STATE OF MICHIGAN

COURT OF APPEALS

KENNETH BRAFMAN,

Plaintiff/Counter-Defendant-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

and

CAROLYN PARYLO BRAFMAN, MK TRANSPORT, MK TRANSPORT, L.L.C., and MK TRANSPORTATION,

Third-Party Defendants-Appellees.

UNPUBLISHED
December 20, 2011

No. 300523
Macomb Circuit Court
LC No. 2009-002409-NF

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendant Auto Club Insurance Association (Auto Club) appeals by delayed leave granted from a circuit court order dismissing its counterclaim and third-party claim on the basis that res judicata barred the claims in light of the parties' settlement in a prior lawsuit that resulted in dismissal of the claims and counterclaims without prejudice. We reverse.

I. BASIC FACTS

The parties' disputes arise from plaintiff Kenneth Brafman's efforts to collect first-party no-fault benefits for injuries suffered in automobile accidents in 1996 and 1999, and Auto Club's contention that Kenneth Brafman, his wife Carolyn Brafman, and the transportation companies that Carolyn Brafman formed to provide transportation services for Kenneth Brafman made misrepresentations and committed fraud with respect to Kenneth Brafman's injuries, his need for services, and the charges for the services.

In 2007 and 2008, Kenneth Brafman and the transportation companies filed lawsuits against Auto Club for no-fault benefits. Auto Club filed counterclaims. The trial court

consolidated the cases. On January 21, 2009, the parties reached a settlement, which they placed on the record. Auto Club agreed to pay $20,000 to the Brafmans. The Brafmans agreed that they would not seek reimbursement for "future transportation services" unless there was a material change in Kenneth Brafman's condition that was causally related to the 1996 accident. The day after the settlement, Kenneth Brafman could claim mileage rates for treatment that was medically reasonable and necessary. However, the Brafmans could not claim transportation costs. At Auto Club's request, the parties agreed to dismiss the claims and counterclaims without prejudice. Kenneth Brafman's counsel and the trial court noted that res judicata "may" apply to "these issues" if there was another lawsuit or counterclaim. The trial court entered an order closing the case because the parties had voluntarily dismissed their claims and counterclaims without prejudice.

In May 2009, Kenneth Brafman filed the present case for first-party no-fault benefits and declaratory relief. Auto Club filed a counter complaint as well as a third-party complaint against Carolyn Brafman and the transportation companies. Auto Club alleged that on October 1, 1996, and from January 29, 1999, to the present, the Brafmans made intentional, material, and false representations about Kenneth Brafman's condition, the services rendered to him, and the necessity for those services. Auto Club sought reimbursement and exemplary damages.

The Brafmans and the transportation companies moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), and argued that res judicata barred Auto Club's counter complaint and third-party complaint. The trial court agreed and granted their motion. This Court granted Auto Club's delayed application for leave to appeal.

II. APPLICABILITY OF RES JUDICATA TO A CONSENT JUDGMENT DISMISSING A CASE WITHOUT PREJUDICE

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo.[1] The applicability of res judicata presents a question of law that this Court also reviews de novo.[2]

B. LEGAL STANDARDS

Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first."[3] The doctrine of res judicata will bar a subsequent action between the same parties when the facts or evidence essential to the action

[1] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[2] *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

[3] *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007), quoting *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

are identical to those that were essential to a prior action.[4] The decree in the prior action must have been a final decision.[5] "[A] voluntary dismissal *with* prejudice acts as res judicata with respect to all claims that could have been raised in the first action."[6] However, an order of dismissal *without* prejudice, even when made after a full hearing, does not act as res judicata of the merits of further legal proceedings on the same subject.[7] The phrase "without prejudice" in an order dismissing a claim indicates "'a right or privilege to take further legal proceedings on the same subject, and show that the dismissal is not intended to be *res adjudicata* of the merits.'"[8] "'A dismissal of a suit without prejudice is no decision of the controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought.'"[9]

A judgment that a court enters with the consent of the parties will be deemed a determination of the merits for the purpose of applying the doctrine of res judicata.[10] But where the parties assent to entry of an order dismissing an action without prejudice, the order is presumably intended to carry into effect the agreement that the parties reached to allow further proceedings as necessary to resolve the controversy.[11]

Although the parties entered a settlement on the record in January 2009, resulting in an order dismissing all claims, the order was not a final decision on the merits because the dismissals were without prejudice. The order dismissed all claims without prejudice, leaving open the possibility that a party could raise those claims in a later lawsuit. Therefore, res judicata did not bar Auto Club from re-filing its fraud claims against the Brafmans and the transportation companies.

The Brafmans argue that by affirming the trial court's order, this Court will hold Auto Club to its agreement. "'An agreement to settle a pending lawsuit is a contract and is governed

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[4] *Sewell v Clean Cut Mgt Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

[5] *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379-380; 521 NW2d 531 (1994); *Begin v Mich Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009).

[6] *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 396; 573 NW2d 336 (1997) (emphasis added).

[7] *McIntyre v McIntyre*, 205 Mich 496, 498-500; 171 NW 393 (1919); *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 509-510; 686 NW2d 770 (2004).

[8] *McIntyre*, 205 Mich at 499 (citation omitted, emphasis in original).

[9] *Id*. (citation omitted).

[10] *Begin*, 284 Mich App at 599.

[11] *L & L Concession Co v Goldhar-Zimner Theatre Enterprises Inc*, 332 Mich 382, 386-387; 51 NW2d 918 (1952).

by the legal principles applicable to the construction and interpretation of contracts.'"[12] However, the contractual aspects of a settlement agreement are distinct from the principles of res judicata. As previously explained, res judicata does not apply where the former action was resolved by a dismissal without prejudice. The fact that the parties agreed to the entry of an order of dismissal without prejudice does not endow the order with the potential for res judicata effect.

We reverse.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

[12] *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006) (citation omitted).