STATE OF MICHIGAN

COURT OF APPEALS

FURNESS GOLF CONSTRUCTION, INC., f/k/a CASTLE ROCK COMMUNICATIONS, INC.,

Plaintiff,

and

TRANSCONTINENTAL INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

v

RVP DEVELOPMENT CORPORATION,

Defendant-Appellant.

UNPUBLISHED
June 11, 2009

No. 279398
Manistee Circuit Court
LC No. 00-009766-CH

RVP DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v

FURNESS GOLF CONSTRUCTION, INC., f/k/a CASTLE ROCK COMMUNICATIONS, INC.,

Defendant,

and

TRANSCONTINENTAL INSURANCE COMPANY,

Intervening Defendant-Appellee.

No. 279399
Manistee Circuit Court
LC No. 00-09791-CK

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

RVP Development Corporation (RVP) appeals as of right a June 27, 2007 monetary judgment entered on an award of case evaluation sanctions in favor of intervening defendant Transcontinental Insurance Company, a/k/a CNA. Specifically, RVP claims CNA is not entitled to any case evaluation sanctions because the trial court erred when it granted CNA the right to intervene in this litigation to pursue case evaluation sanctions against RVP and because the trial court erroneously set aside a satisfaction of judgment entered between RVP and Furness Golf Construction, Inc. (Furness) that settled the matter of case evaluation sanctions. Alternatively, RVP argues that even if CNA is deemed to be entitled to case evaluation sanctions, CNA's subrogation right is expressly limited to the recovery of amounts it actually paid to provide counsel to Furness, its insured. Thus, RVP concludes, the trial court erred when it awarded monetary sanctions that exceeded the total amount of attorneys' fees actually paid by CNA. We affirm the order granting CNA the right to intervene in order to pursue case evaluation sanctions against RVP. We also affirm the order setting aside the satisfaction of judgment between RVP and Furness. However, we reverse the monetary judgment based on the award of case evaluation sanctions. We conclude CNA's subrogation rights were contractually limited to the recovery of payments actually made on behalf of its insured, Furness. Thus, the trial court erred in entering judgment in an amount in excess of the actual attorneys' fees paid by CNA. We remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Furness was retained by RVP to construct one of Michigan's most beautiful golf courses, Arcadia Bluffs. CNA provided liability insurance coverage for Furness. On September 26, 1988, a severe rainstorm passed over the golf course in the midst of construction, causing substantial erosion damage and giving rise to two lawsuits. In January 2000, Furness brought suit against RVP to collect $546,123.98 that was retained by RVP under the Construction Lien Act, MCL 570.1101 *et seq.* In February 2000, RVP filed suit against Furness, seeking $4.5 million in damages that allegedly resulted from negligence and a breach of contract by Furness.

In accordance with the terms of its liability insurance policy with Furness, CNA retained the law firm of Plunkett & Cooney to defend Furness in the negligence/breach of contract action. The lower court consolidated the two lawsuits and tried them together. The jury rendered a verdict of no cause of action in RVP's negligence/breach of contract case. The jury also found in favor of Furness in the construction lien case and a judgment was entered awarding Furness $527,464.34, plus interest. Further, because RVP rejected the case evaluation, the trial court awarded Furness case evaluation sanctions pursuant to MCR 2.403(O)(6)(b) in the amount of $330,188.00, plus costs and interest. The trial court arrived at this amount after determining that $385 was a reasonable hourly rate for counsel representing Furness.

RVP claimed an appeal as of right in this Court. This Court affirmed the judgment of no cause of action in the negligence/breach of contract case, as well as the judgment in favor of Furness in the construction lien case. However, this Court found that the evidence did not support the trial court's finding that $385 per hour was a reasonable hourly billing rate for Furness's counsel. This Court issued an unpublished per curiam opinion on August 3, 2004, that

reversed the award of case evaluation sanctions and remanded "to the trial court to determine reasonable attorneys' fees under MCR 2.403 . . ."[1]

In a letter dated November 18, 2004, the president and sole shareholder of Furness, Tim Furness, authorized attorney Clay Ottoni[2] to reach a negotiated settlement of any remaining issues with RVP. In the letter, Tim Furness apprised Ottoni that he had instructed Plunkett & Cooney to have no further contact with RVP's attorneys in connection with settling any of the pending issues, "including the amount of case evaluation sanctions that RVP may be required to pay."

On April 18, 2005, RVP and Furness entered into a settlement agreement. The agreement included the provision that RVP would pay $100,000 to Glenn Arden, who is the father-in-law of Tim Furness and who was identified as the assignee of Thumb National Bank, a creditor of Furness. A satisfaction of judgment was filed in the trial court on May 9, 2005, releasing the parties "from all claims for further fees and costs." CNA was not provided with notice of the satisfaction of judgment.

On May 16, 2005, Plunkett & Cooney, acting on behalf of CNA and in a manner arguably inconsistent with the interests of its client, Furness, filed a motion to set aside the satisfaction of judgment. Plunkett & Cooney posited that the satisfaction of judgment entered between RVP and its client, Furness, was "void" and "bogus." Plunkett & Cooney asserted that Furness had "absolutely no right to give up any attorney fees claim in this case."

The trial court granted CNA's motion to set aside the satisfaction of judgment and allowed CNA to intervene. The trial court concluded that CNA had subrogation rights pursuant to its contract of insurance with Furness that permitted CNA to assert the right to recover case evaluation sanctions. Thereafter, RVP moved for summary disposition asserting that CNA's subrogation claim (for case evaluation sanctions) was limited to the amount it actually paid. RVP argued that CNA actually paid Plunkett & Cooney an attorney fee of $115 per hour. CNA responded that RVP did not have standing to raise any issues with regard to the contract between Furness and CNA. It also argued that CNA had the right, pursuant to its insurance contract and the case evaluation court rule, to recover reasonable attorney fees. CNA also raised equitable subrogation in the alternative.

The trial court concluded that RVP had the right to be heard regarding the reasonableness of the attorney fees, but that RVP did not have standing under the insurance contract between CNA and Furness to argue that attorney fees should be limited to the attorney fees actually paid. Thus, the trial court concluded that CNA's general subrogation rights, together with the court rule on case evaluation sanctions, entitled CNA to reasonable attorney fees. In the alternative,

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[1] Unpublished per curiam opinion of the Court of Appeals, entered August 3, 2004 (Docket Nos. 241125 and 241126). The Supreme Court denied RVP's application for leave to appeal. *Furness Golf Construction, Inc. v RVP Development Corp,* 472 Mich 894; 695 NW2d 76 (2005).

[2] Ottoni was the corporate attorney for Furness.

the trial court concluded that even if RVP had standing to object to the amount of attorney fees under the contract, that equitable subrogation entitled CNA to recover reasonable attorney fees and not merely actual attorneys fees.

The trial court held an evidentiary hearing regarding attorney fees. Following the evidentiary hearing, the trial court concluded that the evidence supported a finding that $385 per hour was a reasonable hourly rate for the services provided by Plunkett & Cooney in this case. This appeal followed.

II. Analysis

A. The Intervention of CNA and the Setting Aside of the Satisfaction of Judgment

This Court has previously considered RVP's claims on these matters. "The law of the case doctrine provides that 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.'" *City of Kalamazoo v Department of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428; 454, 302 NW2d 164 (1981). However, "the law of the case doctrine does not operate as a limitation on the power of appellate courts, but rather as a discretionary rule of practice." *Id*. at 135-136, citing *Locricchio v Evening News Ass'n*, 438 Mich 84, 109, 476 NW2d 112 (1991).

In *RVP Development Corp v Furness Golf Construction, Inc*, unpublished order of the Court of Appeals, entered October 27, 2006 (Docket Nos. 272919, 272920), a panel of this Court considered RVP's applications for leave to appeal the order granting CNA's motion to set aside the satisfaction of judgment entered between RVP and Furness. This Court denied RVP's applications "for lack of merit in the grounds presented." *Id*. In *RVP Development Corp v Furness Golf Construction, Inc*, unpublished order of the Court of Appeals, entered October 27, 2006 (Docket Nos. 272721, 272723); a panel of this Court considered RVP's application for leave to appeal from an order granting CNA's motion to intervene in order to pursue case evaluation sanctions against RVP. This Court denied RVP's applications "for lack of merit in the grounds presented." *Id*.

As reflected in the language of these orders it is clear that "in determining how to dispose of [these] application[s] for leave to appeal, [this Court] look[ed] to the merits of the claims made in the application." *Halbert v Michigan*, 545 US 605, 610; 125 S Ct 2582; 162 L Ed 2d 552 (2005). A denial on the merits becomes the law of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Here, this Court clearly addressed RVP's claims in regard to setting aside the satisfaction of judgment and the motion to intervene.

Accordingly, we will not revisit these issues since they were raised and in prior appeals and another panel of this Court determined that these issues were without legal merit.

B. The Judgment Entered in Favor of CNA

The only issue raised anew in this appeal is whether the trial court erred by awarding CNA case evaluation sanctions in an amount higher than the amount of attorney fees actually paid by CNA.[3]

1. Standard of Review

A trial court's grant of case evaluation sanctions is subject to de novo review on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, a trial court's determination of reasonable attorney fees is reviewed for an abuse of discretion. *Id.* at 377; *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). An abuse of discretion will be found where the trial court, in the exercise of its discretion, reaches a result that is outside the range of principle outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Additionally, "[a]n error of law may lead a trial court to abuse its discretion." *Gawlik v Rengachary*, 270 Mich App 1, 8-9; 714 NW2d 386 (2006). As a general matter, a court "'by definition abuses its discretion when it makes an error of law.'" *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006), quoting *Koon v United States*, 518 US 81; 100, 116 S Ct 2035; 135 L Ed 2d 392 (1996).

2. Standing

CNA argues, and the trial court concluded, that RVP lacked standing to claim CNA's subrogation rights were limited to recovering attorneys' fees actually paid by CNA. We disagree. We conclude the trial court committed an error of law when it concluded that RVP lacks legal standing to challenge the scope of CNA's subrogation rights.

> Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires a demonstration that the

[3] In attacking the merits of the monetary judgment entered against it, RVP also claims: (1) CNA did not satisfy the contractual conditions necessary to become subrogated to the rights of Furness; and (2) even if subrogation applies, CNA would stand in the shoes of Furness, which has already released the subrogated claim and filed a satisfaction of judgment. RVP further argues that if subrogation applies but the release of RVP is not honored, CNA's claim would still be subordinate to the claim of Glenn Arden, Thumb National Bank's assignee, because Furness granted Thumb National Bank a first security interest in all its assets—including its right to collect case evaluation sanctions. RVP therefore asserts that it acted properly in paying Arden, who perfected his secured position before CNA asserted its subrogation claim. Significantly, all of these arguments were presented in the prior appeals. Therefore we decline to consider them again in this appeal.

> plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. [*House Speaker v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993).]

RVP is not denied standing merely because it is not a party to the insurance contract. While a stranger to a contract generally cannot maintain a claim for breach of the contract, *First Security Savings Bank v Aitken*, 226 Mich App 291, 305; 573 NW2d 307 (1997), overruled on other grounds, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1998), the issue in the present case does not relate to a breach of the agreement. Rather, the issue is whether the terms of the subrogation provision of the contract permit CNA to recover an amount greater than the amount actually paid by CNA. On that issue, RVP, which is the party that must ultimately pay any award, has a substantial interest that is singularly unique and on which it has every reason to ensure sincere and vigorous advocacy. Therefore, CNA's claim that RVP does not have standing to challenge the scope of CNA's subrogation rights is without merit.

