

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

KIMBERLY WITHERS, INDIVIDUALLY)	
AND AS ADMINISTRATRIX OF THE)	
ESTATE OF ALAN J. WITHERS,)	CASE NO. 04 MA 39
DECEASED.)	
)	
PLAINTIFF-APPELLANT,)	
)	
- VS -)	O P I N I O N
)	
NATIONWIDE INSURANCE CO.,)	
et al.,)	
)	
DEFENDANTS-APPELLEES.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 97CV767.

JUDGMENT: Affirmed in part; Reversed in part and Remanded.

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: November 26, 2004

APPEARANCES:

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VUKOVICH, J.

{¶1} Plaintiff-appellant Kimberly Withers (hereinafter referred to as “Withers”) appeals from the Mahoning County Common Pleas Court’s decision that denied her Civ.R. 60(B) motion to vacate its previous judgment. The issue raised in this appeal is whether the trial court erred in denying the Civ.R. 60(B) motion. For the reasons stated below, the decision of the trial court is affirmed in part, reversed in part and remanded for further proceedings.

STATEMENT OF FACTS AND CASE

{¶2} On January 24, 1997, Withers filed a complaint “individually and as the Administratrix of the Estate of Alan J. Withers” against defendants-appellees Nationwide Insurance Company and Lincoln General Insurance Company. (01/24/97

Complaint). Alan Withers, Kimberly Withers' husband, died on January 14, 1996, in a vehicular accident in the state of Georgia. The complaint sounded in wrongful death; it stated that Withers, individually and as administratrix of her husband's estate, was entitled to underinsured motorist coverage under the Lincoln and Nationwide policies. She further requested \$10,000 in "Added Death Benefit"¹ under the Nationwide insurance policy. Answers and summary judgment motions were filed by the parties. Lincoln conceded that underinsured motorist coverage was available; however, there remained a dispute as to the amount.

{¶3} On December 31, 1997, the trial court signed a journal entry stating, "upon information of the parties, this case is settled and dismissed. Journal Entry to be furnished by counsel." A release was executed on January 20, 1998. The release stated that Withers, both "individually and as the Administratrix" of Alan Withers' estate settled the claims asserted against Lincoln for \$72,500. It went on to release Lincoln "from any and every claim, demand, right or cause of action for insurance coverage that could be pursued by her, her heirs, executors, administrators, successors, and assigns." (01/20/98 Release). Nationwide paid Withers' the \$10,000 "Added Death Benefit." A dismissal entry approved by Withers, Nationwide and Lincoln was signed and entered as an order by the trial court on February 3, 1998.

{¶4} On December 15, 2003, a hearing occurred in the probate court on the status of Alan Withers' estate. It appears that at this hearing, the probate court discovered that a settlement was reached on the wrongful death claim and that Withers never requested its approval prior to the settlement as is required by R.C. 2125.02(C). The probate court then issued a judgment entry dated December 18, 2003. It stated that Withers as the Administratrix was required to seek its approval for any wrongful death settlement, and since she did not seek approval, the trial court's dismissal of her wrongful death claim based upon the settlement is "of no consequence." It then stated, "The Estate thus has and shall pursue its chose in action for the wrongful death of the Decedent and report further to this Court." J.E. dated 12/18/03.

¹The "Added Death Benefit" stated that Nationwide will pay \$10,000 for any insured using an approved motor vehicle seat belt at the time of the accident.

{¶15} Thus, based upon the probate court's judgment on January 14, 2004, Withers filed a Civ.R. 60(B) motion to vacate the 12/31/97 and 02/03/98 journal entries. Nationwide and Lincoln both submitted motions in opposition to vacation. The trial court overruled Withers' motion on February 12, 2004. Withers timely appeals from that decision raising one assignment of error.

ASSIGNMENT OF ERROR

{¶16} "THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF'S MOTION TO VACATE."

{¶17} Withers argues that the trial court erred in denying her Civ.R. 60(B) motion to vacate the 12/31/97 and 02/03/98 journal entries. These journal entries dismiss the action against both Lincoln and Nationwide. On appeal, Withers' argument solely addressed Lincoln; no arguments are made as to Nationwide. However, given the nature of the case and the impact vacation may have on each party, Nationwide and Lincoln will be addressed separately.

LINCOLN

{¶18} It is axiomatic that a court is endowed with inherent power to vacate judgments rendered by it. Civ.R. 60; *First Natl. Bank of Dunkirk v. Smith* (1921), 102 Ohio St. 120. While courts may vacate voidable judgments upon motion of a party pursuant to Civ.R. 60(B), they also have inherent power to vacate their own void judgments without satisfying the requirements of Civ.R. 60(B). *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70; *In re Miller* (1986), 33 Ohio App.3d 224, 227.

{¶19} Before the trial court and this court, Withers' argument has been that she is entitled to relief from judgment pursuant to Civ.R. 60(B). This argument is based upon the presumption that the 12/31/97 and 02/03/98 journal entries were voidable. However, after reviewing the facts and the law, we find that this presumption is incorrect and that the 12/31/97 and 02/03/98 journal entries as they pertain to Lincoln are void.

