

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-577

Filed 21 February 2023

Rowan County, No. 20 CVS 1518

VICKI MEEKER ELLER, Plaintiff,

v.

KEVIN L. AUTEN, in his official capacity as the Sheriff of Rowan County and ROWAN COUNTY, TERESA MENSCHER HAUPT, and ROWAN COUNTY, Defendants.

Appeal by unnamed defendant from orders entered 18 February 2022 by Judge Nathaniel Poovey in Rowan County Superior Court. Heard in the Court of Appeals 25 January 2023.

Shelby, Pethel and Hudson, P.A., by Kathryn C. Setzer, for plaintiff-appellee.

Teague Rotenstreich Stanaland Fox, & Holt, PLLC, by Savannah E. Fox, Kara V. Bordman, and Steven B. Fox, for unnamed defendant-appellant Nationwide Mutual Insurance Company.

ARROWOOD, Judge.

Nationwide Mutual Insurance Company (“unnamed defendant”) appeals from the trial court’s orders denying their motion for summary judgment, granting summary judgment for Vicki Meeker Eller (“plaintiff”), and granting plaintiff’s

motion to modify the arbitration award. Unnamed defendant contends there is a genuine issue of fact as to whether the exclusivity provision of the Workers' Compensation Act applies, barring plaintiff's uninsured motorist benefits. Unnamed defendant further argues amending the arbitration award was improper, because the arbitrators were acting within their authority in deducting the Workers' Compensation lien from plaintiff's award. For the following reasons, we affirm.

I. Background

On 12 October 2017, plaintiff, an assistant to the Rowan County Register of Deeds, was walking to her car to leave for the day when she was struck by a vehicle as she was crossing the street. The vehicle that struck plaintiff was a Ford SUV, owned by Rowan County, and driven by Teresa Menscer Haupt ("defendant Haupt"), a Rowan County Sheriff's Office deputy. Defendant Haupt was on duty at the time of the accident. Plaintiff was taken by EMS to Novant Health. As a result of being struck by a vehicle, plaintiff suffered bodily injury.

On 20 November 2019, plaintiff entered into a settlement agreement with Rowan County, the North Carolina Association of County Commissioners, and Sedgwick Claims Management Insurance. The agreement settled the claims that resulted from the accident between the named parties, in exchange for a lump sum payment to plaintiff of \$16,000.00. The document further stated the settlement was "of all claims whatsoever under the North Carolina Workers' Compensation Act" and was "not an admission of liability."

On 14 September 2020, plaintiff filed this action against Kevin L. Auten (“defendant Auten”), in his official capacity as the Sheriff of Rowan County, Pennsylvania National Mutual Casualty Insurance Company, defendant Auten’s surety, defendant Haupt, and Rowan County. In this initial complaint, plaintiff alleged defendant Haupt was negligent, and defendant Auten was liable for defendant Haupt’s negligence under the theory of *respondeat superior*. Furthermore, plaintiff alleged the vehicle driven by defendant Haupt did not have “in force collectible liability insurance coverage,” meaning defendants “were uninsured motorists within the meaning of N.C. Gen. Stat. § 20-279.21(b)(3).” Plaintiff requested arbitration, “pursuant to the provisions of [p]laintiff’s uninsured motorist (UM) insurance coverage.”

The relevant portion of the uninsured motorist policy states:

If we and an insured do not agree:

1. Whether that insured is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle or underinsured motor vehicle; or
2. As to the amount of such damages; the insured may demand to settle the dispute by arbitration.

The following procedure will be used:

. . . .

4. The arbitrators will resolve the issues. *A written decision on which two arbitrators agree will be binding on the insured and us.*

(emphasis added)

Unnamed defendant answered on 19 October 2020, alleging the claims were “barred by the Exclusivity Provisions of the Worker[s] Compensation Act,” and demanding a jury trial. On 1 December 2020, plaintiff filed a motion to compel arbitration and a motion to stay further proceedings pending the arbitration. Plaintiff claimed her insurance coverage through unnamed defendant “included an agreement to arbitrate UM claims when demanded by the insured.” Thereafter, unnamed defendant filed a motion for summary judgment, alleging there was no genuine issue of material fact since plaintiff’s claims were “barred by the exclusivity provision of the North Carolina Workers[] Compensation Act[.]”

On 27 January 2021, plaintiff voluntarily dismissed the claims against Pennsylvania National Mutual Casualty Insurance Company without prejudice. On 15 February 2021, Judge Anna Mills Wagoner entered an order to compel arbitration and stay proceedings pending arbitration. Judge Mills also entered an order specifically addressing unnamed defendant’s motion for summary judgment, stating unnamed defendant could, after arbitration, “re-notice for hearing [their] Motion for Summary Judgment[.]”