3. CNA's Contractual Subrogation Rights

RVP argues that CNA's subrogation claim was limited to the amount of fees and costs actually paid by CNA in providing counsel to Furness. We agree.

CNA's subrogation rights are derived from the policy of insurance it issued to its insured, Furness. An insurance policy is a contractual agreement that must be interpreted pursuant to the law of contracts. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007); *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992); *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). The primary goal in the interpretation of a contract is to honor the intent of the parties, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003); *Tenneco Inc, supra* at 444, and when presented with a dispute, a court must determine what the parties' agreement is and enforce it, *Shefman v Auto Owners Ins Co*, 262 Mich App 631, 637; 687 NW2d 300 (2004). The contractual language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 178; 760 NW2d 624 (2008); *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). An insurance contract is clear if it fairly admits of but one interpretation. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999); *Hellebuyck v Farm Bureau Gen Ins Co*, 262 Mich App 250, 254; 685 NW2d 684 (2004). If an insurance contract's language is clear, its construction is a question of law for the court. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Section IV, subpart 8 of the insurance policy between CNA and Furness provided, in pertinent part:

> *If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us.* The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them. [Emphasis added.]

Significantly, the above quoted language is clear and easily understood. Stated in the simplest of terms, this language provides that when Furness gained the right to recover attorneys' fees pursuant to the case evaluation court rule, CNA was vested with the right to recover "*all or part*" of the fees it paid to provide Furness with counsel. We reject CNA's claim that this provision grants it the right to pursue all case evaluation sanctions the trial court may impose. Such an interpretation is unsupported by the express language of the insurance contract.

We also reject the argument, embraced by the trial court, that the purpose and the intent of the case evaluation court rule enhances and expands CNA's contractual subrogation rights. A court rule cannot modify the rights and duties of a clear and unambiguous contract that is not in violation of public policy. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003). Here, CNA's right to recover is not expanded by the case evaluation court rule; rather, CNA's right to recover is limited by the clear and unambiguous contract of insurance it issued to Furness.

4. Equitable Subrogation

CNA also argues that it possesses a right to recover reasonable attorneys' fees under the court rule pursuant to the doctrine of equitable subrogation. We disagree.

Equitable subrogation is a very narrow principle that has been described as follows:

> "[E]quitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Auto-Owners Ins v Amoco Production*, 468 Mich 53, 59; 658 NW2d 460 (2003), quoting *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion by Williams, C.J.) The doctrine of equitable subrogation is best understood as *allowing a wronged party* to stand in the place of the client, assuming specific conditions are met. Those conditions are: (1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two are merged with regard to the particular issue where negligence of counsel is alleged, (2) *the third party must lack any other available legal remedy*, and (3) the third party must not be a "mere volunteer," i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed to the client. [*Beaty, v Hertzberg & Golden, PC*, 456 Mich 247, 254-255; 571 NW2d 716 (1997) (Emphasis added) (Citations omitted).]

Applying the above legal principles to the present case, we conclude CNA does not possess any rights under the doctrine of equitable subrogation. First, CNA is not a "wronged party." By awarding it only actual attorney fees it will get exactly what it contracted to receive—subrogation of the amount it paid to provide its insured with legal counsel. Second, CNA has available a legal remedy— an action for contractual subrogation. It has long been understood that "equity will not imply a contract in law where an express contract exists." *Ramirez v Bureau of State Lottery*, 186 Mich App 275, 285; 463 NW2d 245 (1990) (holding that equity will not interfere where a legal remedy is available); see also *LaBour v Michigan Nat Bank*, 335 Mich 298, 302; 55 NW2d 838 (1952) ("It is fundamental that equity follow the law.").

Since CNA has an express contractual subrogation agreement, it cannot rely on equity to claim more than it is entitled to under its insurance contract.

III. Conclusion

We affirm the order granting CNA the right to intervene. We affirm the order setting aside the satisfaction of judgment between RVP and Furness. We reverse the monetary judgment entered against RVP and in favor of CNA. We remand for further proceedings consistent with this opinion.

We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Brian K. Zahra