{¶10} R.C. 2125.02(C) states that the personal representative appointed by the probate court may settle the wrongful death action with the consent of the probate court. This statute clearly mandates that the personal representative must obtain the probate court's consent to settle a wrongful death action. *Fosnight v. Esquivel* (1995),

106 Ohio App.3d 372, 375 (holding that the wrongful death settlement was not enforceable since the probate court's approval was neither obtained nor sought), citing *Matz v. Erie-Lackawanna RR. Co.* (1965), 2 Ohio App.2d 136, 141. This requirement is necessary because the probate court is charged with determining whether a settlement is "fair and equitable." *Stacy v. Nationwide Mut. Ins. Co.* (1998), 125 Ohio App.3d 658, 666. Without this determination, the probate court is unable to protect the beneficiaries of the estate and is unable to act as the superior guardian. Thus, R.C. 2125.02(C) confers exclusive jurisdiction solely on the probate court to approve settlements in wrongful death actions. *Comer v. Bench*, 2d Dist. No. 19229, 2003-Ohio-2821.

{¶11} Moreover, a wrongful death settlement is void when the probate court's approval is not sought or obtained. *Baltimore & Ohio RR. Co. v. Hottman* (1903), 1 Ohio CC(NS) 17, affirmed without opinion in *Baltimore & Ohio RR. Co. v. Hottman* (1904), 70 Ohio St. 475. See, *Fosnight*, 106 Ohio App.3d at 375 (wrongful death settlement not enforceable without the probate court's approval). While the *Baltimore* case may be dated, it is directly on point on this issue. In *Baltimore*, the wife of the deceased, who was named as the administratrix of her husband's estate, settled with the insurance company without the probate court's approval. In making this settlement, the wife signed a release both in her individual capacity and in her capacity as administratrix of the estate. *Id.* Later, the wife brought suit on behalf of her two minor children claiming damages for the wrongful death of their father. The appellate court, relying on the wrongful death statute, held that the settlement and release were void as to the children. *Id.* It stated that the statute conferred a qualified power to settle on the personal representative that could only be exercised by the consent of the probate court that appointed the personal representative. *Id.*

{¶12} In the instant matter, the probate court's approval was never sought or obtained. Thus, given that the probate court has exclusive jurisdiction to approve wrongful death settlements, the trial court did not have the authority to dismiss the case against Lincoln based upon the unapproved settlement. The 12/31/97 and 02/03/98 journal entries as they pertain to Lincoln are void and must be vacated; the requirements in Civ.R. 60(B) did not need to be met.

{¶13} This determination raises an issue as to the money that was already paid to Withers by Lincoln pursuant to the release and settlement contract. Considering that the judgment is void and unenforceable, equity dictates that Withers cannot retain the money and still pursue an action (otherwise she could obtain a windfall). Thus, the parties are left with two options. The first option is that the amount paid by Lincoln to Withers must be paid back. The second option is that the amount already paid could be used as an offset to any amount awarded by a trier of fact or to any settlement amount that is approved by the probate court.

NATIONWIDE

{¶14} As stated previously, Withers' arguments raised on appeal solely address Lincoln and do not mention Nationwide. Accordingly, for this reason alone, any error as to Nationwide is not properly before this court and the dismissal order as to it is upheld. Regardless, even if Withers' did argue that the trial court improperly denied her Civ.R. 60(B) motion as it related to Nationwide, her argument would still fail.

{¶15} Nationwide paid Withers the "Added Death Benefit" of \$10,000. The amount of the "Added Death Benefit" was pre-determined and not subject to negotiations. Thus, it was not a settlement and, as such, probate court approval was not required. Consequently, the judgment as to Nationwide is not void.

{¶16} Thus, our analysis turns to whether the trial court erred in denying the Civ.R. 60(B) as it pertained to Nationwide. "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. All three requirements must be satisfied before a Civ.R. 60(B) motion can be granted. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶17} Withers fails to establish that she is entitled to relief under Civ.R. 60(B). She is unable to meet the second prong of the three prong test. As to the second prong, Withers claims that she is entitled to relief pursuant to both Civ.R. 60(B)(4) and (5). Subsection (4) states that relief may be obtained when “the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.” Civ.R. 60(B)(4). Subsection (5) states that relief may be obtained for “any other reason justifying relief from the judgment.” Civ.R. 60(B)(5). Her argument, under both subsections is based upon R.C. 2125.02(C), the probate court judgment entry and the inequitableness of allowing the dismissal to stand.

{¶18} As aforementioned, the “Added Death Benefit” paid by Nationwide was not settlement. The amount of the benefit was predetermined and, as such, did not require a “fair and equitable” determination from the probate court. See *In re Estate of Alexander* (11993), 92 Ohio App.3d 190, 200. Thus, probate court approval was not required. Therefore, any argument that R.C. 2115.02(C) and the probate court’s subsequent order renders the trial court’s prior dismissal of Nationwide no longer equitable fails under both Civ.R. 60(B)(4) and (5).

{¶19} The trial court did not commit error by denying the Civ.R. 60(B) motion as to Nationwide. The dismissal judgment as to Nationwide must stand.

{¶20} For the foregoing reasons, the decision of the trial court is affirmed as to Nationwide, reversed as to Lincoln and remanded for further proceedings according to law and consistent with this Court’s opinion.

Waite, P.J., concurs.
DeGenaro, J., concurs.