STATE OF MICHIGAN

COURT OF APPEALS

HAROLD JUSTIN PALKA,

Plaintiff-Appellee,

v

AAA OF MICHIGAN, doing business as AUTO CLUB GROUP INSURANCE COMPANY,

Defendant/Third-Party Plaintiff-Appellant,

and

HOME-OWNERS INSURANCE COMPANY,

Defendant/Third-Party Defendant-Appellee.

UNPUBLISHED
April 11, 2024

No. 361695
Livingston Circuit Court
LC No. 16-029031-NF

Before: CAVANAGH, P.J., and K. F. KELLY and RICK, JJ.

PER CURIAM.

This dispute regarding insurer priority under the no-fault act, MCL 500.3101 *et seq*., is before us for the second time after this Court previously affirmed determinations that resulted in defendant/third-party defendant, Home-Owners Insurance Company (Home-Owners), being designated the insurer of highest priority with respect to no-fault benefits payable to or on behalf of plaintiff. *Palka v AAA of Mich*, unpublished per curiam opinion of the Court of Appeals, issued September 10, 2020 (Docket Nos. 350204 and 350207) (*Palka I*). Several months after the Supreme Court denied leave to appeal in *Palka I*, defendant/third-party plaintiff, AAA of Michigan, doing business as Auto Club Group Insurance Company (AAA), filed a motion to reopen the case before the trial court on the basis that it was improperly closed on July 29, 2019, by an order that did not adjudicate AAA's third-party claim for reimbursement of the benefits it

paid in this matter. AAA now appeals by leave granted[1] the order denying its motion to reopen the case. Finding no error warranting reversal, we affirm.

I. BACKGROUND

As this Court explained in *Palka I*, plaintiff was seriously injured when he was struck by an automobile while riding a motocross bike on November 7, 2015. The automobile was owned and operated by Geraldine Przeslawski, who was insured by AAA. *Id*. at 2. Plaintiff was uninsured at the time of the accident, but purportedly lived with his mother, who was insured by Home-Owners. *Id*.

AAA filed a third-party complaint against Home-Owners[2] in October 2016, seeking (1) a declaration that Home-Owners was the insurer of highest priority in this matter; (2) a declaration that the motocross bike plaintiff was riding constituted an off-road vehicle (ORV), rather than a motorcycle; and (3) a money judgment against Home-Owners for benefits AAA had previously paid to or on behalf of plaintiff. In August 2017, the trial court granted summary disposition in favor of AAA, concluding that plaintiff was domiciled with his mother at the time of the accident. Several months later, the trial court again granted summary disposition in favor of AAA with respect to the nature of the motocross bike. The combined effect of these rulings demonstrated that Home-Owners was the insurer of highest priority. Home-Owners pursued an interlocutory appeal concerning these matters, but this Court denied Home-Owners's application for failure to persuade the Court of the need for immediate review. *Palka v AAA of Mich*, unpublished order of the Court of Appeals, entered July 18, 2018 (Docket No. 342167).

At a hearing held in July 2019, the parties advised the trial court that they had resolved the remaining issues that had been raised in dispositive motions and had judgments and orders prepared for filing.[3] Home-Owners noted that it did not intend to appeal the issues that would be resolved in such orders, but planned to appeal the "prior order." According to Home-Owners, the goal in resolving the remaining dispositive motions was "to get to a final order." AAA confirmed that the parties had reached an agreement regarding the substance of the orders. Plaintiff submitted

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[1] *Palka v AAA of Mich*, unpublished order of the Court of Appeals, entered November 30, 2022 (Docket No. 361695).

[2] Home-Owners repeatedly complains that AAA never pleaded a claim against it because the third-party complaint referred exclusively to Auto-Owners Insurance Company, a related but distinct corporate entity. Home-Owners emphasizes that AAA never amended the substantive allegations of the third-party complaint after the trial court entered a stipulated order correcting the caption to properly identify the corporate parties, so no allegations have been pleaded against Home-Owners. We acknowledge Home-Owners's position on this matter, but deem it unnecessary to address this point to properly resolve this appeal. In the interest of clarity, we will refer to Home-Owners throughout this opinion.

