

STATE OF MICHIGAN
COURT OF APPEALS

DOLORES Y. JOHNSON,

Plaintiff-Appellee,

v

HENRY FORD HOSPITAL, THOMAS FOX,
M.D., DR. TENDER, and M. LITTLE, L.P.N.,

Defendants-Appellants.

UNPUBLISHED

July 3, 2001

No. 219327

Wayne Circuit Court

LC No. 93-314869-NH

Before: Sawyer, P.J., and Griffin and O’Connell, JJ.

PER CURIAM.

Defendants appeal by right from the trial court’s entry of judgment on an arbitration award in this medical malpractice action. We affirm.

Defendants’ two claims of error will be addressed together. Plaintiff, who claims multiple personality disorder, alleged that defendants’ failure to render her unconscious during a colonoscopy caused her to regress into one of her alter personalities in order to cope with revived memories of her childhood’s alleged sexual abuse, and that her recovery took two years. Defendants essentially claim that the arbitrator’s factual finding that plaintiff’s alter personalities equate with her principal personality, despite finding that plaintiff’s principal personality had no memory of the procedure, was legal error requiring reversal because the arbitrator improperly relied on this Court’s prior opinion reversing the trial court’s grant of summary disposition for defendants. *Johnson v Henry Ford Hosp*, unpublished opinion per curiam of the Court of Appeals, issued 9/20/96 (Docket No. 181296).

We review only the legal conclusions, not factual findings, appearing on the face of an arbitration award to determine whether, but for the legal error, a substantially different award would have been made. *Detroit Automobile Inter-Ins Exchange v Gavin*, 416 Mich 407, 429, 443; 331 NW2d 418 (1982). Whether “the law of the case” applies, i.e. this Court’s summary disposition decision in the present case, constitutes a legal question reviewable de novo, *Ashker v Ford Motor Co*, 245 Mich App 1; ___ NW2d ___ (2001).

Nowhere on the face of the arbitration award does the arbitrator state that he is relying on this Court’s prior opinion for a legal conclusion. Rather, the arbitrator’s decision that plaintiff’s personalities equate to each other and experienced the colonoscopy was labeled a factual finding.

We are limited to a review of the arbitration award only, where, as here, the reasons stated for the award are in the issued arbitration opinion itself. *Gavin, supra* at 428-429; *Dohanyos v Detrex Corp*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). Moreover, because the error defendants point to in the award is a factual finding, it is not reviewable. *Gavin, supra* at 429, 443; *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999).

Even if this issue were a mixed question of law and fact, it would still be within the province of the arbitrator's sole discretion. *Gavin, supra* at 429. Defendants are actually attacking the arbitrator's refusal to weigh particular evidence on the existence and separation of plaintiff's personalities, but this was within the arbitrator's discretion as well. *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988). This Court may not review this arbitrator's award even if it is against the great weight of the evidence or unsupported by substantial evidence. *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986).

Underlying defendants' claim of error is their contention that this jurisdiction disapproves of repressed memory theory as evidence of personal injury in a tort cause of action. While our Supreme Court has held that repressed memories, as the sole evidence of a tort, cannot be used to toll the statute of limitations under the discovery rules and disability statutes, *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995), at least one case held that where there was other evidence of the abuse, repressed memory evidence was acceptable, *Meiers-Post v Schafer*, 170 Mich App 174; 427 NW2d 606 (1988). This is the case here, because plaintiff did not base her claim of an offensive touching on repressed memory evidence. It is undisputed that defendants performed the colonoscopy on plaintiff. Rather, plaintiff used her repressed memories as evidence of the trauma the colonoscopy inflicted on her conscious mind, and as an explanation why the procedure would cause emotional and mental trauma. Moreover, a witness also described the trauma plaintiff experienced while the procedure was being performed.

Under the structured standard of review applied to arbitration awards, it was within the arbitrator's powers to find as fact that plaintiff's personalities were equivalent for purposes of finding that plaintiff sustained a redressable injury.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell