STATE OF MICHIGAN

COURT OF APPEALS

REBECCA A. PITSCH, Plaintiff-Appellee,	UNPUBLISHED March 1, 2011
v	No. 295485 Kent Circuit Court
CITIZENS INSURANCE COMPANY, Defendant-Appellant.	LC No. 08-011382-CK

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order entering a consent judgment after the court denied defendant's motion for summary disposition. At issue is the scope of a release signed by plaintiff in 1994 regarding an automobile accident that occurred in 1992. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

After the accident, plaintiff settled her third-party negligence claim against the driver of the vehicle, Jennifer DeWitt, and the vehicle's owners, Leon and Jolynn Bekius, for their American States Insurance policy limit of $50,000. In connection with the settlement, plaintiff signed a release. The relevant language in the release states:

> . . . I/we the undersigned, . . . have released and discharged . . . the said JENNIFER DE WITT, LEON AND JOLYNN BEKIUS heirs, executors, administrators, insurers, successors and assigns, of and from any and all liability, claims, demands, controversies, damages, actions and causes of actions on account of personal injuries and any and all other loss and damage of every kind and nature . . . resulting to the undersigned from [the] accident . . . and of and from all liability, claims, judgments, demands, controversies, agreements, damages, actions, and causes of action whatsoever, either in law or equity against any other persons, firms or corporations which the undersigned, their heirs, executors, administrators, successors and assigns, can, shall or may have . . . resulting from the accidents . . . and from the beginning of the world to the day of these presents.

After signing this release, plaintiff initiated a series of lawsuits against her own insurer, defendant, for first-party benefits it failed to pay. According to plaintiff, each of these lawsuits was settled after case evaluation, with defendant agreeing to pay disputed first-party benefits.

Defendant did not argue during any of this litigation that the above-quoted release operated to release it from liability for first-party benefits. Nor did defendant raise the issue of release in its answer to plaintiff's instant lawsuit. Defendant first raised the matter in its motion for summary disposition.

The trial court disagreed that the 1994 release acted to release plaintiff's first-party claims against defendant, finding that the release was "a settlement involving third party issues. This is not a third party case, it's a first party case, and so I believe it's separable." The court additionally found that collateral estoppel "justifiably would be a separate basis to deny summary disposition in this regard, since we're dealing with the same subject matter, the same statutory scheme, and the same claim for recovery." The court summed up its reasons for denying the motion "based on my assessment that the release does not apply to the first party case, based on my assessment that the language of the release, even if it does apply, doesn't preclude this cause of action, and based upon my assessment independently to [sic] collateral estoppel would be a sufficient basis to deny the motion."

In this Court, defendant argues that the language in the release is identical in meaning to the release language in *Romska v Opper*, 234 Mich App 512, 514; 594 NW2d 853 (1999), and *Shay v Aldrich*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009 (Docket No. 282550).[1] The *Shay* Court held that a release of "all other persons" was to be construed as broadly as it was written, citing *Romska*, which employed similar broad language. *Id*., slip op at 4. Defendant also argues that collateral estoppel cannot apply to this case because the earlier suits were concluded by settlement and the pertinent issue was not actually litigated and decided.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When a court assesses a motion under MCR 2.116(C)(10), substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, and, to survive the motion, the nonmoving party must come forward with at least some evidentiary proof upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

We agree with plaintiff that the language in the release did not bar her suit. Even assuming, solely for purposes of argument, that *Shay* and *Romska* had remained good law, they are distinguishable. The language of the release at issue here, while broad in places, is not broad

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[1] We note that *Romska* was recently overruled and *Shay* was reversed. See *Shay v Aldrich*, 487 Mich 648; 790 NW2d 629 (2010). Because we find that the language in this case is not controlled by those cases, this occurrence has no bearing on our decision.

in its statement of *who* is being released, unlike the language in *Shay* and *Romska*. The release language at issue in *Shay* read:

> For the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($ 12,500.00) DOLLARS to me in hand paid by **Michigan Municipal Liability and Property Pool** do for ourselves, executors, administrators, successors and assigns, discharge, **ALLEN PARK POLICE OFFICER** [Locklear/Allbright] **and Michigan Municipal Liability and Property Pool, insurer,** together with all other persons, firms and corporations, from any and all claims, demands and actions which I have now or may have arising out of any and all damages, expenses, and any loss or damage resulting from an incident occurring on September 8, 2004. [*Shay*, slip op at 2.]

In short, the signers in *Shay* "discharged . . . all other persons." Similarly, the language at issue in *Romska* read:

> I/we hereby release and discharge Boyan Daskal and Veliko Velikov, his or her successors and assigns, and all other parties, firms, or corporations who are or might be liable, from all claims of any kind or character which I/we have or might have against him/her or them, and especially because of all damages, losses or injuries to person or property, or both, whether developed or undeveloped, resulting or to result, directly or indirectly, from an accident which occurred on or about May 16, 1994 at [left blank] and I/we hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I/we may have against him/her or them by reason of the above-named damages, losses or injuries. [*Romska*, 234 Mich App at 514 (emphasis removed).]

Shortened to its fundamentals, this language serves to "release and discharge . . . all other parties, firms, or corporations who are or might be liable."

The language of the present release, similarly reduced, shows that plaintiff "released and discharged . . . [*the tortfeasors,*] *heirs, executors, administrators, insurers, successors and assigns*, of and from any and all liability . . . and from all liability . . . against any other persons, firms or corporations which the undersigned, their heirs, executors, administrators, successors and assigns, can, shall or may have . . . resulting from the accidents" (emphasis added). The only entities released are the tortfeasors and their heirs, executors, administrators, insurers, successors and assigns, not "any other persons." The "any other persons" language comes into play only in delineating the scope of the release from liability that is applicable to the tortfeasors and their heirs, executors, administrators, insurers, successors and assigns. Defendant is disingenuous in arguing in its appellate brief that the language at issue in this case is "identical" to that in *Romska* and *Opper*.

The language at issue here simply does not bar plaintiff's suit against defendant. Summary disposition was properly denied.[2]

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter

[2] We need not address defendant's argument that the trial court erred in applying collateral estoppel. Moreover, although this is not argued by the parties, we note that defendant failed to raise the release defense in its answer, as required by MCR 2.116(D)(2), and thus the defense was barred by MCR 2.116(D)(2) and waived under MCR 2.111(F)(2) and (3). *Kemerko Clawson LLC v RxIV Inc*, 269 Mich App 347, 351 n 2; 711 NW2d 801 (2005). Defendant never sought to amend its answer; the scheduling order required amendment to take place "no later than January 28, 2009." Defendant's motion was not filed until February 13, 2009. Therefore, affirmance is also proper based on defendant's failure to timely plead the defense of release.