STATE OF MICHIGAN

COURT OF APPEALS

HARRY T. BROWN, Personal Representative of the Estate of REGINA EDWARDS RANDOLPH,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AKILAH MARIE LAWRENCE, and ROCKER'S, INC., d/b/a SUZ'S BAR & GRILL,

Defendants-Appellees.

UNPUBLISHED
May 21, 2009

No. 284325
Oakland Circuit Court
LC No. 2007-085426-NZ

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from orders granting summary disposition to defendants State Farm Mutual Insurance Company and Rocker's, Inc. We reverse.

The facts for purposes of this appeal are largely undisputed. The decedent was killed as a result of events occurring on the evening of October 28, 2006. While attempting to cross a street in Pontiac, she was struck by a Chevrolet truck driven by Tramone Chasen. She was propelled into the air and landed in the center lane of the street, where she remained, alive but unmoving. Although people arrived to render assistance, to activate flashers on at least one nearby vehicle, and to situate a vehicle as a partial, makeshift roadblock, a Pontiac Grand Am driven by Akilah Lawrence proceeded over the decedent and dragged her several feet. Lawrence had been driving while intoxicated. The decedent died as a result of her injuries.

Plaintiff, without filing suit, sought to recover from Chasen's insurance company. On March 14, 2007, a probate court entered an order stating:

> IT IS HEREBY ORDERED that the Motion to Approve Partial Settlement and Attorneys Fees for this Wrongful Death matter on behalf of the estate of Regina is granted and the court will accept partial settlement on the Wrongful Death Matter as to Tramone Dontei Chasen only, for the amount insured of 20,000.00, the full policy limit, being that Mr. Chasen does not own or share interest in any recoverable assets[.] This will account for full and final Settlement as to Tramone Dontei Chasen only . . . .

A release had been executed on March 12, 2007, and stated, in part:

> FOR THE SOLE CONSIDERATION of TWENTY THOUSAND DOLLARS . . . paid by TITAN INSURANCE, I, HARRY T. BROWN . . . hereby release and discharge TRAMONE CHASEN, his successors, assigns and all other persons, insurers, firms or corporations who are or might be liable, from any and all claims, damages, actions, causes of action, and suits of whatever kind, known or unknown, prior to and including the date hereof, and particularly for all injuries to person or damage to property resulting or to result, and especially the liability arising, from an accident which occurred on or about OCTOBER 28, 2006.
>
> The payment made to me is upon my warranty that I have not received any consideration whatever [sic] for, nor have I released heretofore any person, firm or corporation from any claim or liability for any injuries to person or property arising from said accident, and I agree to hold harmless and indemnify the said from any loss, claim[,] liability, cost or expense growing out of any claim against them or either of them for contribution by any alleged joint tortfeasor.
>
> In exchange for the consideration I have received for executing this release, I fully understand and intend that I further release the above-mentioned parties of any rights of indemnification, contribution, or joiner as third party defendants or additional defendants which I may have against the said parties and which have [arisen] or may arise from the OCTOBER 28, 2006 accident with respect to any claims, causes of action or suits of or by persons or entities other than mine/ours.

Subsequently, on August 29, 2007, Plaintiff sued Lawrence and Rocker's, which operated the bar that served alcohol to Lawrence. He also sought the payment of uninsured motorist benefits through the decedent's policy with State Farm.

On December 17, 2007, State Farm moved for summary disposition under MCR 2.116(C)(7), arguing that the release executed with Chasen precluded the claim against State Farm. Rocker's later joined in the motion.

At a hearing on February 13, 2008, the trial court agreed with State Farm and Rocker's, stating, in part:

> The scope of a release is governed by the intent of the parties as they express therein. . . . If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain ordinary meaning of the language of the release.
>
> Having considered the parties' arguments, the [c]ourt finds that [the] March 12, 2007, release clearly released State Farm and Rocker's from any and all liability as a result of the October 28th accident. The [c]ourt notes according to plain terms of the release, that plaintiff released all other persons, insurers, or corporations from any and all claims for all injuries – and for all injuries. The term any is synonymous with all, and is the broadest classification leaving no

room for exceptions. See [*Romska v Opper*, 234 Mich App 512, 515; 594 NW2d 853 (1999)].

The [c]ourt finds the unpublished opinion of [*Cook v Shensky*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2004 (Docket No. 246913),] factually distinguishable from this case. In *Cook* the court there recognized that a subsequent medical malpractice could not be released from the language in the release, which described the nature of the claims released as they related to the auto – an automobile accident. In *Cook* the medical malpractice claims also occurred ten months subsequent to the automobile accident.

Here, decedent was struck within minutes by the two vehicles and [the] claims in this case arise out of the accident of October 28, 2006. . . . These are clearly within the plain language of the release.

The court entered orders dismissing the claims against State Farm and Rocker's. Later, on March 14, 2008, the court, at plaintiff's request, entered an order dismissing, without prejudice, any claims against Lawrence and thereby disposing of all remaining claims in the case.

Plaintiff contends that the March 12, 2007, release did not bar his claims in the instant case. We review de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff. . . . A motion under this subrule should be granted only if no factual development could provide a basis for recovery. [*Romska*, *supra* at 515.]

In *Romska*, *supra* at 513, the plaintiff's vehicle was struck by a vehicle owned by Boyan Daskal and driven by Veliko Velikov. David Opper allegedly caused Velikov to swerve into oncoming traffic and strike the plaintiff's vehicle. *Id*. The plaintiff executed a release in connection with proceedings against Daskal and Velikov. *Id*. at 513-514. The release stated, in part:

I/we hereby release and discharge Boyan Daskal and Veliko Velikov, his or her successors and assigns, and *all other parties, firms, or corporations who are or might be liable*, from all claims of any kind or character which I/we have or might have against him/her or them, and especially because of all damages, losses or injuries to person or property, or both, whether developed or undeveloped, resulting or to result, directly or indirectly, from an accident which occurred on or about May 16, 1994 at [left blank] and I/we hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I/we may have against him/her or them by reason of the above-named damages, losses or injuries. [*Id*. at 514 (emphasis supplied by *Romska*).]

The plaintiff subsequently sued Opper, and the trial court concluded that the release barred plaintiff's lawsuit. *Id*. at 514-515. This Court concluded that Opper clearly fit within the "all other parties, firms, or corporations who are or might be liable" language from the release. *Id*. at 515. It stated that it need not "look beyond the plain, explicit, and unambiguous language of the release in order to conclude that [Opper] has been released from liability." *Id*. at 515. The Court emphasized that the word "all" had been used in the release. *Id*. at 515-516.

Here, while the release at issue does employ broad language such as "any and all claims," the significant point is that the release specifically refers to "*an accident*," to "*said accident*," and to "*the OCTOBER 28, 2006 accident*" (emphasis added). Given that the release was executed with Chasen, the references to "an accident," to "said accident," and to "the OCTOBER 28, 2006 accident" clearly mean *the accident caused by Chasen*.[1] It cannot be seriously disputed that *two* accidents occurred on October 28, 2006. First, the decedent was struck by Chasen and was propelled to the center lane of the street. Then, after people had already stopped to help the decedent, after the police had been called, and after certain emergency flashers had been activated, a *second* accident took place. The March 12, 2007, release refers only to the *first* accident. We find unpersuasive the trial court's conclusion that the "decedent was struck within minutes by the two vehicles and [the] claims in this case arise out of the accident of October 28, 2006." That only minutes passed between the accidents does not negate the fact that two accidents occurred. This case is unlike *Romska*, in which a single accident occurred that was caused by multiple individuals.

State Farm cites the unpublished case of *Walker v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2006 (Docket No. 265604), in support of its position that a single accident occurred. We first note that unpublished opinions are not binding on this Court. See MCR 7.215(C)(1). Second, in that case, there was

> a lightning-quick, uninterrupted succession of blows dealt by similar vehicles, going similar speeds, moving in the same stream of traffic, and arising from the unitary recklessness of their drivers. The second impact flowed naturally from the first and occurred well before plaintiff reached safety. [*Walker*, *supra*, slip op at 2.]

A witness speculated that the drivers "were drag racing." *Id*.

This case presents a far different situation. People had already stopped to help the decedent and emergency flashers had been activated. This was not an "uninterrupted succession of blows." *Id*. In *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999), the Court indicated that the term "accident" was not defined in the insurance policies at issue. It then stated,

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[1] We reject State Farm's assertion that the release "does not limit its application to only those persons or insurers who have liability in connection with an October 28, 2006 accident."

> However, using the common meaning of the term, we have repeatedly stated that an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected. [*Id*. (internal citations and quotation marks omitted.]

Here, there was an *additional* "happening by chance" and an event that was "not anticipated" when the vehicle driven by Lawrence ran over the decedent despite the gathered people, the flashers, and the partial, makeshift roadblock. We conclude that the release did not bar the instant lawsuit.

In light of our conclusion, we need not address the additional arguments raised on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood