NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0747

KATHIE POLITE AND WEBB POLITE, JR.

VERSUS

ALBERT C. MINCEY JR., PROGRESSIVE SECURITY INSURANCE COMPANY AND 21ST CENTURY CENTENNIAL INSURANCE COMPANY

Judgment rendered December 23, 2015.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 110,740
Honorable Alvin Turner, Judge

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BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

Higginbotham, J. concurs.

Crain, J. concurs.

PETTIGREW, J.

This is an appeal by the plaintiffs, Kathie and Webb Polite, Jr., of a March 18, 2015 order dismissing with prejudice their suit, in its entirety, against all defendants. The order expressly was granted on the basis of plaintiffs suggesting to the district court that they had reached a compromised settlement "with *all* defendants herein." (Emphasis added.) Plaintiffs now assert that the order of dismissal inadvertently included the UM carrier by dismissing *all* defendants, when they only intended to dismiss the defendant tortfeasor Albert C. Mincey, Jr. and his liability insurer Progressive Security Insurance Company (Progressive), in reaching the compromise settlement. Plaintiffs maintain that they intended to preserve their rights to pursue claims against plaintiffs' UM carrier 21st Century Centennial Insurance Company (21st Century or UM carrier). Thus, on appeal, plaintiffs seek from this court a substantive amendment, to the district court's order dismissing all defendants, to reflect instead the intended dismissal of only Mr. Mincey and Progressive, and preserving plaintiffs' claims against the UM carrier.

FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 2013, Mr. Mincey rear-ended Kathie Polite's vehicle when she stopped to make a left turn, while traveling westbound on La. Hwy. 42 in Ascension Parish. On August 7, 2014, Kathie and her husband, Webb, filed suit for her alleged injuries and corresponding losses as well as for Webb's loss of consortium, naming as defendants, Mr. Mincey, Progressive, and 21st Century. Two answers to the petition were filed, one by Mr. Mincey and Progressive, and the other by 21st Century. Each defendant denied liability and requested a trial by jury.

Aside from those pleadings, the record contains copies of several notices for medical records depositions issued by Progressive in October and in December of 2014. The aforementioned March 18, 2015 order of dismissal with prejudice, that is the subject of this appeal, is the next filing that appears in the record.

On April 17, 2015, the Polites filed a petition for devolutive appeal of the March 18, 2015 judgment dismissing all defendants, asserting it should be invalidated for vice of substance inasmuch as plaintiffs did not intend for that judgment to dismiss the UM

carrier.[1] In their petition for appeal, the Polites indicated that they had also, that same date, filed a petition to annul the judgment for vice of substance, based on the same substantive error and "out an abundance of caution." The district court granted plaintiffs' petition for devolutive appeal on April 21, 2015.

Also, on that same date, April 21, 2015, plaintiffs filed, and were granted, an *ex parte* motion to supplement the record with the Receipt, Release and Indemnity Agreement (receipt and release) that had been executed and signed by them on March 5, 2015, as well as copies of a chain of emails between counsel for plaintiffs and counsel for the UM carrier. Plaintiffs maintain that the language in the receipt and release (whereby in exchange for the payment received by them from Progressive, in the amount of the policy limits of $100,000.00 and $1,000.00 for property damage, they expressly agreed to release Progressive and Mr. Mincey from any claims asserted in connection with the accident at issue), evidences that it was never their intent to gratuitously release 21st Century (who is not named in the release document). Plaintiffs add that the email exchanges between their counsel and counsel for 21st Century, following the entry of the order of dismissal, is also evidence that the dismissal of the UM carrier was an inadvertent error and not contemplated by them when reaching the compromise.

Although the motion to supplement the record was granted by the district court, we note that neither the receipt and release nor the email exchanges were ever presented to or considered by the district court prior to the order of dismissal or even prior to the motion for appeal being granted. Accordingly, although actually included in the record before us on appeal, these documents are not properly before us on review. See **In re Melancon**, 2005-1702 (La. 7/10/06), 935 So.2d 661, 666. Instead, the only things properly before us on review are the order of dismissal, which expressly dismisses

[1] Plaintiffs' counsel represents on appeal that the order of dismissal containing the error was drafted by counsel for Progressive as a professional courtesy. He also candidly admits that he did not notice that the draft contained language dismissing all the defendants, rather than just Progressive and its insured, Mr. Mincey. According to plaintiffs' counsel, he did not become aware of the error in the order until attempting to compromise the plaintiffs' claims with the UM carrier. It was at that time that counsel for 21st Century advised him that the order of dismissal dismissed all the defendants; thus, the entire case was over.

all defendants, and the candid representations by plaintiffs' counsel: that he overlooked the error when he approved and signed the order of dismissal, that he did not discover the error until after the delays for filing a motion for new trial had run, and that he had been unable to obtain the consent of the UM carrier to allow a substantive modification of that judgment to omit the erroneous dismissal, under La. C.C.P. art. 1951, discussed below.

APPLICABLE LAW AND ANALYSIS

The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal. Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable on appeal. La. C.C.P. art. 2088. That same article contains an illustrative list of ten matters not reviewable on appeal, and making substantive changes to the judgment appealed is not included in that list.

Subsection A(4) of Article 2088 provides a district court retains jurisdiction to "[c]orrect any misstatement, irregularity, informality, or omission *of the trial record,* as provided in Article 2132." (Emphasis added.) However, reference to Article 2132 renders clear that only mistakes in connection with what is included in the record on appeal, such as omitting a material part of the trial record from the record submitted on appeal, may be corrected under the authority of Article 2088.[2] That authority does not extend to correcting alleged substantive errors in a final judgment. Accordingly, the district court's jurisdiction over the matter, including the ability to modify the order of dismissal, divested when the motion for appeal was granted.

