ATTORNEY FOR APPELLANT:

JOHN JOHNSTON
Johnston & Johnston
Wabash, Indiana

ATTORNEY FOR APPELLEE
INDIANA FARM BUREAU INS.:

DANE L. TUBERGEN
Hunt Suedhoff Kalamaros LLP
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

LARRY TIDMORE,

Appellant-Plaintiff,

vs.

LINN A. MACKEY and INDIANA FARM BUREAU INSURANCE,

Appellees-Defendants.

No. 27A04-1005-PL-323

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0902-PL-70

September 22, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Larry Tidmore appeals from the trial court's order granting summary judgment in favor of Indiana Farm Bureau Insurance (Farm Bureau) and Linn Mackey[1] on Tidmore's complaint for damages stemming from a vehicular accident. Specifically, Tidmore argues that there are genuine issues of material fact relating to the following disputes such that summary judgment is inappropriate: (1) Farm Bureau violated the Unfair Claims Settlement Practices Act[2]; (2) a Farm Bureau claims agent misrepresented the content of the release signed by Tidmore and his wife; (3) the release is ambiguous; and (4) the release is not supported by adequate consideration. Finding no error, we affirm.

FACTS

Tidmore and his wife, Rebecca, were involved in an accident in Marion when their van, which Tidmore was driving, was struck by a pickup truck being driven by Mackey. Tidmore believed that Mackey was at fault in the accident, learned that she was covered by an insurance policy issued by Farm Bureau, and contacted Farm Bureau representatives.

On January 7, 2008, Tidmore and Rebecca went to a Farm Bureau claim office, where they met with claim representative Beth Neubauer. Tidmore advised Neubauer that Rebecca had been injured and their van damaged in the accident; he also stated that

[1] Although the trial court's order granted summary judgment in favor of both Mackey and Farm Bureau, Tidmore's arguments on appeal relate only to Farm Bureau. Therefore, we summarily affirm the order insofar as it relates to Mackey.

[2] Ind. Code § 47-4-1-4.1

he had not sustained any injuries. Tidmore requested a settlement for the claimed damages.

Neubauer told Tidmore and Rebecca that Farm Bureau would pay them $3,800 for Rebecca's injuries and the damage to their van in exchange for a release. The Tidmores accepted the offer. Neubauer prepared a check for the agreed upon amount and a written release entitled "**FULL AND FINAL RELEASE OF ALL CLAIMS**[.]" Appellant's App. p. 48, 63. Because Tidmore had advised Neubauer that he was not injured, nothing was said about any theoretical injuries he may have sustained in the accident. Tidmore and Rebecca signed the release without first reading the document. They also accepted and deposited the check.

At some point after the Tidmores signed the release, Tidmore evidently determined that he had, in fact, sustained injuries in the accident. Therefore, on February 2, 2009, Tidmore filed a complaint against Mackey, seeking damages for those injuries. On July 2, 2009, Mackey moved to dismiss, citing the release signed by the Tidmores in support of her motion. On July 17, 2009, Tidmore filed an amended complaint naming Farm Bureau as an additional defendant. The trial court held a hearing on Mackey's motion and determined that it would require consideration of matters outside the pleadings, continuing the hearing for briefing and submission of evidence for summary judgment. On November 30, 2009, Farm Bureau filed a motion for summary judgment.

Following a March 10, 2010, hearing, the trial court granted summary judgment in favor of Mackey[3] and Farm Bureau on April 22, 2010. Tidmore now appeals.

DISCUSSION AND DECISION

Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the movant. Owens Corning, 754 N.E.2d at 909. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

I. Unfair Claims Settlement Practices Act

Tidmore first argues that Farm Bureau violated the Unfair Claims Settlement Practices Act by obtaining the release. In making this argument, however, Tidmore ignores section 18 of the Act, which provides as follows:

> This article does not create a cause of action other than an action by:
> (1) The commissioner to enforce his order; or
> (2) A person, as defined in section 1 of this chapter, to appeal an order of the commissioner.

In other words, the Act does not create a private right of action.

Furthermore, the Act does not conflict with the longstanding common law rule that "[t]here is no duty running from the insurer to the [third-party] claimant to settle a claim, nor is the claimant a third-party beneficiary of the duty owed the insured by the

[3] The trial court elected to treat Mackey's motion to dismiss as a motion for summary judgment.

insurer." Eichler v. Scott Pools, Inc., 513 N.E.2d 665, 667 (Ind. Ct. App. 1987). The Act does not give Tidmore standing to sue Farm Bureau for its handling of his claim against Mackey; therefore, we decline to reverse on this basis.

II. The Release

Tidmore next makes a number of arguments related to the release. First, he argues that Neubauer misrepresented the content of the release to the Tidmores before they signed it. He also argues that the release is ambiguous and not supported by adequate consideration.

A. Alleged Misrepresentation

A person who chooses not to read an agreement before signing it is not justified in relying on any misstatement uttered by the other party to the agreement, except under certain limited circumstances. Fultz v. Cox, 574 N.E.2d 956, 958 (Ind. Ct. App. 1991). Among to the exceptions to the general rule are fraud and misrepresentation. Id. To establish misrepresentation inducing a settlement, a claimant must prove that there was (1) a material representation of past or existing facts that (2) was false, (3) was made with knowledge or reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) proximately caused the injury complained of. Tru-Cal, Inc. v. Conrad Kacsik Instrument Sys., Inc., 905 N.E.2d 40, 45 (Ind. Ct. App. 2009), trans. denied; see also Siegel v. Williams, 818 N.E.2d 510, 515 (Ind. Ct. App. 2004) (holding that the essential elements of misrepresentation inducing a settlement are the same as the elements on any action for fraud).

Here, in his affidavit, Tidmore attests as follows regarding the content of the communication between Neubauer and the Tidmores at the time they signed the release:

> 8. Beth Neubauer told me the release was for the damage to our van and my wife's injuries.
>
> 9. At no time did Beth Neubauer, or anyone else, say anything about settling for any injuries I received in the accident.
>
> 10. At no time did Beth Neubauer, or anyone else, say the release was a release for any injuries I received in the accident.
>
> 11. I believed Beth Neubauer when she told me the release was just for the damage to our van and my wife's injuries.
>
> 12. Because I believed what Beth Neubauer told me about what was in the release, I did not read it, and I signed the release without reading it.

Appellant's App. p. 64. Farm Bureau does not dispute these assertions, though it disputes the implication that Neubauer was attempting to hide the proverbial ball or in any way attempting to disguise the nature of the release.

It is undisputed that Tidmore told Neubauer that he sustained no injuries in the accident. In other words, it is undisputed that Neubauer did not know that there were any other injuries to be covered. This fact, alone, establishes that Neubauer was not acting with the intent to deceive the Tidmores. Similarly, it establishes that Neubauer was not acting with knowledge or reckless knowledge of the alleged falsity of her statement that the release covered only Rebecca's injuries and damage to the van.

Tidmore directs our attention to Fultz v. Cox in support of his argument. 574 N.E.2d 956 (Ind. Ct. App. 1991). In Fultz, Cox was injured in a one-car accident as a passenger in a car being driven by Fultz and insured by Farm Bureau Insurance. Cox met

with a claims representative, who offered $1,000 as a settlement, falsely or mistakenly representing that the payment would cover only her clothing and lost wages. Nothing was discussed regarding her medical costs. She signed the document without reading it. Later, she incurred additional medical expenses and claimed additional damages, but Farm Bureau refused to pay, citing the release signed by Cox. Thereafter, Cox sued Fultz and Farm Bureau. The trial court denied Farm Bureau's motion for summary judgment, finding a genuine issue of material fact as to whether Cox reasonably relied on the claims representative's misrepresentation regarding the content of the release. We affirmed on the same basis. Id. at 958-59.

We find Fultz to be distinguishable from the instant case. In Fultz, the claims representative was aware of Cox's injuries. Indeed, Cox's medical expenses up to that point in time had been paid under the medical payments provisions of the auto insurance policy. Thus, when the claims representative told Cox that the release covered her lost wages and property damage, it was in the larger context of her medical bills being paid for separately; thus, it could have been concluded that the representative's statement implied that compensation for any additional medical expenses would be made separately. Here, in contrast, Tidmore advised Neubauer that he had not been injured. Any statement made by Neubauer that the release was for Rebecca's injuries and damage to the van could not have been made with the implied understanding that compensation for Tidmore's injury would be separately made. Unlike in Fultz, there is simply no basis for us to conclude that Tidmore could have impliedly understood that his—at that time—nonexistent or undisclosed injuries would be treated separate and apart from the release.

Furthermore, the Tidmores must establish that they reasonably and rightfully relied upon Neubauer's representations regarding the content of the release. Initially, we observe that this was the first time these individuals had met; therefore, it is not as though there was a relationship of trust and confidence between the Tidmores and Neubauer. Additionally, we note that this court has explained that the rule barring enforcement of an agreement that was induced by fraud has various exceptions,

> "and one of them occurs when the representations, though false, relate to the legal effect of the instrument sued on. Every person is presumed to know the contents of the agreement which he signs, and has, therefore, no right to rely on the statements of the other party as to its legal effect."

Plymale v. Upright, 419 N.E.2d 756, 764 (Ind. Ct. App. 1981) (quoting Clem v. New Castle and Danville R.R. Co., 9 Ind. 488, 489 (1857)) (emphasis added by Plymale court). Therefore, even if we were to conclude solely for argument's sake that Neubauer's statement to the Tidmores that the release only covered Rebecca's injuries and damage to the van, it would not have been reasonable for Tidmore to rely on that statement inasmuch as it relates to the legal effect of the release.

We also note that the language and typeface of the release could not have been clearer regarding its all-encompassing nature:

FULL AND FINAL RELEASE OF ALL CLAIMS

> FOR THE SOLE CONSIDERATION of the payment to the undersigned(s) of the sum of [$3,800], the receipt and sufficiency of which is hereby acknowledged, the undersigned(s) . . . do(es) hereby **RELEASE AND FOREVER DISCHARGE** Linn Mackey, and any firm, corporation, personal representative, or successor identified in interest with the party **RELEASED**, from any and all claims, demands, damages, actions, causes of action, or suits of any

> kind or nature, in law or in equity, however arising, up to the date of this **FULL AND FINAL RELEASE OF ALL CLAIMS** and specifically for any injuries, known or unknown, to the person or to property, including any claim for loss of consortium, resulting or to result from an accident which occurred on or about the 4th day of January, 2008, [in Marion].
>
> The terms of this **FULL AND FINAL RELEASE OF ALL CLAIMS** have been completely read and are fully understood by the undersigned(s) . . . .
>
> The execution of this **FULL AND FINAL RELEASE OF ALL CLAIMS** is a voluntary act on the part of the undersigned(s). . . .
>
> ***
>
> This **FULL AND FINAL RELEASE OF ALL CLAIMS** is the **ENTIRE AGREEMENT** between the parties and the terms of this **RELEASE** are contractual and not a mere recital.

Appellant's App. p. 43 (all emphases original). Had Tidmore even cursorily glanced at this document, it would have been immediately obvious, given the repeated emphasis in all capital, bolded letters of the phrase "**FULL AND FINAL RELEASE OF ALL CLAIMS**," that the release was, in fact, just that—a full and final release of all claims. Given the repeated emphasis of this phrase in the document, we simply cannot conclude that it was reasonable for Tidmore to rely upon the so-called misrepresentation made by Neubauer. Therefore, the trial court properly concluded that the release should not be nullified for this reason.

B. Ambiguity

Tidmore next argues that the release is ambiguous. He first argues that it is ambiguous regarding to whom it applies. We disagree. It clearly covers the "undersigned(s)," which is a word that is repeated throughout the document, and

inasmuch as Tidmore and Rebecca both signed the document, it is readily apparent that the release applies to both of them.

Tidmore also argues that the release is ambiguous when it states that he and Rebecca were releasing all claims "for any injuries, known or unknown, to the person or to property," that arose from the accident. Appellant's App. p. 43. Tidmore argues that the use of the word "person," in a singular form, creates an ambiguity as to whether the release applies just to Rebecca's injuries or also to his own injuries. We disagree. It is evident, when reading the entire paragraph, that the word "person," as used in the phrase "injury to the person," is merely used to distinguish one form of injury—bodily injury—from another form of injury—property damage. In this context, "person" is not used for the purpose of identifying a particular person who has been injured. Therefore, we find no ambiguity on this basis.

C. Consideration

Finally, Tidmore argues that the release is not supported by adequate consideration because the consideration was only intended to cover the injuries to Rebecca and damage to the van. Thus, he argues that claims for his own injuries were released for no consideration. It is undisputed that Tidmore did, in fact, receive consideration for the release—$3,800. The release specifically states that it covers "any injuries, known or unknown[.]" Id. Tidmore offers no argument or evidence that $3,800 is inadequate consideration, he merely contends that the release applies only to Rebecca's injuries and damages to the van. We have already found herein, however, that the release plainly, clearly, and unambiguously covers all claims arising from the accident. We do not find

that the amount of consideration received by Tidmore for the release is so inadequate as to nullify the agreement.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.