The matter was heard before a panel of three arbitrators, one selected by plaintiff, one by defendant, and a third arbitrator selected by the other two. The panel was tasked with determining whether plaintiff was entitled to recover from the

unnamed defendant, her uninsured motorist carrier. This included the issue of whether her claim was barred by the Workers' Compensation Act exclusivity provision, and the amount of her damages.

Arbitration was conducted on 23 November 2021, and the arbitrators found the plaintiff was injured by the negligence of defendant and was therefore entitled to \$37,500.00. The day after the arbitration, plaintiff's attorney emailed Judge William Freeman ("Judge Freeman"), one of the arbitrators, asking if the arbitrators deducted the workers' compensation lien, which plaintiff claimed to have presented as evidence during the arbitration, from the award plaintiff received. Judge Freeman replied, stating they "did consider the lien and deducted it."

In response, plaintiff filed a motion to modify the award, or, in the alternative, to vacate the arbitration award and remand the matter. Furthermore, unnamed defendant filed a motion for summary judgment, again arguing that plaintiff's claim under their UM policy was barred by the exclusivity provision of the North Carolina Workers' Compensation Act. Both matters came on for a hearing on 10 February 2022 in Rowan County Superior Court, Judge Poovey presiding. Attorneys for unnamed defendant, plaintiff, and defendant Rowan County were present.

On 18 February 2022, the court entered orders granting plaintiff's motion to modify the arbitration award, denying unnamed defendant's motion for summary judgment, and granting summary judgment for plaintiff "solely on the issue of

whether [p]laintiff's claim [wa]s barred by the exclusive remedy provisions of the Workers' Compensation Act." On 2 March 2022, the arbitration panel filed an amended arbitration award, which stated, "[b]y a 2 to 1 decision," plaintiff was entitled to "recover the total sum of \$78,555.39, which amount represents the worker[s'] compensation lien of \$41,055.39 and an additional sum of \$37,500.00."

The amended award also addressed the role of the lien during the initial arbitration hearing. At the first hearing, Judge Freeman "did not discuss whether or not his position or number in value was before or after deducting the worker[s'] compensation lien[.]" arbitrator Adkins calculated the initial award value "after deducting the value of the worker[s'] compensation lien[.]" and arbitrator Burton "never stated" whether the value reflected the deduction of the arbitration award. However, two of the three arbitrators believed the initial award amount was "after having deducted the worker's compensation lien[.]" On 14 March 2022, unnamed defendant filed a notice of appeal.

II. Discussion

On appeal, unnamed defendant contends the trial court erred in granting summary judgment for plaintiff and in ordering the arbitration panel to amend its award. Specifically, unnamed defendant asserts they were entitled to summary judgment because plaintiff's claims were barred by the exclusivity provision of the Workers' Compensation Act and therefore plaintiff should have been precluded from receiving UM benefits. Furthermore, unnamed defendant argues that the trial court

erred in granting plaintiff's motion to modify the arbitration award since none of the statutory grounds for modification existed.

A. Summary Judgment

Unnamed defendant's first argument on appeal is that the trial court erred in denying their motion for summary judgment because plaintiff's claims were barred. We disagree.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). "We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (citations and quotation marks omitted). "[E]vidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577 (citation omitted).

Here, there is no genuine issue of material fact because whether the exclusivity

provision was applicable was among the issues to be determined by the arbitration panel. North Carolina has a “strong public policy that ‘supports upholding arbitration awards[,]’ ” as “[t]he purpose of placing a dispute into binding arbitration is so that it can be resolved expeditiously, inexpensively, and with finality.” *R.E.M. Constr., Inc. v. Cleveland Constr., Inc.*, ___ N.C. App. ___, 876 S.E.2d 851, 855, (citation omitted) (alteration in original), *disc. review denied*, ___ N.C. ___, 881 S.E.2d 318 (2022); *Dalenko v. Peden Gen. Contractors, Inc.*, 197 N.C. App. 115, 125, 676 S.E.2d 625, 632 (2009), *appeal dismissed and cert. denied*, 363 N.C. 801, 690 S.E.2d 534 (2010). Generally, facts at issue addressed in the arbitration award are binding, and arbitration awards can only be vacated on very limited grounds enumerated in our statutes. *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986) (“[J]udgment entered on an arbitration award is conclusive of all rights, questions, and facts in issue, as to the parties and their privies[.]”); *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 488-89, 606 S.E.2d 173, 175 (2004). “Accordingly, ‘if the dispute is within the scope of the arbitration agreement, then the court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists.’ ” *R.E.M. Constr., Inc.*, ___ N.C. App. at ___, 876 S.E.2d at 855 (citation and brackets omitted).