[3] Two orders were entered following the July 2019 hearing because this case was consolidated with a direct provider action in the trial court. Only the order entered in case number 16-029031-NF is relevant to this appeal.

a proposed order under MCR 2.602(B)(3), which was entered by the trial court on July 29, 2019. The order granted plaintiff's motion for partial summary disposition and entered judgment in favor of plaintiff and against Home-Owners in the amount of $247,641.04. Below the judge's signature, the order stated, "This is a final order and closes the case."

Home-Owners filed a claim of appeal from the July 29, 2019 order. In its appellate brief in that case, Home-Owners alleged that the trial court's July 29, 2019 order (though misidentified as having been entered on July 18, 2019) was a final order and that this Court had jurisdiction to resolve its claim of appeal. AAA was designated as an appellee and its appellate brief stated only that it concurred in Home-Owners's statement regarding jurisdiction. In an unpublished, per curiam opinion issued on September 10, 2020, this Court affirmed the trial court's rulings regarding plaintiff's domicile and the nature of the motocross bike. *Palka I*, unpub op at 2, 7.

In January 2022, AAA filed with the trial court what it titled as a motion to reopen an erroneously closed case. AAA alleged that it paid more than $700,000 in first-party no-fault benefits in this matter and that its third-party complaint included a claim for reimbursement that was never adjudicated. Thus, according to AAA, there was never a final order entered, and the case should not have been closed following entry of the July 29, 2019 order. AAA also asserted for the first time that Home-Owners's claim of appeal was filed prematurely. AAA's motion to reopen the case was accompanied by a motion for summary disposition regarding the reimbursement claim.

Home-Owners responded that Michigan law does not recognize a motion to reopen a case following entry of a final order and that AAA's motion was more properly construed as an inexcusably tardy motion for relief from the July 29, 2019 final order. Home-Owners also disagreed with AAA's position regarding the finality of the July 29, 2019 order. Plaintiff concurred with Home-Owners and further noted that the July 29, 2019 order was "discussed, calculated, and agreed upon by all counsel," with the intention that the order be final and result in closure of the case. The trial court agreed that AAA's motion was effectively a mislabeled motion for relief from judgment and denied it as untimely under MCR 2.612(C)(2). This appeal followed.

II. STANDARD OF REVIEW

This Court reviews the construction and application of court rules de novo. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000). The principles governing construction of statutes are equally applicable to court rules. *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 271; 870 NW2d 494 (2015). "Namely, the court rule is to be interpreted according to its plain language, giving effect to the meaning of the words as they ought to have been understood by those who adopted them." *Id*. (quotation marks and citations omitted). Unambiguous language must be enforced as written. *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 367; 986 NW2d 451 (2022).

III. FINALITY OF THE JULY 29, 2019 ORDER

AAA maintains on appeal that the July 29, 2019 order was not final and should not have resulted in closure of the case because it did not adjudicate all the claims and all the rights and liabilities of all the parties. We disagree.

AAA relies on MCR 2.604(A) to support its contention that the July 29, 2019 order was not final because AAA's claim for reimbursement remained unresolved at the time it was entered. In pertinent part, MCR 2.604(A) states:

> [A]n order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

Although this rule is not phrased as defining the circumstances in which an order or judgment is deemed final, it clearly contemplates that finality is established only when "all the claims and the rights and liabilities of all the parties" have been adjudicated. MCR 2.604(A). By clear implication then, an order that adjudicates "fewer than all the claims" is not final and, according to the plain language of MCR 2.604(A), does not "terminate the action." *Id*. See also *Yudashkin v Linzmeyer*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (reasoning that order granting summary disposition to two defendants was not a final judgment and did not terminate action because claim against third defendant remained to be adjudicated). Home-Owners questions the applicability of the rule in this context, but it does not offer any legitimate dispute that an order will only be deemed final if it resolves all the claims, rights, and liabilities of all the parties to a lawsuit.

AAA's third-party complaint outlined the factual and legal basis for its belief that Home-Owners was the insurer of highest priority for payment of plaintiff's no-fault benefits and specifically alleged that it was seeking reimbursement of the no-fault benefits it paid to or on behalf of plaintiff. At the time the trial court entered the July 29, 2019 order that granted a judgment in favor of plaintiff and against Home-Owners, the trial court had already resolved the issues underlying the priority dispute, but had yet to address AAA's reimbursement claim. Again, while Home-Owners raises a variety of reasons that the trial court could no longer enter judgment on that issue after *Palka I*, it does not seem to seriously dispute that AAA's claim for reimbursement was never fully resolved on the merits. Thus, entry of the July 29, 2019 order adjudicated "fewer than all the claims" raised in AAA's third-party complaint and, under the plain and unambiguous language of MCR 2.604(A), would not ordinarily be considered a final judgment or order that terminated the action.

Home-Owners attaches much significance to this Court's consideration of its appeal in *Palka I*, reasoning that this Court would not have had jurisdiction unless the order from which its claim of appeal was taken—the July 29, 2019 order—was final. We find Home-Owners's argument on this point unpersuasive. "The jurisdiction of the Court of Appeals is provided by law, and its practice and procedure are prescribed by the court rules and our Supreme Court." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004). Under MCL 600.308(1) and MCR 7.203(A)(1), this Court has jurisdiction in an appeal by right from a final judgment or order. Relevant to this issue, a final judgment or order in a civil case includes "the first judgment or order

that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ."[4] MCR 7.202(6)(a)(i). Importantly, it is the filing of a claim of appeal from a final judgment or order that vests this Court with jurisdiction. *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009). Home-Owners's contention that this Court's exercise of jurisdiction is proof of the finality of an order puts the cart before the horse.

Nonetheless, the manner in which the July 29, 2019 order was entered is highly significant to proper resolution of this issue. The parties appeared before the trial court for a hearing regarding dispositive motions not relevant to this appeal. At that time, the parties advised the court that they reached agreements resolving the case. Home-Owners specifically mentioned its intention to appeal an earlier order and explained that the purpose of resolving the then-pending motions was "to get to a final order." AAA confirmed that it was in agreement regarding the substance of the order. Because of the involvement of the Michigan Catastrophic Claims Association, however, both insurance companies indicated that they could not place a stipulation on the record. Consequently, the July 29, 2019 order was entered without objection pursuant to the 7-day rule. AAA's agreement to this process and entry of the order that was designated as final, thus closing the case, effectively waived adjudication of AAA's reimbursement claim.

It has long been the law of this state that waiver occurs upon "the intentional relinquishment of a known right." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254; 776 NW2d 145 (2009), quoting *Book Furniture Co v Chance*, 352 Mich 521, 526; 90 NW2d 651 (1958) (emphasis omitted). " 'The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive.' " *The Cadle Co*, 285 Mich App at 254-255, quoting *Book Furniture Co*, 352 Mich at 526-527. The record demonstrates that AAA participated in entry of the July 29, 2019 order with full understanding that (1) it was being submitted as a final order; (2) the order bore the language required by MCR 2.602(A)(3) indicating that it was a "final order and closes the case"; and (3) Home-Owners intended to pursue a claim of appeal from the order to challenge the trial court's earlier rulings regarding the priority dispute. The last of these points is the most significant because Home-Owners could only claim an appeal by right from the July 29, 2019 order if it was the first order to dispose of all the claims and adjudicate the rights and liabilities of all the parties. MCR 7.202(6)(a)(i). See also *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007) (reasoning that order appealed was final, thus giving rise to appeal by right, because there was nothing left for the trial court to decide). This fact should have been manifestly apparent to AAA given this Court's previous denial of Home-Owners's interlocutory appeal. By clear implication then, AAA was waiving its right to adjudication of its

[4] Home-Owners suggests that the July 29, 2019 order also meets the definition of a final judgment or order as defined in MCR 7.202(6)(a)(ii), which refers to "an order designated as final under MCR 2.604(B)," because the order explicitly stated that it was "a final order and closes the case." MCR 2.604(B), however, applies only to "receivership and similar actions." The final order language in the July 29, 2019 order was presumably incorporated in compliance with MCR 2.602(A)(3), and is not controlling with respect to this Court's jurisdiction. *Stumbo v Roe*, 332 Mich App 479, 482 n 1; 957 NW2d 830 (2020).

unresolved reimbursement claim. Accordingly, the July 29, 2019 order *was* a final order for purposes of MCR 2.604(A) and MCR 7.202(6)(a)(i)[5] because, with the reimbursement claim having been waived, it disposed of all the remaining claims in need of adjudication.

In light of our conclusion on this issue, we decline to address AAA's arguments concerning whether the finality of the July 29, 2019 order was established through the law of the case and whether AAA was judicially estopped from challenging the finality of the order.

IV. DENIAL OF AAA'S MOTION TO REOPEN THE CASE

AAA also argues that the trial court erred by misconstruing its motion to reopen the case as a motion for relief from judgment. We disagree.

Preliminarily, we note that AAA does not challenge whether its motion was untimely under MCR 2.612(C)(2). AAA's claim of error is premised on the trial court having mischaracterized its motion, which AAA maintains was not governed by MCR 2.612 at all because it did not seek relief from a judgment. In advancing this theory, however, AAA identifies no alternative legal framework under which its motion to reopen the case ought to have been considered. It cites no authority applicable to this issue at all, instead relying strictly on arguments of logic. For that reason alone, we would be free to deem this issue abandoned. See *Pegasus Wind, LLC v Tuscola Co*, 340 Mich App 715, 754; 988 NW2d 17 (2022) ("By failing to provide any legal argument or analysis, the [litigant] has effectively abandoned any claim of error on this question."), oral argument ordered on the application 511 Mich 977 (2023). Even so, we will exercise our discretion to consider this issue. See *In re Warshefski*, 331 Mich App 83, 87; 951 NW2d 90 (2020) (choosing to address abandoned issue, despite the respondent's failure to identify supporting authority).

In *Peterson v Oakwood Healthcare, Inc*, 336 Mich App 333, 340-341; 970 NW2d 389 (2021), a trial court awarded sanctions against the intervening plaintiff for filing a frivolous motion for relief from judgment. The trial court's reasons for doing so were not entirely clear, but seemed to include the fact that the case had been closed and, therefore, could not be reopened. *Id*. at 347. As this Court observed in *Peterson*, the trial court apparently "accept[ed] plaintiff's assertion that the proper procedure for the [intervening plaintiff] would have been to have moved to reopen the case and then move for relief from judgment." *Id*. *Peterson* concluded that the trial court's view on this matter was patently wrong, noting, in part, that "the vehicle to 'reopen' a case is MCR 2.612(C) itself." *Id*. In light of this precedent, the trial court did err by construing AAA's motion to "reopen the case" as a motion for relief from judgment governed by MCR 2.612(C).

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[5] To be clear, we do not suggest that AAA waived a flaw in this Court's subject-matter jurisdiction in *Palka I*, as it is well settled that subject-matter jurisdiction cannot be waived. *LME v ARS*, 261 Mich App 273, 278; 680 NW2d 902 (2004). Although the parties have focused much of their respective arguments on AAA's concessions in its *Palka I* appellate brief, our analysis is focused on AAA's actions before the trial court. By agreeing to entry of a final order in the trial court, despite the fact that its reimbursement claim had not been decided or reduced to a judgment, AAA waived the reimbursement claim.

Moreover, AAA's contention that its motion could not logically be construed as a motion for relief from judgment when the trial court's summary disposition rulings were favorable to AAA is unpersuasive. It is beyond dispute that AAA's purpose in filing its motion was to reopen the case so as to allow AAA to pursue a money judgment against Home-Owners. Reopening of the case was necessary because the July 29, 2019 order, on its face, was designated as a final order and closed the case. Thus, AAA was, indeed, seeking relief from that portion of the July 29, 2019 order, regardless of whether it had any complaint regarding the balance of the order granting partial summary disposition and judgment in favor of plaintiff. MCR 2.612(C) governs a motion seeking relief from "a final judgment, order, or proceeding." MCR 2.612(C)(1). The trial court, therefore, did not err by applying MCR 2.612(C), and the time constraints imposed by subrule (C)(2), to AAA's motion to reopen the case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Michelle M. Rick