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[2] Entitled, *Record on appeal; correction*, La. C.C.P. art. 2132 provides:

> A record on appeal which is incorrect or contains misstatements, irregularities or informalities, or which omits a material part of the trial record, may be corrected even after the record is transmitted to the appellate court, by the parties by stipulation, by the trial court or by the order of the appellate court. All other questions as to the content and form of the record shall be presented to the appellate court.

A final judgment may be amended at any time to alter the phraseology of the judgment, *but not its substance*, or to correct errors of calculation. "The judgment may be amended only after a hearing with notice to all parties, except that a hearing is not required if all parties consent or if the court or the party submitting the amended judgment certifies that it was provided to all parties at least five days before the amendment and that no opposition has been received." La. C.C.P. art. 1951. As noted earlier, the UM carrier maintains that the judgment clearly dismissed plaintiffs' claims against it and it has refused to consent to allowing a substantive modification to that judgment.

In a case similar to the one before us, **LaBove v. Theriot**, 597 So.2d 1007 (La. 1992), the plaintiffs in an automobile accident case submitted to the trial court a judgment dismissing the case as to all defendants, which judgment the trial court signed. Subsequently, the plaintiffs submitted, ex parte, another judgment that purported to amend the first judgment in order to reserve their rights to proceed against one of the defendants previously dismissed through alleged inadvertence. The trial court signed the judgment, and the defendant filed an exception of res judicata. The trial court sustained the exception. The supreme court explained that there was "no question that the amendment of the original judgment, which purported to reinstate a suit previously dismissed with prejudice, was one of substance, and therefore not permissible under La.Code Civ.Pro., art. 1951." *Id.*, 597 So.2d at 1010. Instead, the supreme court explained that "when an error of substance has crept into a final judgment, that error may be corrected by way of a timely motion for a new trial or by appeal" or "by consent of the parties." *Id.* Because the plaintiffs failed to move for a new trial, appeal the first judgment, or support with competent evidence their claim of consent, the supreme court agreed that the amended judgment was without legal effect and that the first judgment remained valid.

In the instant case, plaintiffs admittedly did not file a timely motion for a new trial, and they were unable to obtain the consent of 21st Century to modify the order of dismissal. Thus, the only remedy available to them is the appeal presently before us.

However, in order to prevail on appeal, the plaintiffs must present sufficient evidence to establish that the order of dismissal did not represent the parties' intent.

The only information properly before us on appeal is the order of dismissal itself, which expressly and unequivocally dismisses "*all* defendants herein," and the uncorroborated, unsupported representations by plaintiffs' counsel in argument, that it was not their intent in reaching the compromise for the UM carrier to be dismissed. 21st Century has refused to consent to any modifications to the judgment, taking the position that the judgment clearly dismissing it is final and ended this litigation. Also, notably missing is any evidence to corroborate counsel's representations regarding the parties' intent in reaching the compromise settlement, such as statements or verifications by Progressive, the other party to that agreement. (As stated earlier, the receipt and release, inasmuch as it was not presented to nor considered by the district court prior to rendering the judgment, is not properly before us on appeal.)

Thus, on the showing made, plaintiffs did not prove that the intent of the parties was to dismiss only Progressive and Mr. Mincey, and preserve their rights against the UM carrier, in direct contrast with the clear language of the judgment. Absent proof that they are entitled to relief on appeal of an otherwise clearly stated judgment, we are constrained to affirm that judgment. See **Black v. Anderson**, 2006-891 (La. App. 5 Cir. 3/13/07), 956 So.2d 20, 24-25, writ denied 2007-0794 (La. 6/1/07), 957 So.2d 180 (where the fifth circuit refused to modify an order of dismissal that dismissed the UM carrier as well as the tortfeasor's liability carrier notwithstanding plaintiff's claims that the dismissal did not evidence the parties' true intent. The court's refusal was based on the clear language of the order of dismissal and the plaintiff's insufficient proof of the parties' intent to the contrary.).

Finally, plaintiffs alternatively ask this court to invoke our authority under La. C.C.P. art. 2164, and remand the matter with instructions to the district court to modify the judgment to reflect the parties' intent. However, Article 2164 authorizes us to render any judgment that is just, legal, and proper *upon the record on appeal.* As we have noted,

the record on appeal does not sufficiently establish the parties' intent to warrant such an instruction to the district court on remand.

We do note, however, that the Petition to Annul the judgment has been filed and remains pending before the district court. Nothing in this opinion affects the plaintiffs' rights to pursue that petition; we have not considered that petition (see La. C.C.P. art. 2005) or the merits thereof, and plaintiffs remain entitled to a contradictory hearing at the district court and the opportunity to prove that they may be entitled to an annulment thereof under La. C.C.P. arts. 2001-2006, governing the annulment of judgments.

CONCLUSION

For all the foregoing reasons, we are constrained to affirm the order of dismissal that dismissed all of plaintiffs' claims against all the defendants herein, including the plaintiffs' UM carrier, 21st Century Centennial Insurance Company. Further, we remand this matter to the district court to proceed with a hearing on the plaintiffs' Petition to Annul the March 18, 2015 judgment. All costs of this appeal are assessed to the plaintiffs, Kathie and Webb Polite, Jr.

AFFIRMED AND REMANDED.