Here, no such grounds to vacate the award exist, nor does unnamed defendant argue any of these circumstances apply. Rather, unnamed defendant argues there is

a genuine issue of material fact as to the applicability of the exclusivity provision. We need not address whether the provision was applicable because the arbitration panel was specifically tasked with determining what damages, *if any*, the plaintiff was entitled to recover and resolving any issues related to the claim. Furthermore, such a determination was within the scope of the arbitration agreement in unnamed defendant's policy, which specifically stated the arbitrators would decide whether the insured was "legally entitled" to damages. Because the issue was within the scope of the arbitration agreement, and unnamed defendant has not presented any statutory grounds for vacating the award, we find unnamed defendant's motion for summary judgment was properly denied.

Even, *arguendo*, had the provision applied and the arbitrators incorrectly found otherwise, "an award may not be vacated merely because the arbitrator erred as to law or fact. Where an arbitrator makes such a mistake, it is the misfortune of the party." *Smith*, 167 N.C. App. at 489-90, 606 S.E.2d at 175-76 (citations and internal quotation marks omitted).

In this case, there is no genuine issue of material fact, because the arbitrators decided plaintiff was entitled to damages, and therefore, summary judgment on the issue of whether plaintiff's claims were barred was properly granted to plaintiff.

B. Arbitration Award

"It is well established that parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award." *Carolina Virginia Fashion*

Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 410-11, 255 S.E.2d 414, 417 (1979). However, “a trial court may modify an arbitration award only where the arbitrators make (1) a mathematical error, (2) an error relating to form, or (3) an error resulting from arbitrators’ exceeding their authority.” *Thompson v. Speller*, 256 N.C. App. 748, 750, 808 S.E.2d 608, 610 (2017) (citations omitted).

Although an arbitration award “is always open to attack on the ground that the arbitrators exceeded their” authority, there are very few instances in which our courts have encountered such a case. *Thomasville Chair Co. v. United Furniture Workers of Am.*, 233 N.C. 46, 48, 62 S.E.2d 535, 537 (1950); *Smith*, 167 N.C. App. at 490, 606 S.E.2d at 176 (citation omitted). In those rare occurrences, this Court has found “that an arbitrator exceeds his authority when he arbitrates *additional* claims and *matters not properly before him*.” *Howell v. Wilson*, 136 N.C. App. 827, 830, 526 S.E.2d 194, 196 (emphasis in original) (emphasis added), *disc. review denied*, 352 N.C. 418, 544 S.E.2d 244 (2000).

For example, in *G.L. Wilson Building Company v. Thorneburg Hosiery Company, Inc.*, this Court determined that arbitrators exceeded their authority in including counsel fees in the award. *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 687, 355 S.E.2d 815, 817, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987). This Court reasoned that although the arbitration agreement allowed for such an award, the statutes excluding counsel fees from an arbitration award and specifying the amount of such an award were controlling, and therefore

“the arbitrators had no authority to include such fees in the arbitration award.” *Id.* Thus, whether the arbitrators exceeded their authority in this case depends on the language of the statute.

The relevant portion of the statute reads:

The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that *said amount will be deducted by the court from any amount of damages awarded to the plaintiff.*

N.C. Gen. Stat. § 97-10.2(e) (2022) (emphasis added).

Here, when plaintiff inquired as to how the arbitrators came to the award amount, Judge Freeman stated the arbitrators “did consider the lien and deducted it.” Even when the arbitration panel had the opportunity to reconvene, two out of the three panel members stated the initial award sum was after deducting the lien. In its amended award, the panel found plaintiff was entitled to the initial award amount plus the amount of the lien in a “2 to 1 decision.” Even if the decision was not unanimous, unnamed defendant’s policy only requires a panel decision of two out of three arbitrators to be binding. Because issues related to the deduction of a lien is statutorily authorized for the court after an award has been granted, the arbitrators considered a matter not properly before them and therefore outside their authority.

Still, unnamed defendant further argues in their brief that they are not a “third

party” under N.C. Gen. Stat. § 97-10.2(a), and thus there is “no valid lien[.]” The relevant portion of the statute states:

The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the “third party.”

N.C. Gen. Stat. § 97-10.2(a). This Court has previously found that “under N.C. Gen. Stat. § 97-10.2, payments made by the UIM carrier as well as the tort-feasor are from a ‘third party[.]’ ” *Levasseur v. Lowery*, 139 N.C. App. 235, 238, 533 S.E.2d 511, 514, (citation omitted), *disc. review denied*, 352 N.C. 675, 545 S.E.2d 426 (2000), *and aff’d*, 353 N.C. 358, 543 S.E.2d 476 (2001). Therefore, unnamed defendant’s argument is without merit.

Since the authority to reduce plaintiff’s award by the amount of the lien was vested in the trial court by statute, the arbitrators were acting outside of their authority. Accordingly, the trial court did not err by granting plaintiff’s motion to amend the arbitration award.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).