# STATE OF MICHIGAN

# COURT OF APPEALS

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HEALTH CALL OF DETROIT a/k/a JADELLS, INC.,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

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UNPUBLISHED
December 22, 2009

Nos. 286353; 288009
Oakland Circuit Court
LC No. 2008-090757-CK

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff appeals as of right the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(6) (the rule of abatement) and (C)(7) (res judicata), and a subsequent order awarding sanctions and costs. Application of the rule of abatement is not in issue in this appeal.[1] We reverse the grant of summary disposition in part, reinstate plaintiff's claims, and remand.

The circuit court's determination of a motion for summary disposition is reviewed de novo, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004), as is the application of the doctrine of res judicata, *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229; 720 NW2d 756 (2006). When reviewing summary disposition granted under MCR 2.116(C)(7), "the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998).

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[1] MCR 2.116(C)(6) bars the bringing of a case while "[a]nother action . . . between the same parties involving the same claim" is pending in another court. The court below believed *HealthCall I* was pending before the Supreme Court at the time of its order. In fact, the Supreme Court had disposed of *HealthCall I* three days before the court below issued its order on May 30, 2008. See *HealthCall of Detroit, Inc v State Farm Mut Auto Ins Co*, 481 Mich 877; 748 NW2d 828 (2008).

The original litigation (*HealthCall I*) was a claim for the expenses of medical care and treatment under the no-fault insurance act, MCL 500.3101 *et seq.* The parties agreed to attend a facilitative mediation. At the conclusion of that facilitation a document entitled "Facilitation Settlement" was signed by counsel for each party and the facilitator, retired Judge Kaye Tertzag. It provided in pertinent part:

> The case was resolved by way of settlement as follows: That State Farm shall pay RN care at $49 for 1,944 hours or $54,864.00, and $23,000.00 for aide care outstanding from 7/23/04 – 10/31/05. The parties shall take testimony from BCBSM regarding periods 11/1/04 – 1/31/05 and no resolution of the inpatient portion of the bill relating to attendant care.

The final issue mentioned in the facilitation document, i.e. the one referenced as having "no resolution," was resolved by the trial court on cross motions for summary disposition and a final order was entered.

Some nine months later, plaintiff sought to reopen *HealthCall I* in the form of a motion to strike part of the opinion and order of the court. Plaintiff asserted that one of the issues had not been fully resolved by the facilitation or by the court. Specifically, plaintiff claimed that payment of certain benefits could not be determined until after the taking of the agreed-upon BCBSM deposition, that the deposition had been taken, and that the case needed to be reopened to determine liability for those payments. The trial court refused to reopen the case, but advised plaintiff's counsel that if defendant had violated the facilitation agreement that an action for breach of that agreement might be a proper action. Plaintiff unsuccessfully sought appellate relief.

Thereafter, plaintiff filed the instant litigation, which is a claim for breach of contract, promissory estoppel, and unjust enrichment. Plaintiff alleges that the facilitation settlement contained an agreement that defendant has violated. Specifically, plaintiff asserts that the portion of the facilitation settlement reading, "The parties shall take testimony from BCBSM regarding periods 11/1/04-1/31/05," means that the parties shall take the testimony, and if BCBSM indicates that it will not pay for the treatment in that period, then defendant will do so.[2]

To apply res judicata, three prerequisites must be met: "a prior decision on the merits; 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; and both actions must be between the same parties or their privies." *Sloan v Madison Hts*, 425 Mich 288, 295; 389 NW2d 418 (1986). Defendant had the burden of proving the applicability of res judicata to plaintiff's claim. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

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[2] Such liability would be based on the coordination of benefits provision of MCL 500.3109a, whereby the health insurer is primarily liable where the no-fault insurance and comprehensive health insurance coverages overlap. See, e.g., *John Hancock Prop & Cas Ins Cos v Blue Cross & Blue Shield of Michigan*, 437 Mich 368, 370-371; 471 NW2d 541 (1991).

The current litigation is not barred by res judicata because the prior and current claims are distinct. Although they both seek what seem to be the same payments, the payments arise out of separate (alleged) obligations. Plaintiff's belated claims in *HealthCall I* sought to determine liability for the payments based on the no-fault act because those claims had not been resolved through agreement of the parties or summary disposition. Plaintiff's claims in the instant litigation purport to seek to enforce the facilitation settlement. Further, the instant claims could not have been brought in *HealthCall I* because, taking the facts in the light most favorable to plaintiff, it was not apparent to plaintiff that defendant was breaching the settlement agreement until after the close of that case. Accordingly, res judicata was inapplicable and the trial court erred in granting summary disposition to defendant on that ground.

Further, we find no alternative grounds for affirmance because we conclude that there is an outstanding question of fact that must be resolved.[3] As noted above, the issue is the interpretation of the sentence: "The parties shall take testimony from BCBSM regarding periods 11/1/04-1/31/05." Plaintiff claims that this refers to costs for private duty nursing during that period, which defendant agreed to pay as part of the facilitation settlement, if BCBSM declined to pay them, and that the deposition was to determine BCBSM's coverage during this period. Defendant's brief asserts that it was simply a provision that depositions would be taken, without further obligation and does not provide a clear explanation of what defendant asserts the purpose for the depositions was despite the fact that defendant's counsel was present at the facilitation and signed the agreement. At oral argument, defendant's appellate counsel did not dispute that at the time of facilitation, the parties agreed defendant's responsibility for payment of the costs of private duty nursing during the subject period would be determined based, at least in part, upon the information obtained at the BCBSM deposition. He contended, however, that whether BCBSM was providing coverage was merely one outstanding issue and that if it was found that BCBSM did not provide coverage, defendant retained the right to pursue other defenses, such as causation.

Agreements settling pending lawsuits are contracts and are construed according to the legal principles regarding construction and interpretation of contracts. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written . . . ." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). We find that the second sentence, when read in context, is ambiguous. The facilitation agreement provides for a sum certain for one time period, for testimony to be taken from a nonparty regarding a second time period, and that there is no resolution on another claim. In that context, a reasonable person could conclude that there is an implied obligation to make further payment once the testimony is taken. This position disputes the "plain" language interpretation offered by defendant and renders the agreement ambiguous. Ambiguity creates a

[3] The parties argue over the application of MCR 2.507(G), which acts as a statute of frauds for consent judgments. The parties do not dispute that there is an enforceable contract here; the dispute is as to what the terms of that contract are. Accordingly, the statute of frauds is inapplicable.

fact question that must be resolved by the finder of fact, *Klapp v United Ins Group Agency*, 468 Mich 459, 469; 663 NW2d 447 (2003), which precludes summary disposition. Accordingly, we reverse the trial court's grant of summary disposition, reinstate plaintiff's breach of contract claim, and remand to the trial court for trial. On remand, "the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning. In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, the [finder of fact] is to consider relevant extrinsic evidence." *Id.*

On remand, therefore, we direct the trial court to determine the nature of the parties' agreement under the facilitation agreement, taking into consideration relevant extrinsic evidence and to allow the parties to fully litigate the merits of the issue of defendant's liability for payment for private duty nursing care between July 23, 2004 and October 31, 2005, within the confines of that agreement. In other words, if the trial court finds that the agreement was as plaintiff claims, then it shall determine defendant's liability based solely on whether the BCBSM policy provides coverage. If, on the other hand, the trial court finds that other defenses were not foreclosed by the agreement, then those defenses may be pursued.

Plaintiff also appeals the order of the trial court finding this action frivolous and imposing sanctions. The trial court concluded that the action was frivolous based on its belief that res judicata applied. In light of our conclusion that res judicata does not apply, we reverse the trial court's determination that plaintiff's claim was frivolous and reinstate plaintiff's complaint. Further, the stipulated order for payment of costs required payment only "if the decision is affirmed by the Court of Appeals." Because we did not affirm the grant of summary disposition, plaintiff is not required to pay the $3,500.

We reverse the trial court's grant of summary disposition, reinstate plaintiff's claims, and remand for additional proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff is entitled to costs. MCL 7.219(F).

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering