, 330 Wis. 2d 340, ¶33.

¶11 Turning to the language of the release, we conclude—as the trial court did—that it is an unambiguous general release prohibiting Rebholz from bringing any claims regarding the May 20, 2007 accident against any and all potential tortfeasors, except those specifically mentioned in the reservation of rights provision.

¶12 For starters, the title of the release indicates that it is a release "in full" for "all claims," except those "expressly reserved" therein. (Emphasis added; capitalization omitted.) Additionally, the first sentence of the release clearly and unambiguously explains that the release applies to all potential tortfeasors, not just Darkow and State Farm Auto:

> In consideration of the payment of two hundred fifty thousand dollars … to us in hand paid by State Farm Mutual Automobile Insurance Company, except insofar as expressly stated in the reservations of rights appearing below, Bruce Rebholz (by his guardian), Janet Rebholz, and Aaron Rebholz (hereinafter "the undersigned") *do hereby release and forever discharge Mark Darkow … and State Farm Mutual Auto Insurance Company, and their heirs, representatives, successors, assigns, and all other persons, firms, and corporations, from any and all liability, actions, causes of action, claims and demands known or unknown*, upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained by Bruce Rebholz….

(Some capitalization omitted; emphasis added.)

¶13 While the second sentence of the release indicates that it relates only to Bruce Rebholz's claims against Darkow, his family, and State Farm Auto, we note that the third sentence explains that the release does not relate to any claims Aaron Rebholz may have against Darkow, his family, and State Farm Auto, except his "derivative" and bystander emotional distress claims:

> This release is for, and relates only to, claims against Mark Darkow … and State Farm Mutual Auto Insurance Company, upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained by *Bruce Rebholz* as a result of a golf cart accident which occurred on or about the 20th day of May, 2007, at or near the Lakeland Campground in Milton, Wisconsin. This release does not relate to any claims against Mark Darkow … and State Farm Mutual Auto Insurance Company upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter

> may be sustained directly by *Aaron Rebholz*, as a result of a golf cart accident which occurred on or about the 20th day of May, 2007, except that this release does release and forever discharge *Aaron Rebholz's* derivative claims, and *Aaron Rebholz's* bystander emotional distress claims … if any, as a result of a golf cart accident which occurred on or about the 20th day of May, 2007, at or near the Lakeland Campground in Milton, Wisconsin….

(Emphasis added.)

¶14 It is clear from the placement of these two sentences, one right after the other, their parallel structure, as well as the language of the release as a whole—which specifically proscribes claims against any other parties—that the second and third sentences were meant to be read together to highlight the fact that while Bruce Rebholz released any defendants from any claims arising out of the May 20, 2007 accident, his son, Aaron Rebholz, did not do so.

¶15 The language of the penultimate paragraph of the release further supports this conclusion:

> The undersigned hereby declare that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making, except as reserved above, a full and final compromise, adjustment, and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid incident.

This paragraph confirms that the release is a general release, meant to discharge all potential defendants, except those mentioned in the reservation of rights, from liability, and meant to compensate Rebholz fully for his injuries.

¶16 Moreover, the reservation of Rebholz's rights does not indicate that Rebholz may bring claims against any other defendants:

> Reservation of Rights (of the undersigned): This release expressly reserves any and all rights of the undersigned to claims, actions, causes of action, and demands against State Farm Mutual Auto Insurance Company, and its heirs, representatives, successors, assigns, associated companies, or affiliated companies, insofar as such claims, actions, causes of action, and demands related to coverage, if any, that may still exist under the State Farm Mutual Auto Insurance Company Policy … after exhaustion … of the $250,000.00 per person limit of third-party coverage afforded by such policy, and this release expressly reserves any and all rights of the undersigned to claims, actions, causes of action, and demands against State Farm Mutual Auto Insurance Company, and its heirs, representatives, successors, assigns, associated companies, or affiliated companies, insofar as such claims, actions, causes of action, and demands related to coverage, if any, that may still exist under any other policy issued by State Farm Mutual Auto Insurance Company, or its heirs, representatives, successors, assigns, associated companies, or affiliated companies….

Instead, it limits Rebholz to bringing further claims only against State Farm Auto in the event that any claims against State Farm Auto still exist—either after the policy in question has been exhausted or under any other State Farm Auto policy.

¶17 Furthermore, we note that the language of this release does not contain any of the components that would indicate that this is anything other than a general release.

¶18 For example, the release is not a ***Pierringer*** release. A ***Pierringer*** release satisfies "that portion of the plaintiff's cause of action for which the settling joint tortfeasor is responsible" while simultaneously "reserving the balance of the plaintiff's cause of action against a nonsettling joint tortfeasor." ***Imark Indus., Inc. v. Arthur Young & Co.***, 148 Wis. 2d 605, 621, 436 N.W.2d 311 (1989); ***Jackson v. Ozaukee Cnty.***, 111 Wis. 2d 462, 465, 331 N.W.2d 338 (1983); ***Pierringer v. Hoger***, 21 Wis. 2d 182, 188-89, 124 N.W.2d 106 (1963).

