STATE OF MICHIGAN

COURT OF APPEALS

CAROL J BURKARD, Plaintiff-Appellee,	UNPUBLISHED July 2, 2013
v	No. 311611 Washtenaw Circuit Court
WESTFIELD INSURANCE COMPANY, Defendant-Appellant.	LC No. 07-001348-NF

Before: OWENS, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order reinstating the case and granting summary disposition to plaintiff in this action under the no-fault act. For the reasons set forth below, we reverse and remand for an entry of summary disposition in favor of defendant.

I. BASIC FACTS

On October 29, 2003, plaintiff suffered an automobile accident causing her a variety of injuries. The most serious injury plaintiff suffered was the loss of her right leg. At the time of the accident, defendant was plaintiff's insurer.

On January 3, 2006, plaintiff filed a complaint against defendant, seeking no-fault benefits she claimed defendant had denied. On October 6, 2006, plaintiff answered interrogatories; in response to an interrogatory regarding expenses incurred as a result of the accident, plaintiff responded that her expenses included, inter alia, a "[m]odified [a]ccessible [v]an." On January 25, 2007, plaintiff submitted her case evaluation summary. In it, plaintiff asserted, inter alia, that "[a] claim has been made for an accessible van, which costs $40,000.00." During the course of litigation, plaintiff also produced a February 3, 2006 doctor's prescription for a modified van, and cost estimates for the purchase of a modified van. One of the estimates obtained by plaintiff was an estimate for a 2005 Dodge/Chrysler van for approximately $44,000. Additionally, at her deposition, plaintiff testified that she sought from defendant money to pay for a van.

This lawsuit was resolved on July 30, 2007 by way of a settlement in which defendant agreed to pay plaintiff a total of $268,000. The settlement also included the following release provisions:

> [Plaintiff] does hereby forever release and discharge any and all claims, demands, actions, causes of action, and other rights which she may have or conceive herself to have against [defendant] that exist and/or are pending as of the date of the signing of this AGREEMENT, based upon or arising out of [the accident].
>
> This AGREEMENT does not prevent [plaintiff] from pursuing future claims, demands, actions, causes of action and other rights which arise from [the accident] that accrue and become due and/or pending after the signing of this AGREEMENT provided that the future claims, demands, actions, causes of actions and other rights were not part of, demanded in, or contemplated by the PENDING CLAIM.

On December 13, 2007, plaintiff filed a second lawsuit, alleging that the purchase of a van was not contemplated by the settlement agreement. Both parties moved for summary disposition. Plaintiff argued, among other things, that under *Proudfoot v State Farm Mut. Ins Co*., 469 Mich 476; 673 NW2d 739 (2003), plaintiff could not have submitted a claim for a vehicle reimbursement until she in fact purchased the vehicle, and because plaintiff never purchased the 2005 Dodge/Chrysler, money for that purchase could not be a no-fault claim. Accordingly, plaintiff argued, she "never had any 'claim' or 'cause of action' referenced in the [settlement], and her right to claim [the Dodge/Chrysler] could not have been waived . . . ." Plaintiff argued that her present claim for a van arose from a 2004 Ford Van, which she purchased *after* the settlement was entered and the settlement did not waive her right to recover funds for that purchase. Defendant argued that plaintiff had made requests for a van prior to the settlement and that the settlement funds included funds for the purchase of a van. The trial court agreed with plaintiff and granted summary disposition in her favor. When defendant sought to appeal the trial court's decision regarding summary disposition, the parties entered into a stipulated dismissal. The Supreme Court dismissed the case on December 3, 2009.

On January 6, 2012, plaintiff filed a motion to set aside the dismissal and reinstate her case. Plaintiff's motion asserted that at the time of the dismissal the parties did not agree whether plaintiff's claim for a van would survive the dismissal and that defendant's counsel had sent plaintiff's counsel a stipulated order reinstating the case contemporaneous with the dismissal. However, plaintiff's counsel never signed the stipulated order because he moved offices and the stipulated order was "lost in the shuffle" for two years. Over defendant's objections, the trial court granted plaintiff's motion to reinstate the case and reasserted that it was granting summary disposition in favor of plaintiff on the underlying lawsuit. This appeal followed.

II. STANDARDS OF REVIEW

Appellate courts review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCL 2.116(C)(7) permits summary disposition where a claim is barred by release.

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Id*. at 119 (citation omitted).]

By contrast:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 120 (citations omitted).]

MCR 2.116(I)(2) authorizes trial courts to enter summary disposition in favor of the non-movant "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment. . . ."

Motions to set aside a judgment and reinstate a case are governed by MCR 2.612(C). This Court reviews a trial court's decision whether to set aside a judgment and reinstate a case for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

Finally, the scope of the terms of a release is an issue of law, reviewed de novo on appeal. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

III. ANALYSIS

The sole issue before the trial court at the summary disposition phase was whether plaintiff released her claim for a modified van by signing the July 30, 2007 settlement agreement. The scope of a release is governed by the intent of the parties as expressed in the terms of the release. *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000). "If the text of the release is unambiguous, the parties' intention must be ascertained from the plain, ordinary meaning of the language of the release." *Id*. The language of the release is ambiguous only if it is reasonably susceptible to more than one interpretation. *Cole*, 241 Mich App at 13. That the parties disagree about the meaning of the release does not, in itself, establish ambiguity. *Id*. at 14.

