STATE OF MICHIGAN

COURT OF APPEALS

SUSAN J. NADER, Individually and as Temporary Guardian and Special Conservator of MICHAEL J. NADER

Plaintiffs-Appellants,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
October 25, 1996

No. 177470
LC No. 93-306689

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Plaintiffs appeal as or right from an order of the circuit court granting summary disposition to defendant pursuant to MCR 2.116(C)(7) in this claim alleging the breach of a no-fault insurance contract. We reverse.

In January 1990, plaintiff, Michael J. Nader was involved in an automobile accident. Shortly thereafter, defendant began paying no-fault benefits. In January 1991, plaintiffs brought a breach of contract action against defendant in which they alleged that under their no-fault policy they were entitled to payment for 24-hour unskilled nursing care, wage loss benefits, replacement services, and other personal protection insurance benefits. That lawsuit was dismissed on March 16, 1992, pursuant to a voluntary dismissal. The stipulation to dismiss provided:

> I stipulate to the dismissal of this case with prejudice as to all parties. WITHOUT COSTS THROUGH March 9, 1992.

The order of dismissal provided:

> IT IS ORDERED that this case is dismissed with prejudice. Conditions, if any: w/o costs as to either party through March 9, 1992.

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

After the order of dismissal was entered, defendant continued paying the same no-fault benefits that it had previously paid. These payments continued until June 29, 1992, when defendant notified plaintiffs by mail that it was terminating home care benefits.

In March, 1993, plaintiffs filed the current breach of contract lawsuit. Plaintiffs demanded payment for 24-hour unskilled nursing care, wage loss benefits, replacement services, and other personal protection insurance benefits due after March 9, 1992. Defendant brought a motion for summary disposition, which the circuit court granted under MCR 2.116(C)(7). The court ruled that the voluntary dismissal of defendant's first lawsuit was res judicata as to plaintiffs' second lawsuit.

In reviewing a trial court's decision to grant summary disposition under MCR 2.116(C)(7), we accept as true a plaintiff's well-pleaded allegations and construe them most favorably to the plaintiff. The Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. Such a motion should not be granted unless no factual development could provide a basis for recovery. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993). See also *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994).

With respect to res judicata, a prior decision must have three attributes before it will preclude a subsequent claim. First, the prior case must involve a decision on the merits. Second, the issues must have been resolved in the first case either because they were actually litigated or because they might have been presented in the first action. Third, both actions must be between the same parties or their privies. *Moore v Wicks*, 184 Mich App 517, 519-520; 458 NW2d 653 (1990).

The dispute in this case does not involve a claim that an insured is entitled to additional benefits because his condition changed since he first litigated his claim. See, e.g., *Manley v DAIIE*, 425 Mich 140, 158-159; 388 NW2d 216 (1986). Rather, the dispute here involves the second prong of the res judicata test, i.e., whether the claims in the current lawsuit were resolved in the first case. This involves an interpretation of the March 16, 1992, order of dismissal.

Judgments entered pursuant to the agreement of the parties are in the nature of a contract. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994); *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). Thus, judgments are construed on the basis of contract interpretation principles. *Gramer, supra* at 125. Contractual language is interpreted according to the intent of the parties. Where the language of a contract is unambiguous and unequivocal, its interpretation is a question of law and the intent of the parties is to be discerned from the words used in the instrument. In such a situation, the court may not look to extrinsic testimony or evidence to determine the intent of the parties. *Moore v Campbell Foundry*, 142 Mich App 363, 367; 369 NW2d 904 (1985).

Plaintiffs argue that the order that dismissed the first lawsuit is not res judicata as to the current lawsuit because in the first lawsuit they asserted only a "narrow claim" for 24-hour unskilled nursing benefits, and not a claim for the broader benefits sought in the current lawsuit. We disagree.

The initial complaint was drafted broadly and the order of dismissal clearly states that the parties intended the dismissal to apply to all claims brought, not just to plaintiffs' claim for 24-hour unskilled nursing care benefits. Nevertheless, we find that summary disposition was improperly granted. If this were not a no-fault case, we would be inclined to defendant's view. However, the Legislature has indicated that certain no-fault benefits are payable only as the loss accrues or the expense is incurred. MCL 500.3142; MSA 24.13142, MCL 500.3110(4); MSA 24.13110(4). Thus, under the no-fault act it is contemplated that there will be an ongoing relationship between the insured and the insurance company. This is not to say that future no-fault benefits can be waived in a settlement, but any such waiver must be specific. *Lewis v Aetna Casualty Co*, 109 Mich App 136, 138-140; 311 NW2d 317 (1981). In *Lewis*, the plaintiff signed a release that specifically mentioned the settlement of "future claims." The order of dismissal in this case however does not indicate that future claims were considered. This lack of specificity take this case out of the rule established in *Lewis*. Further the fact that defendant continued to make no-fault payments after entry of the order of dismissal for some time also supports this conclusion.

We further note that defendant's initial letter that cut off payment of benefits did not cite the order of dismissal as justifying its action. See *Martinek v Firemen's Ins Co*, 247 Mich 188, 191; 225 NW 527 (1929).

We reverse the trial court's order and reinstate plaintiffs' claim with reference to no-fault benefits allegedly incurred after March 9, 1992. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka