

STATE OF MICHIGAN
COURT OF APPEALS

JEROME MASKEY and THERESA MASKEY,

Plaintiff–Appellants,

v

RICHARD A. BERG, M.D. and ST. CLAIR
VASCULAR ASSOCIATES, P.C.,

Defendant–Appellees.

UNPUBLISHED

December 13, 1996

No. 181869

LC No. 94-408252-NH

Before: Jansen, P. J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order confirming the arbitration panel’s dismissal of plaintiff’s claims on the basis that the limitations period had expired in this medical malpractice action. We affirm.

On January 24, 1989, plaintiff Jerome Maskey, (Maskey) underwent an aortofemoral by-pass graft which was performed by defendant, Dr. Berg, and allegedly, due to negligence, resulted in Maskey’s permanent paraplegia. Additional acts of negligence allegedly occurred as late as February 2, 1989. On January 22, 1991, plaintiffs filed a complaint in pro per against defendants in the Wayne County Circuit Court, docket no. 91-101730. On February 19, 1992, defendants filed a motion for summary disposition “and/or to compel arbitration” claiming that Maskey signed an arbitration agreement binding him to arbitration. On December 15, 1992, the court entered an order denying defendants’ motion because there was a fact question concerning whether an arbitration booklet was provided to Maskey. A “mini” jury trial was held with respect to whether the agreement to arbitrate was enforceable. On July 20, 1993, the jury concluded that Maskey was provided with the requisite booklet, and therefore, the arbitration agreement was enforceable. On August 4, 1993, the court entered an order dismissing plaintiffs’ cause of action.

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

On or after August 27, 1993,¹ plaintiffs filed a demand for arbitration. Defendants filed a motion to dismiss based on the statute of limitations, MCL 600.5838; MSA 27A.5838. Defendants argued that the demand for arbitration was not filed within the limitations period, even after considering the tolling during the pendency of the circuit court action. The arbitration panel granted dismissal on this basis. Plaintiff filed this action in circuit court to vacate or modify the opinion of the arbitrators. Ultimately, the court entered an order affirming the arbitrator's decision.

On appeal, plaintiffs contend that the trial judge improperly denied plaintiffs' request for relief from the decision of the arbitration panel. Plaintiffs' second issue on appeal, which we will address first, concerns the arbitrators' authority to determine that plaintiffs' claims were untimely. Plaintiffs assert that the issue of whether plaintiffs' demand for arbitration was barred should have been decided by the circuit court and that the arbitrators exceeded their authority in dismissing plaintiffs' claims. We disagree.

Pursuant to MCR 3.602(J), a court shall vacate an arbitration award if, among other reasons, the arbitrators exceeded their powers. Arbitrators are deemed to have exceeded their authority whenever they act beyond the material terms of the contract from which they primarily draw their authority. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). The proper role of the court upon review is to examine whether the arbitrators have rendered an award which comports with the terms of the arbitration contract. *Id.* at 496-497.

The arbitration agreement in this case states in pertinent part as follows:

This agreement applies to my care during THIS hospital stay and/or emergency room visit and includes the hospital, its employees and its independent staff doctors and consultants who have also agreed to arbitrate.

* * *

Michigan laws and the rules of the American Arbitration Association will apply to all arbitration proceedings.

In *Nielsen v Barnett*, 440 Mich 1; 485 NW2d 666 (1992), the Supreme Court considered whether arbitrators exceeded their authority by determining that the plaintiffs' claims were untimely. As in this case, the arbitration agreement at issue in *Nielsen* did not explicitly address the arbitrators' authority to decide the timeliness of the claims. Nevertheless, the Court held:

The absence of a provision in the agreement explicitly authorizing the arbitrators to make a determination of timeliness is not fatal. Just as the arbitrators were authorized to determine whether the defendants owed a duty to the plaintiffs, whether the defendants breached the standard of care, whether any breach of the standard of care was a proximate result of the plaintiffs' injury, and the amount, if any, of the plaintiffs' damages, we believe that the broad grant of authority also empowered the arbitrators to determine whether, in the first instance, the plaintiffs' claim was stale. [*Id.* at 10.]

We discern no basis for distinguishing this case from the holding in *Nielsen*. Thus, we conclude that the arbitrators did not exceed their authority in addressing the timeliness of plaintiffs' claims.

Plaintiffs also argue that the arbitrators erred in determining that the claims were untimely. Where it clearly appears from the face of the award or in the reasons for the decision that the arbitrators through an error of law have been led to a wrong conclusion, and that, but for such error a substantially different award must have been made, the award and decision will be set aside. *Dohanyos v Detrex Corp (Aft Remand)*, 217 Mich App 171, 176; ___ NW2d ___ (1996). We agree with plaintiffs that pursuant to MCL 600.5856(1); MSA 27A.5856(1) the limitations period was tolled during the pendency of the circuit court action. However, the tolling ended when the order of dismissal was entered on August 4, 1993. Therefore, when plaintiffs filed their demand for arbitration at least twenty-three days later, the two-year period of limitation had expired. We reject plaintiffs' argument that the limitation period continued to be tolled during the twenty-one day period provided by court rules for filing a motion for new trial. Accordingly, we are not persuaded that the arbitrators erred in determining that plaintiffs' claims were untimely.

Plaintiffs also argue that the circuit court should have recognized "an 'equitable' tolling of the statute of limitations based on verbal notice to defense counsel that claimant would either appeal the circuit court's grant of summary disposition or proceed in arbitration." However, the court's authority to interfere with the decision of the arbitrators is very limited. MCR 3.602(J) and (K). Thus, the court did not have authority to vacate or modify the decision on the basis asserted by plaintiffs.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

¹ The demand for arbitration is dated August 27, 1993. The date that the demand was filed with the Arbitration Association is uncertain.