

STATE OF MICHIGAN
COURT OF APPEALS

SHEROLYN FLORENCE, as Next Friend of
LYDELL FLORENCE, Minor,

UNPUBLISHED
December 16, 2003

Plaintiff,

and

AUTO CLUB INSURANCE ASSOCIATION,

Intervening Plaintiff-Appellant,

v

No. 242579
Wayne Circuit Court
LC No. 99-913133-NF

HATFIELD USED CARS, INC.,

Defendant-Appellee,

and

JOHN DZON,

Defendant.

Before: Cavanagh, P.J., and Jansen and O’Connell, JJ.

PER CURIAM.

Intervening plaintiff Auto Club Insurance Association (ACIA) appeals as of right from the trial court’s order approving a structured settlement for the minor child and dismissing the case. We affirm in part, reverse in part, and remand.

This case arises from an accident in which Lydell Florence, then the eleven-year-old son of Sherolyn Florence, was struck by a van driven by John Dzon, an uninsured motorist. Dzon had purchased the van from Hatfield Used Cars, Inc. (“Hatfield”). Sherolyn Florence, as next friend for Lydell Florence, filed a three-count complaint, alleging claims for (1) personal injury protection (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*; (2) negligence as to Dzon; and (3) owner’s liability as to Hatfield. The trial court subsequently granted Hatfield’s motion for summary disposition, concluding that Hatfield was not the owner of the vehicle at the time of the accident.

In a prior appeal that resulted in an unpublished opinion, this Court reversed the trial court, holding that Florence, not Hatfield, was entitled to summary disposition because Hatfield was the undisputed owner of the vehicle at the time of the accident. On remand, Florence and Hatfield settled and Florence filed a motion for approval of the settlement and permanent dismissal of all the counts except the count claiming PIP damages. The settlement agreement that Florence sent with its notice of hearing contained a provision allowing ACIA to retain its reimbursement rights for the PIP damages it paid Florence on Hatfield's behalf. Hatfield did not respond to the motion. At the hearing on Florence's motion, counsel for Florence and Hatfield were both present. Counsel for ACIA did not appear, but the attorney for Florence indicated that he spoke with ACIA's counsel and explained that the hearing would finalize settlement. Florence's attorney indicated that counsel for ACIA was planning to pursue subrogation. At that point Hatfield's counsel moved to dismiss any right to "subrogation" ACIA claimed for PIP benefits it paid on Hatfield's behalf, and the trial court granted the motion.

ACIA argues that the trial court erred when it dismissed its claim for reimbursement. We agree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In contravention of MCR 2.116(G), ACIA received no notice of Hatfield's oral motion to summarily dispose of its reimbursement claim. Moreover, the trial court based its dismissal on legally flawed grounds. At the hearing, Hatfield argued that ACIA abandoned its claim for failing to properly pursue the earlier appeal or appear at the settlement conference. But ACIA's lack of participation did not affect its status as a party to the action, see *Kim v Ford Motor Co*, 170 Mich App 544, 548; 429 NW2d 203 (1988), and neither the trial court nor the attorney for Hatfield cited MCR 2.502, which governs dismissals for "failure to prosecute." A dismissal on this ground would not have been proper, because the action was regularly undergoing "steps" and "proceedings," including the hearing on Florence's motion to enter a settlement where the trial court dismissed ACIA's claim. MCR 2.502(A)(1).

Similarly, there is no support for Hatfield's contention that ACIA "slept on its rights" by failing to enter an appearance in the prior appeal or join the settlement discussions. It bears noting that ACIA's reimbursement claim derives its strength from statute, not equitable subrogation or Florence's successful recovery of third-party benefits. MCL 500.3175. Therefore, the equitable maxim "slept on its rights" has dubious application to ACIA's statutory claim. *Lothian v Detroit*, 414 Mich 160, 174; 324 NW2d 9 (1982). Nevertheless, ACIA did not sleep on its right to pursue Hatfield for reimbursement, it merely relied on Florence's appellate efforts and persistence to win Hatfield's liability. While permitting ACIA to sit back and reap the benefit of Florence's appellate labor may seem somewhat inequitable, it does not lend support for Hatfield's summary disposition motion for three reasons. First, ACIA benefited from the efforts of Florence, not Hatfield, and Florence is not complaining. Therefore, Hatfield has no ground to avoid ACIA's reimbursement claim based on unfairness to Florence.

Second, through its nonparticipation, ACIA merely risked losing its ability to recover from Hatfield. Hatfield fails to cite any authority where taking such a risk amounts to a party sleeping on its rights – a phrase usually associated with laches and the failure to timely bring a claim. *Id.* at 175. Theoretically, ACIA never possessed a right to reimbursement from Hatfield until we issued our opinion in the prior appeal, and its right to reimbursement from whomever we deemed responsible was never challenged. Therefore, ACIA's failure to participate in the

appeal does not qualify as sufficiently dilatory action to warrant an equitable forfeiture of its entire reimbursement claim.

Third, allowing Hatfield to escape entirely its PIP liability under these circumstances would prove far more inequitable than allowing ACIA's reimbursement claim to proceed regardless of the amount of effort it initially exerted in pursuing the claim. ACIA paid Hatfield's PIP obligation as MCL 500.3175 required, because Hatfield chose to ineffectively deny the obligation. Now, as the statute allows, ACIA may pursue its reimbursement claim against Hatfield. To hold otherwise would sanction a much more inequitable result.

Defendant's claim that ACIA slept on its right for failing to attend settlement conferences has even less support. Florence's settlement negotiations, regardless of their result, could not possibly affect ACIA's right to reimbursement for the PIP benefits it paid. MCL 500.3175. Where its rights were not implicated, ACIA's failure to participate does not demonstrate any failure to defend them. Similarly, ACIA did not appear at the hearing on the motion to enter the settlement because it had no notice that the hearing would involve its rights. Discerning whether ACIA was "sleeping on its rights" at least requires notifying it of the only challenge ever made to the legitimacy of its reimbursement claim. ACIA's immediate response to its claim's dismissal indicates that it never fell asleep at all, and the trial court erred when it reached the opposite conclusion.

Accordingly, we affirm the trial court's order approving the structured settlement between Florence and Hatfield but reverse the dismissal of ACIA's claim for PIP reimbursement.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell