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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CASSANDRA MEYERS and CHAD PORTER, wife) 1 CA-CV 11-0038
and husband,)
)
) DEPARTMENT C
)
Plaintiffs/Appellants,)
)
) **MEMORANDUM DECISION**
v.) (Not for Publication
) - Rule 28, Arizona
) Rules of Civil
DANA L. MAXWELL and JANE DOE MAXWELL,) Appellate Procedure)
husband and wife; TAMRA VICTORIA GREMS)
and JOHN DOE GREMS, wife and husband,)
)
)
Defendants/Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-013102

The Honorable John Rea, Judge

AFFIRMED

Jeffrey I. Ostreicher, PC
By Jeffrey I. Ostreicher

Phoenix

and

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By David L. Abney
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Scottsdale

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By Michael R. Perry
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Phoenix

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and Michael G. Kelley
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N O R R I S, Judge

¶1 Plaintiffs/Appellants Cassandra Meyers and her husband Chad Porter timely appeal from the superior court's order denying their motion to set aside a judgment under Arizona Rule of Civil Procedure ("Rule") 60(c)(3) and (6). Meyers argues the superior court should have vacated the judgment it entered after she served and Defendants/Appellees Dana Maxwell and Tamra Grems accepted a Rule 68 offer of judgment because Grems' insurer fraudulently failed to disclose the existence of a \$1,000,000 umbrella liability policy. We disagree, and affirm the order of the superior court.

FACTS AND PROCEDURAL BACKGROUND

¶2 On September 19, 2008, Maxwell, while under the influence of a drug and alcohol, drove a car owned and insured by Grems and collided with a car driven by Meyers, seriously injuring her. On December 5, 2008, Meyers' attorney, Jeffrey Ostreicher, wrote to an adjuster for Grems' insurance company, American National Property and Casualty Company ("ANPAC"), requesting "a copy of all information on policies of coverage for both the driver and the owner of the [car] involved in this

collision that apply or may apply to pay [Meyers'] damages." On January 19, 2009, the adjuster sent Ostreicher Grems' automobile insurance policy, which had a per-person liability limit of \$250,000 (the "underlying policy").

¶13 On July 1, 2010, Meyers filed a complaint seeking damages from Maxwell, for his negligence in causing the accident, and Grems, for "negligently entrusting [her] vehicle" to Maxwell.¹ At the same time, Meyers filed a "Notice of Service of" -- but did not yet serve upon Maxwell or Grems -- a Rule 68 offer of judgment for \$250,000, the apparent policy limit of Grems' liability insurance. On July 22, Ostreicher sent the adjuster copies of the complaint and the offer of judgment and told her he was "in the process of having this documentation . . . served" and would "notify [her] once service [had] been effectuated." On September 24, Ostreicher sent the adjuster a demand letter offering to settle the case for "the sum of [the] insured's policy limit of liability coverage," and asking the adjuster to notify him immediately if the liability limit was not \$250,000.

¶14 On October 19, Ostreicher wrote to Benjamin Thomas, an attorney apparently hired by ANPAC, to confirm a "telephone conversation . . . in which [Thomas] told [Ostreicher] that

¹The record reflects this was the first time Meyers had alleged Grems was independently liable for Meyers' damages.

ANPAC [was] willing to pay \$250,000 to settle this matter." Ostreicher also noted Thomas had "advised that there may be a \$1,000,000 policy on Tamra Grems that might apply and . . . [o]nce [Ostreicher had] received and reviewed that policy, [he would] be able to further discuss a possible settlement of this case." The next day, Thomas sent Ostreicher a copy of a \$1,000,000 "umbrella" liability policy, which provided "additional liability protection for [the underlying policy]." In an accompanying letter, Thomas asserted Maxwell did "not meet the definition of 'insured' [in the umbrella policy] as he [was] neither a named insured nor a relative of the named insured."

