

[Cite as *Davie v. Nationwide Mut. Ins. Co.*, 2015-Ohio-4698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102626

ERICA DAVIE

PLAINTIFF-APPELLANT

vs.

**NATIONWIDE MUTUAL INSURANCE
COMPANY, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-815427

BEFORE: Kilbane, P.J., Boyle, J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 12, 2015

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MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiff-appellant, Erica Davie (“Erica”), appeals from the trial court’s judgment denying her motion for summary judgment and granting summary judgment in favor of defendants-appellees, Nationwide Mutual Insurance Company (“Nationwide”) and Sadallah Agency Inc. (“Sadallah”) (collectively referred to as “defendants”). For the reasons set forth below, we affirm.

{¶2} In October 2011, Erica and her husband, Michael Davie (“Michael”), were involved in a car accident with an uninsured motorist in Shaker Heights, Ohio. Erica and Michael were both injured and sought medical treatment. Nationwide insured the Davies under a policy that included uninsured motorist (“UM”) coverage. In October 2012, Michael sued Nationwide, alleging, among other things, loss of consortium, breach of contract, and bad faith. *See Davie v. Nationwide Ins. Co.*, Cuyahoga C.P. No. CV-12-793284. The matter proceeded to trial in December 2013. Acting pro se, Michael presented a case with no expert testimony proving that his injuries were proximately caused by the accident. At the conclusion of Michael’s case, the trial court directed a verdict in Nationwide’s favor. The court found Michael offered testimony that he received treatment for soft tissue injuries for two years after the accident, without offering expert opinion to demonstrate how this treatment was related to the accident. The directed verdict disposed of Michael’s contract claims, and the trial court allowed defendants leave to file a motion for summary judgment on Michael’s remaining loss of consortium claim arising from Erica’s injuries.

{¶3} Michael then appealed to this court in *Davie v. Nationwide Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 101285, 2015-Ohio-104 (“*Davie I*”). On appeal, we affirmed the trial court’s judgment, finding that Michael

admittedly did not offer expert testimony to show that his soft tissue injuries were proximately caused by the tortfeasor's negligence. This constituted a failure of proof on the issue of the uninsured motorist's claim and warranted the court directing a verdict in Nationwide's favor. This failure of proof renders all other claimed trial errors moot because they would not warrant a new trial when [Michael] failed to make a prima facie case of negligence.

Id. at ¶ 14.¹

{¶4} Following our decision, the trial court granted Nationwide's motion for partial summary judgment on Michael's loss of consortium claim. The court based its denial in part on the fact that Michael's recovery under a consortium claim was the subject of full payment and release with Nationwide. The release the trial court referred to was executed by Michael and Erica in November 2012. It states in relevant part:

For and in consideration of the payment to me/us, Erica Davie and Michael Davie, individually and as husband and wife, claimant(s) herein, of (\$25,000.00) Twenty-five Thousand and 00/100 dollars, the receipt and sufficiency of which is acknowledged, and for other good and valuable consideration, I/we * * * do completely release and forever discharge [Nationwide], its employees [and] agents, * * * of and from any and all past, present, and future actions, causes of action, claims, legal or contractual obligations, demands, damages of any kind, claims of bad faith, * * * loss of services, * * * compensation of any kind, * * * and all consequential damage on account of, or in any way growing out of Uninsured/Underinsured Motorist Coverage of an automobile policy * * * issued to Michael Davie, for any and all known and unknown personal injuries, death, and/or damages resulting or to result from an accident/incident that occurred on or about 10-12-2011[.] It is understood and agreed that this Release and Trust Agreement only applies to the bodily injury claim, uninsured motorist claim of Erica Davie and all derivative claims arising hereunder, particularly the derivative claim of Michael Davie. This release does not extinguish the bodily injury, uninsured motorist claim of Michael Davie as set forth in the lawsuit of Michael Davie filed in Cuyahoga County Court of Common Pleas being case number 12-793[284].

¹In a related appeal, *Davie v. Nationwide Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 101453, 2015-Ohio-422, we affirmed the trial court's decision granting default judgment against the uninsured motorist in a complaint brought by Nationwide for the UM benefits it paid to the Davies.

{¶5} In October 2013, Erica filed a complaint in the instant case against Nationwide and Sadallah, asserting the following seven causes of action: (1) loss of consortium; (2) breach of contract; (3) breach of good faith and fair dealing; (4) bad faith; (5) negligent infliction of emotional distress; (6) intentional infliction of emotional distress; and (7) unjust enrichment. Erica alleges that Nationwide and Sadallah denied the existence of the Davies' auto insurance policy with Nationwide, Nationwide and Sadallah acted in bad faith by failing to acknowledge her loss of consortium claim, and Nationwide was unjustly enriched by failing to pay Erica benefits under the policy. Erica further alleges that she suffered emotional distress as a result of their conduct.

{¶6} Erica and defendants both filed motions for summary judgment. The defendants opposed Erica's motion, arguing Erica's claims fail because of the release she signed in November 2012. Defendants also moved to strike Erica's summary judgment motion because she submitted declarations with her motion instead of a sworn statement. In response, Erica filed a motion to strike defendants' brief in opposition, claiming it was untimely. Erica also filed a brief in opposition to defendants' motion for summary judgment and a motion to strike evidence. Erica argued that she understood the release to read that only her bodily injuries and her husband's derivative claims were waived — not her loss of consortium claim. She further argued that defendants' exhibits A001-B040 should not be considered because they were not referenced to by a properly framed affidavit. She also filed a supplement, including her sworn affidavit. Defendants opposed Erica's motion.

{¶7} In October 2014, the trial court canceled trial and stayed the proceedings until the disposition of *Davie I*, 8th Dist. Cuyahoga No. 101285, 2015-Ohio-104. Following our disposition of this appeal, the trial court issued the following journal entry, denying Erica's

motion for summary judgment and granting defendants' motion for summary judgment. The trial court thoughtfully stated:

This Court has considered the parties arguments and law in their respective motions for summary judgment, briefs in opposition, replies thereto and exhibits attached by each party. This Court finds that the release that was executed by the plaintiff and her husband in consideration of the payment of \$25,000.00 completely release and forever discharge the defendant Nationwide Insurance Company and its agents, employees and officers affiliates, of which would include the defendant Sadallah Agency, of and from any and all past, present and future actions, causes of action, claims, legal or contractual obligations, demands, damages of any kind, claims of bad faith and loss of services.

Further, the release also expressly states that the release only applies to the bodily injury, uninsured motorist claim of Erica Davie and all derivative claims arising hereunder, particularly the derivative claim dependent upon the tort claim of Michael Davie. This Court also finds that the release expressly states that it does not extinguish the bodily injury, uninsured motorist claim of Michael Davie as set forth in the lawsuit of Michael Davie filed in Cuyahoga County Court of Common Pleas[.] This Court notes that [Michael's case was] disposed not in favor of its Plaintiff, Michael Davie. Finally, there exists no genuine issue of material fact related to the intent of the parties to the release.

Therefore, the release bars Plaintiff's claim for loss of consortium, and the disposition of [Michael's case] bars the plaintiff's consortium claim as a matter of law. Furthermore, the release also bars the plaintiff's claims for breach of contract, breach of good faith and fair dealing, bad faith, negligent infliction of emotional distress, intentional infliction of emotional distress and unjust enrichment. Therefore, defendants' motion * * * for summary judgment is granted. Plaintiff's motion * * * for summary judgment is denied as it raises no genuine issue of material fact.

{¶8} It is from this order that Erica appeals, raising the following two assignments of error for review, which shall be discussed together.

Assignment of Error One

The trial court erred by denying [Erica's] motion to strike improperly attached summary judgment evidence, and basing its decision in reliance upon that evidence in violation of Civ.R. 56 (E).

Assignment of Error Two

The trial court's finding that Nationwide's drafted release was unambiguous, thereby waiving [Erica's] and her children's separate claims to loss of consortium, regardless of parol evidence and claim of mutual mistake of executing a release[,] which included conflicting and fraudulent language[,] resulted in a summary judgment granted in error under Civ.R. 56.

{¶9} Within these assigned errors, Erica challenges the trial court's disposition of defendants' motion for summary judgment, arguing that: (1) certain evidence should have been stricken from the record, and (2) Erica never intended to dispose of her loss of consortium claim when she signed the release. Rather, she claims her intent was for the release to apply only to her bodily injury claim.

{¶10} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows.

{¶11} Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶12} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by

affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

Improperly Attached Summary Judgment Evidence

{¶13} Erica argues the email printouts attached to defendants’ motion for summary judgment, which detailed some of the court’s journal entries in Michael’s case, were not supported by an affidavit and should have been stricken from evidence.

{¶14} Civ.R. 56(C) provides a list of materials the trial court may consider when deciding a motion for judgment. These materials include “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]” *Id.* “The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.” *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981).

{¶15} While the journal entries initially were not certified copies, defendants rectified any concern by attaching certified copies of the journal entries in Michael’s case to its reply brief. Moreover, the docket reveals that the trial court took judicial notice of Michael’s case by staying Erica’s case pending an appeal in Michael’s case and by referring to the disposition of Michael’s case in its decision denying Erica’s motion for summary judgment. Therefore, we find Erica’s argument unpersuasive.

{¶16} Erica next argues that two affidavits submitted by Nationwide claims adjuster, Ryan Martig (“Martig”), were not made by personal knowledge and should have been stricken from evidence.

{¶17} Civ.R 56(E) provides that “[s]upporting * * * affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” “‘Personal knowledge’ is ‘knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.’” *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 26, quoting *Black’s Law Dictionary* 875 (7th Ed.Rev.1999), citing Weissenberger, *Evidence*, Section 602.1, at 213 (2002). A trial court has wide discretion to determine whether a witness has sufficient personal knowledge to testify competently. *Wholesale Builders Supply, Inc. v. Green-Source Dev., L.L.C.*, 8th Dist. Cuyahoga No. 99711, 2013-Ohio-5129, ¶ 13, citing *Starinchak v. Sapp*, 10th Dist. Franklin No. 04AP-484, 2005-Ohio-2715.

{¶18} Here, Martig identifies himself as the claims adjuster handling the Davies’ claim in both affidavits. He states in one affidavit that his testimony is made on personal knowledge and review of the Davies’ claim file. In the other affidavit, he states that he had the principal responsibility of adjusting the Davies’ claim. Based on the foregoing, it is reasonable to conclude that the statements in his affidavits are based upon his personal knowledge.

{¶19} Accordingly, the first assignment of error is overruled.

Loss of Consortium Claim

{¶20} In the instant case, the trial court granted defendants’ motion for summary on two grounds: (1) the language in the release and (2) the directed verdict against Michael on his

negligence claim. Erica argues that prior to signing the release, she chose to employ her own language to reflect her intent. The release was modified to include the following language:

It is understood and agreed that this Release and Trust Agreement only applies to the bodily injury claim, uninsured motorist claim of Erica Davie and all derivative claims arising hereunder, particularly the derivative claim of Michael Davie. This release does not extinguish the bodily injury, uninsured motorist claim of Michael Davie[.]

{¶21} Erica contends that the release was not intended to extinguish her loss of consortium claim. It was intended to extinguish her bodily injury claims only.

{¶22} It is a fundamental principle in contract construction that contracts should “be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language.” *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. The intent of the parties is presumed to reside in the language they chose to use in their agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 131, 509 N.E.2d 411 (1987), paragraph one of the syllabus. Extrinsic evidence is admissible to ascertain the intent of the parties when the contract is unclear or ambiguous, or when circumstances surrounding the agreement give the plain language special meaning. *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). A reviewing court should give the contract’s language its plain and ordinary meaning unless some other meaning is evidenced within the document. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978); *Shelly Co. v. Karas Props.*, 8th Dist. Cuyahoga No. 98039, 2012-Ohio-5416, ¶ 16.

{¶23} Here, the plain language of the release states that in exchange for \$25,000, Erica and Michael

completely release and forever discharge [Nationwide], its employees [and] agents, * * * of and from any and all past, present, and future actions, causes of action, claims, legal or contractual obligations, demands, damages of any kind, claims of bad faith, * * * loss of services, * * * compensation of any kind, * * * and all consequential damage resulting from the accident.

It further provides that the release

only applies to the bodily injury claim, uninsured motorist claim of Erica Davie and all derivative claims arising hereunder, particularly the derivative claim of Michael Davie. This release does not extinguish the bodily injury, uninsured motorist claim of Michael Davie[.]

(Emphasis added.)

{¶24} When we read the plain terms of the agreement, we find it unambiguously states that it applies to Erica’s bodily injury UM claim, as well as all derivative claims, which includes her loss of consortium claim. In consideration for \$25,000, Erica released her rights to recover from the defendants on any and all past, present, and future causes of action, legal or contractual obligations, damages of any kind, or claims of bad faith coverage. We are constrained by this language and will not create a meaning different than the plain and ordinary language used in the release. *See Co. Wrench v. Andy’s Empire Constr., Inc.*, 8th Dist. Cuyahoga No. 94959, 2010-Ohio-5790, ¶ 19, citing *Buckeye Pipe Line Co.* Therefore, Erica’s loss of consortium claim and her remaining causes of action are barred by the release she executed in November 2012.²

{¶25} Moreover, regardless of the release, Erica’s loss of consortium claim is barred by the fact that Michael’s case failed. We note that

²We note that Erica referenced a loss of consortium on her children’s behalf as part of her loss of consortium claim. Erica brought the complaint, however, in her individual capacity, and never articulated a separate claim on her children’s behalf. As a result, we decline to interpret Erica’s complaint as asserting derivative claims on behalf of her minor children.

[i]n order to prove a loss of consortium claim, the plaintiffs first must establish the underlying action. Although a separate cause of action, a consortium claim is a derivative claim in the sense that it can only be maintained if the primary negligence action is proven.

Urban v. Goodyear Tire & Rubber Co., 8th Dist. Cuyahoga Nos. 77162, 77776, & 76703, 2000 Ohio App. LEXIS 5730 (Dec. 7, 2000), *14, citing *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585 N.E.2d 384 (1992). Here, Michael failed to prove any bodily injury and his claim was dismissed on directed verdict, which was affirmed by this court on appeal. It follows then that Erica's loss of consortium claim also fails. Therefore, we find that trial court properly granted summary judgment in favor of defendants.

{¶26} Accordingly, the second assignment of error is overruled.

{¶27} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
PATRICIA A. BLACKMON, J., CONCUR