¶19 "[T]he salient feature of the ***Pierringer*** release is that it insulates the settling defendant from any possible liability for contribution, and it protects the nonsettling defendant from the possibility of being liable for more than its just share, *i.e.*, more than the obligation imposed as the proportional result of the nonsettling defendant's own negligence." ***Jackson***, 111 Wis. 2d at 465-66. In order to constitute a ***Pierringer*** release, the following language must be present: (1) the releasing party releases only that portion of the claim for damages attributable to the settling tortfeasor; (2) the releasing party will assume or satisfy that portion of the liability that is determined to be the responsibility of the settling joint tortfeasor; and (3) the releasing party is reserving rights to pursue other non-settling tortfeasors, and an assumption by the plaintiff or the contribution claims of the non-settling tortfeasors against the settling tortfeasors. ***Jackson***, 111 Wis. 2d at 465; ***Pierringer***, 21 Wis. 2d at 184-85. The release in the instant case is not a ***Pierringer*** release because: (1) it does not release only a portion of Rebholz's claim, but instead releases all tortfeasors "in full" (capitalization omitted); (2) it contains no language whereby Rebholz assumes Darkow's and/or State Farm Auto's responsibility for his injuries; and (3) it does not reserve the right to pursue non-settling tortfeasors, but rather, it only reserves the right to pursue additional claims against State Farm Auto in two specific circumstances. Moreover, we note that in ***Pierringer***, the release at issue stated that "the settlement was a compromise of the plaintiff's claims which exceeded the consideration paid and the plaintiff and the respondents knew the respondents were not paying the full amount of the plaintiff's damages." ***Id.*** at 184. No such language is present in the release at issue here.

¶20 Similarly, the release is not a ***Loy*** release/covenant not to sue. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 416-17, 320 N.W.2d 175 (1982). A ***Loy***

release, or covenant not to sue, is not a satisfaction of merely a portion of a plaintiff's claim, but is instead an agreement to discharge the settling joint tortfeasor with a reservation of rights of the full cause of action against the nonsettling joint tortfeasors. ***Imark***, 148 Wis. 2d at 621-22; *see also* ***Loy***, 107 Wis. 2d at 420. In other words, a covenant not to sue does not provide that the plaintiff will assume or satisfy that portion of the liability that is determined to be the responsibility of the settling joint tortfeasors. *See* ***Imark***, 148 Wis. 2d at 622. The release in the instant case is not a covenant not to sue because, as noted above, it contains no reservations of rights regarding non-settling tortfeasors; it only reserves rights against one of the settling tortfeasors, State Farm Auto.

¶21 We are not persuaded by Rebholz's contention that the trial court erred in failing to consider extrinsic evidence that would have shown that Rebholz never intended for the release to be a general one because Rebholz has in fact pointed to no such evidence. For example, Rebholz notes that prior to its signing the release was modified several times by the parties' attorneys, but never explains how this information gives rise to even an inference that the parties intended the release to be anything other than what the plain, unambiguous language shows it to be—a general release. Additionally, Rebholz points to his attorney's argument at the summary judgment hearing as evidence that he never intended to release all potential tortfeasors from liability. But, as our supreme court has stated, an attorney's arguments are not evidence. *See* ***Merco Distrib. Corp. v. O & R Engines, Inc.***, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976). Indeed, we observe that, contrary to Rebholz's argument that the trial court ignored a "plethora of evidence" of the parties' intent, not a single piece of evidence outside the release itself was offered to prove that the parties intended it to be anything other than what it was.

¶22 We are also not persuaded that "the issue of compensation" is proof of ambiguity in the release. Specifically, Rebholz argues that the fact that he was not fully compensated is evidence of ambiguity in the release regarding the parties' intent. While it is certainly true that we may consider factors such as whether the obligee has received "'full satisfaction, or that which the law must consider as such,'" in determining the nature and scope of the release, *see* ***Brown***, 88 Wis. 2d at 234 (citation omitted), Rebholz has set forth no evidence showing that the $250,000.00 he received in consideration for the release did not adequately compensate him for the damages he suffered. Because Rebholz has not sufficiently developed this argument, we will not consider it. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (court of appeals "may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record"); *see also* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (court will not develop a party's arguments).

¶23 In sum, the only conclusion that follows from our review of the release language in its entirety, as well as the absence of any extrinsic evidence to the contrary, is that it is a general release. Under the clear, unambiguous language of the release, Rebholz is precluded from bringing claims against all defendants except against State Farm Auto in those specific circumstances allowed by the reservation of rights. Therefore, we conclude that summary judgment against all defendants in this matter was proper.

¶24 As a final matter, we note that in affirming the trial court's grant of summary judgment, Lakeland Leisure's cross-appeal, which seeks reinstatement of Lakeland Leisure's claims for contribution and indemnity—has become moot.

We therefore need not address the parties' arguments which have been submitted in the event that the trial court's ruling would have been reversed. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (cases should be decided on narrowest possible ground).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.