¶15 On October 26, a Minnesota process server hired by Ostreicher served Maxwell with the summons, complaint, and the \$250,000 offer of judgment. Ostreicher later acknowledged in the superior court his service of these documents was a "mistake" and explained he "had time to get a hold of [the] process server and say . . . yank that \$250,000 offer of judgment," but he "didn't do that . . . [and] that was [his] mistake." On November 5, Ostreicher sent the complaint and offer of judgment to Thomas, who had agreed to accept service on behalf of Grems. Ostreicher later acknowledged this service was also "[his] mistake" which he took "responsibility for." On November 19, Ostreicher told Thomas he had "thoroughly reviewed"

the umbrella policy and determined that it applied to both Grem and Maxwell. Accordingly, he insisted Maxwell and Grem "file timely Answers to the Complaint."

¶16 In late November, Maxwell and Grem separately answered the complaint. Then, on December 7, Maxwell and Grem jointly accepted Meyers' \$250,000 offer of judgment. Ostreicher immediately wrote to Thomas -- who was representing Grem -- and Maxwell's attorney objecting to their acceptance of the offer of judgment and asserting the offer was based on the adjuster's representation liability coverage "was \$250,000 when in reality, it was \$1,000,000." Nevertheless, on December 17, Maxwell and Grem lodged a form of judgment pursuant to the \$250,000 Rule 68 offer, which the superior court entered on December 20.

¶17 On January 18, 2011, Meyers moved to set aside the judgment, arguing, among other things, ANPAC "committed fraud, misrepresentation or 'other misconduct' in procuring the Judgment." The superior court denied Meyers' motion, emphasizing "[w]hatever 'misconduct' may be attributed to the insurance company for not disclosing the umbrella policy before mid October, that misconduct was not the cause of the entry of judgment. Plaintiffs' counsel forwarded the Complaint and tendered the offer of judgment weeks after receiving a copy of the umbrella policy."

DISCUSSION

¶8 Meyers argues on appeal the superior court abused its discretion in denying her motion to set aside the judgment because it was based on an offer of judgment procured by ANPAC's fraud in failing to disclose the umbrella policy. We disagree, and agree with the superior court's reasoning. Even assuming misconduct regarding non-disclosure of the umbrella policy before mid-October, that misconduct did not lead to entering of the judgment. Accordingly, the superior court did not abuse its discretion in refusing to vacate the judgment. See *Morris v. Giovan*, 225 Ariz. 582, 583, ¶ 7, 242 P.3d 181, 182 (App. 2010) (citation omitted) (appellate court reviews "whether there is sufficient basis to set aside a judgment under Rule 60(c) for an abuse of discretion").

¶9 As discussed, Ostreicher initially filed notice of the \$250,000 offer of judgment while under the impression this was the maximum liability limit of the applicable insurance policy. See *supra* ¶ 3. Nevertheless, even assuming ANPAC misled Ostreicher and thus Meyers by withholding information about the umbrella policy, the critical flaw in Meyers' argument is that Thomas expressly informed Ostreicher about the umbrella policy before Ostreicher served the offer of judgment on Maxwell and Grems. Ostreicher's admitted negligence, see *supra* ¶ 5, not any

alleged fraud on the part of ANPAC, caused the judgment Meyers now seeks to have set aside.

¶10 Further, the fact that the umbrella policy could possibly apply to Meyers' claims does not suggest ANPAC was, as Meyers argues, "using its own wrong to gain an advantage" by accepting the \$250,000 offer. To the contrary, well before Maxwell and Grems accepted the offer of judgment, ANPAC notified Ostreicher it did not believe the umbrella policy provided any additional liability coverage for Maxwell, and, conversely, he notified ANPAC he believed the umbrella policy applied to both Grems and Maxwell. Thus, the possibility of a prolonged dispute over liability coverage created an incentive for ANPAC to settle, an incentive that fell squarely within the purposes of Rule 68. See *Preuss v. Stevens*, 150 Ariz. 6, 7, 721 P.2d 664, 665 (App. 1986) (citation omitted) ("The purpose of Rule 68 is to encourage settlements and avoid protracted litigation.").

¶11 In short, under the circumstances presented here, the superior court did not abuse its discretion in denying Meyers' motion to set aside the judgment.

CONCLUSION

¶12 For the foregoing reasons, we affirm the superior court's order. As the prevailing parties on appeal, Maxwell and Grems are entitled to recover their costs subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

 /s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

 /s/
MARGARET H. DOWNIE, Judge

 /s/
JON W. THOMPSON, Judge