The scope of the settlement is unambiguous. Plaintiff agreed to release "all claims, demands, actions, causes of action, and other rights" which she "may have or conceive herself to have" against defendant "that exist and/or are pending as of the date of the signing of" the release and settlement agreement, and that are "based upon or arising out of the" November 29, 2003 motor vehicle accident. "[T]here cannot be any broader classification than the word 'all,' and 'all' leaves room for no exceptions." *Shay v Aldrich*, 487 Mich 648, 660-61; 790 NW2d 629 (2010).

Both the trial court and plaintiff focused their analysis narrowly, only on the term "claim" used in the settlement agreement. The trial court concluded that plaintiff's desire for a van was not a "claim" pending at the time of the settlement, and therefore her desire for a van was not pending at the time of the settlement. However, the settlement agreement, by its own terms, applies to "all claims, demands, actions, causes of action, and other rights which she may have or conceive herself to have" at the time of the settlement. The dictionary defines "demand" as "to ask for with proper authority; claim as a right." Random House Webster's College Dictionary (2nd ed, 1997). Similarly, the term "right" is defined as "something that is due to anyone by just claim." Random House Webster's College Dictionary (2nd ed, 1997). In the instant case, plaintiff made numerous pre-settlement requests for money for a van. For example, plaintiff's responses to interrogatories made a request for money for a "[m]odified [a]ccessible [v]an." During the course of the litigation, plaintiff also produced a February 3, 2006 doctor's prescription for a modified van, and cost estimates for the purchase of a modified van. One of the estimates obtained by plaintiff was an estimate for a 2005 Dodge/Chrysler van for approximately $44,000. Indeed, in plaintiff's own case evaluation summary, plaintiff conceded that "a claim has been made for an accessible van, which costs $40,000.00." At her deposition, prior to the execution of the settlement, plaintiff testified that she sought payment for the van from defendant.

These pre-settlement actions are "demands" under the plain definition of the term; moreover, these requests were made due to plaintiff's belief that she had a contractual right to recover funds for the van consistent with the common definition of the term "right." Plaintiff made her demands before, and believed she had the right to recover funds for the van prior to, the settlement contract's execution. In light of the contract release's use of the term "all," plaintiff's demand for van funds and her belief that the contract entitled her to those funds, was discharged by her agreeing to the terms of the settlement agreement. Indeed, the record reflects that plaintiff "demand[ed]" or at minimum "conceive[d] herself to have " the "right[]" to a van before the settlement entered; accordingly, plaintiff's desire for a van was accounted for by the settlement agreement, and plaintiff waived her right to recover additional funds for a van as part of the settlement agreement.

Plaintiff argues that under *Proudfoot*, 469 Mich 476, an expense is only allowable after it has been incurred. Plaintiff notes that, in this case, she "did not incur the expense relating to the [van] until . . . three months *after* the [settlement] was executed." Accordingly, plaintiff argues that the van issue could not have been "pending" at the time of the settlement agreement. We disagree.

Proudfoot stands for the proposition that an insurer has no obligation to pay for an expense until it is in fact incurred. *Id*. at 484. However, the fact that plaintiff had not incurred

any expense in obtaining a van at the time she executed the settlement is irrelevant to whether she had "claims, demands, actions, causes of action, and other rights" pending at the time of that settlement. As the Court noted in *Proudfoot*, "a trial court may enter 'a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed[, but s]uch a declaration does not obligate a no-fault insurer to pay for an expense until it is actually incurred." *Id*. (alterations in original). In short, an insured's "claims, demands, actions, causes of action, and other rights" precede the insurer's obligation to pay. In other words, when an insurer is *obligated* to pay is a concept distinct from when an insurer *may choose* to pay in the form of a settlement. In the instant case, defendant chose to pay a settlement. The settlement amount included funds for "all claims, demands, actions, causes of action, and other rights which [plaintiff] may have or conceive herself to have" at the time of the settlement. As explained, the record clearly establishes that prior to the execution of the settlement plaintiff either, in fact, made demands for a van, or conceived herself to have a right to funds for the van.

Having concluded that summary disposition should have been granted to defendant rather than plaintiff in January, 2009, we need not consider whether the lawsuit was properly reinstated because there should have been no lawsuit left to reinstate. However, if we were to reach this issue, we would conclude that the trial court abused its discretion by reinstating the lawsuit. *Redding*, 214 Mich App at 643. This Court has previously recognized that one policy purpose behind the time limitations in MCR 2.612(C) is to preserve the finality of judgments. See *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994). Moreover, plaintiff offers no authority to establish a) that losing a document "in the shuffle" is a sufficient "other reason justifying" setting aside a judgment under MCR 2.612(C)(1)(f); or b) that filing the motion to reinstate two years after the judgment is "within a reasonable time" under MCR 2.612(C)(2), considering that plaintiff's counsel had the document to be signed during that entire time.

Reversed and remanded for entry of an order of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, as the prevailing party may tax costs under MCR 7.219(A).

/s/ Donald S. Owens
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra