NOT DESIGNATED FOR PUBLICATION

JAMES ROGERS **NO. 02-CA-626**

VERSUS

FIFTH CIRCUIT

BMW OF NORTH AMERICA, INC., PEAKE MOTOR COMPANY, INC., A/K/A PEAKE BMW, XYZ INSURANCE COMPANY, ABC INSURANCE COMPANY, WILLIAM ODENWALD and STATE FARM INSURANCE COMPANY

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NO. 560-172, DIVISION "M,"
HONORABLE HENRY G. SULLIVAN, JR., JUDGE PRESIDING

November 26, 2002

SUSAN M. CHEHARDY
JUDGE

Panel composed of Judges James L. Cannella,
Susan M. Chehardy, and Walter J. Rothschild.

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AFFIRMED.

This is a personal injury suit in which the plaintiff appeals the dismissal of his claims against two of the defendants on an exception of res judicata. We affirm.

On November 5, 1999 James Rogers was a passenger in his own 1997 BMW automobile, which was being driven by William Odenwald. They were traveling north on Interstate 55 in St. John the Baptist Parish when the BMW collided with the rear of a Chevrolet truck. The airbag failed to deploy and Rogers sustained serious injuries.

Rogers' automobile insurer was GEICO; Odenwald qualified as an omnibus insured under the GEICO policy.[1] On October 13, 2000, Rogers settled with GEICO and Odenwald in a document titled "Release in Full of All Claims."

Rogers then filed suit against Odenwald and Odenwald's liability insurer (State Farm Insurance Company). Plaintiff alleged that Odenwald was liable for various acts of omission and/or negligence in his driving.[2]

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[1] The GEICO policy defines as "insured" a person using the auto with the permission of the policyholder.

[2] Plaintiff also named as defendants various entities associated with the manufacture and/or the maintenance of the BMW automobile: the manufacturer, the dealer from which plaintiff had purchased his car, and their insurers. He made products liability claims and alleged that the BMW-related defendants were liable for negligence and lack of skill regarding the failure of the airbag system.

State Farm and Odenwald filed an exception of res judicata, asserting that they have no further liability to plaintiff because plaintiff released Odenwald without restriction in the settlement with GEICO. As a result, plaintiff's action against Odenwald is barred. Defendants contended that plaintiff cannot proceed against State Farm alone after release of its insured.

The trial court granted the exception. Plaintiff's motion for new trial was denied and he appealed.

On appeal plaintiff asserts (1) the trial judge committed manifest error in granting the exception of res judicata and in not granting a new hearing and/or new trial; (2) the trial judge erred in granting the exception of res judicata "without taking parol extrinsic evidence or testimony as to the intent of the parties in making of the release after being made aware that the scope of the release was in controversy or contested."

The release document contained the following verbiage:

> I/we, James Rogers, Releasor(s)... hereby remise, release, and forever discharge Geico William Odenwald Releasee(s), successors and assigns, *and/or his, her or their associates, heirs, executors and administrators, and all other persons, firms or corporations* of and from any and every claim, demand, right or cause of action, of whatever kind or nature, on account of or in any way growing out of any and all personal injuries and consequences thereof, including, but not limited to, all causes of action preserved by the wrongful death statute applicable, any loss of services and consortium, any injuries which may exist but which at this time are unknown and unanticipated and which may develop at some time in the future, all unforeseen developments arising from known injuries, and any and all property damage resulting or to result from an accident that occurred on or about the 5 day of November 1999, at or near I-55 St. John Parish La, and *especially all liability arising out of said accident* including, but not limited to, all liability for contribution and/or indemnity. AS A FURTHER CONSIDERATION FOR THE MAKING OF SAID SETTLEMENT AND PAYMENT, IT IS EXPRESSLY WARRANTED AND AGREED:

> (1) That I/we understand fully that this is a *final settlement and disposition of the disputes both as to the legal liability for said accident, casualty, or event and as to the nature and extent of the injury, illness, disease, and/or damage which I/we have ....*
>
> ...
>
> (3) That no promise, agreement, statement or representation not herein expressed has been made to or relied on by me/us and this release contains the entire agreement between the parties. [Italics added.]

Plaintiff argues he did not intend to release State Farm by releasing Odenwald. GEICO's policy was primary because it was the liability coverage on the vehicle, while Odenwald's liability policy through State Farm was excess coverage. Plaintiff asserts State Farm required that GEICO's liability limits be exhausted before State Farm would settle with plaintiff. At the same time, according to plaintiff, GEICO would not settle unless Odenwald was included in the release. Plaintiff contends that State Farm misled him into settling with GEICO on the understanding that State Farm's policy funds would become available after the settlement. Instead, after the GEICO settlement was confected and plaintiff filed suit, State Farm responded with its exception of res judicata.

Plaintiff contends the judgment should be reversed and the trial court should be ordered to hold a hearing on the intent of the parties in signing the release. He argues that parol or extrinsic evidence should be allowed to show intent and to show that the release was executed due to plaintiff's detrimental reliance upon the representation of State Farm.

Plaintiff also contends the release is ambiguous because there were other claims arising out of the accident, such as the claim for the defective airbag against the manufacturer of the car. Further, he argues that the defense of res judicata should have been personal to the insured, since State Farm was not a party to the release. Finally, he asserts that an obvious injustice has taken place because he

intended to release only the primary insurance carrier, but the excess carrier used the release to escape paying a legitimate claim after requiring settlement.

In response, State Farm asserts that its liability is premised on Odenwald's liability. That is, because plaintiff's dismissal of Odenwald was without reservation of any rights, the dismissal was a full release of all claims against him and he has no further liability to plaintiff. Hence, State Farm cannot be liable because there is no basis for independent liability against it as Odenwald's insurer.[3]

State Farm contends that the unambiguous release is the law between the parties and that parol evidence is not admissible to vary the terms of an unambiguous agreement. Defendant also points out that plaintiff never attempted to offer any extrinsic evidence, so the district court made no ruling on that issue.

"As a general rule, deferential standards of review apply to factual and other trial determinations, while determinations of law are subject to de novo review." State v. Hampton, 98-0331, p. 18 (La. 4/23/99), 750 So. 2d 867, 884, *citing* City of New Orleans v. Bd. of Comm'rs, 93-0690 (La. 7/5/94); 640 So. 2d 237.

"A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." La.C.C. art. 3071.

"Transactions have, between the interested parties, a force equal to the authority of things adjudged. They can not be attacked on account of any error in law or any lesion." La.C.C. art. 3078.

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[3] The Direct Action Statute, La.R.S. 22:655(B)(1) provides that the injured person may bring a direct action against the insurer alone only under limited circumstances: when the insured is bankrupt or insolvent; when service cannot be made on the insured; when the action is between children and their parents or between married persons; when the insurer is an uninsured motorist carrier; or when the insured is deceased.

Based on La.C.C. Art. 3078, a valid compromise can form the basis of a plea of res judicata. Rivett v. State Farm Fire and Casualty Co., 508 So.2d 1356, 1359 (La.1987). The proper procedural mechanism for interposing the defense of transaction or compromise is the peremptory exception of res judicata, id., although a motion for summary judgment can be granted based on a finding of res judicata when there is no genuine issue as to any material fact. R.G. Claitor's Realty v. Juban, 391 So.2d 394, 403 (La.1980) (*on rehearing*).

In Webre v. Fabre, 01-499 (La.App. 5 Cir. 10/30/01), 800 So.2d 1036, *writ denied*, 01-3155 (La. 2/8/02), 808 So.2d 352, this Court held that the release of the tortfeasor Fabre, the insured under the policy, did not defeat the plaintiff's right to maintain the direct action, where the plaintiff reserved his right in the release to proceed against the excess insurer.

Here, however, plaintiff failed to reserve his rights against the excess insurer. The release of the tortfeasor was unconditional and all-encompassing. The language of the release is unambiguous.

When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the intent of the parties. La.C.C. art. 2046.

> Parol or extrinsic evidence is generally inadmissible to vary the terms of a written contract unless the written expression of the common intention of the parties is ambiguous.... A contract is considered ambiguous on the issue of intent when either it lacks a provision bearing on that issue, the terms of a written contract are susceptible to more than one interpretation, there is uncertainty or ambiguity as to its provisions, or the intent of the parties cannot be ascertained from the language employed.

Campbell v. Melton, 01-2578, p. 6 (La. 5/14/02), 817 So.2d 69, 75.

Hence, the release is proper ground for granting the exception of res judicata with respect to Odenwald. The question is whether State Farm also can take advantage of the res judicata effect.

To sustain an exception of res judicata, there must be identity of the parties, the cause, and the thing demanded. Charles E. McDonald Land Dev., Inc. v. Cashio, 552 So.2d 1050, 1052 (La.App. 1 Cir. 1989), *citing* Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La.1978).

That does not mean the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity. Morris v. Haas, 95-75, p. 11 (La.App. 5 Cir, 05/30/95), 659 So. 2d 804, 810. Therefore, the requirement of identity of parties is met where a successor or privy of one of the parties is involved. Ditch v. Finkelstein, 399 So.2d 1216, 1222 (La.App. 1st Cir.1981), *citing* Quinette v. Delhommer, 247 La. 1121, 176 So.2d 399 (1965), and Scurlock Oil Co. v. Getty Oil Co., 294 So.2d 810 (La.1974).

> The source of the insured's obligation to the injured plaintiff is a delictual obligation arising from the insured's negligence. The source of the insurer's obligation to the injured plaintiff is the contract of insurance. The insured's obligation is solidary with the insurer for those damages within the coverage limits of the policy, while there is no solidary liability for the portion of the damages in excess of the coverage.

Rollins v. Richardson, 35171, p. 15 (La.App. 2 Cir. 12/7/01), 803 So. 2d 1028, 1037, *writ granted*, 02-556 (La. 5/10/02), 815 So.2d 829.

Once the insured has been absolved by compromise and release, he is no longer exposed to liability. Thus, a plaintiff has no claim against a liability insurer where the plaintiff has executed a full and unrestricted release of the insured, with

no reservation of rights insofar as the insured's liability covered by the insurer's policy limits.[4]

We find the cases cited by plaintiff in support of his position distinguishable.[5]

We note that on appeal plaintiff has raised arguments that were not presented to the trial court: the doctrine of detrimental reliance and the principle of *actio de in rem verso*, the Louisiana version of unjust enrichment.

However, courts of appeal will review only issues which were submitted to the trial court, unless the interest of justice clearly requires otherwise. Unif. Rules, La.Courts of App., Rule 1-3; Cacioppo v. Alton Ochsner Found. Hosp., 01-808, p. 2 (La.App. 5 Cir. 12/26/01), 806 So. 2d 803, 804 n.1, *writ denied*, 02-262 (La. 3/28/02), 812 So.2d 634. Accordingly, we do not consider these issues.

For the foregoing reasons, the judgment is affirmed. The parties are cast with their own costs for this appeal.

AFFIRMED.

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[4] La.R.S. 13:4232(A) sets out the exceptions to the res judicata effect of a judgment. It states that a judgment does not bar another action by the plaintiff when exceptional circumstances justify relief from the res judicata effect of the judgment; when the judgment dismissed the first action without prejudice; or, when the judgment reserved the right of the plaintiff to bring another action.

[5] In those cases either the release contained reservation-of-rights language—e.g., Futch v. Fidelity & Casualty Co. of New York, 166 So.2d 274 (La. 1964); or there was language restricting the release to the policy that insured the vehicle in which the accident occurred—e.g., Chabaud v. Sylvester, 98-2852 (La. 2/5/99), 728 So.2d 851; or the release concerned a separate type of action—e.g., Brown v. Drillers,Inc., 93-1019 (La. 1/4/94), 630 So.2d 741.

Court of Appeal

FIFTH CIRCUIT
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