IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNESTINE HARRIS,
Appellant,
vs.
SCOTT G. NESTAVAL,
Respondent.

No. 43112

FILED

JUL 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment in a personal injury action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

FACTS AND PROCEDURAL HISTORY

On May 21, 2002, appellant Ernestine Harris (Harris) filed suit in district court alleging negligence against respondent Scott Nestaval (Nestaval). The claim arose from a car accident that occurred between the parties on May 24, 2000.

After the accident, Harris personally, and through her attorney, contacted Nestaval's insurance carrier, State Farm, seeking settlement of her claims. Harris specifically sought information regarding Nestaval's policy limits and any other coverage he had through State Farm.

On August 17, 2001, State Farm attempted to fax Harris a certificate of coverage and a note indicating that it was in the process of investigating whether Nestaval had any excess coverage. This information was faxed to the wrong number. That same day, State Farm mailed Harris a check for $100,000, a release of claims form, and a letter instructing her to sign the release form before negotiating the check and then to return the signed form to State Farm.

On August 21, 2001, Harris cashed the check and promptly paid her attorney fees and medical bills. Harris never signed or returned the release form. Later that day, State Farm faxed and mailed Harris a letter indicating that Nestaval had one million dollars in umbrella coverage in excess of his driver's insurance policy. The fax was again sent to the wrong number.

After receiving the letter regarding the one million dollar coverage, Harris attempted to negotiate with State Farm for the remainder of her damages. State Farm advised that Harris should return the $100,000 check within ninety days or State Farm would consider the check an accord and satisfaction thereby resolving her claim. Harris did not return the $100,000. State Farm refused further negotiations and asserted that the claim had been resolved

Nestaval filed a motion for summary judgment on May 14, 2003, arguing that the parties had reached an accord and satisfaction. The district court granted Nestaval's motion on February 3, 2004, and entered its findings of fact, conclusions of law and judgment on March 4, 2004. Harris now appeals.

DISCUSSION

"An appeal from an order granting a motion for summary judgment is reviewed de novo."[1] "On appeal, the question is whether any genuine issue of fact was created by the pleadings and proof offered."[2] "A

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[1]United Nat'l Ins. Co. v. Frontier Ins. Co., 120 Nev. ___, ___, 99 P.3d 1153, 1156 (2004) (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

[2]McPherron v. McAuliffe, 97 Nev. 78, 79, 624 P.2d 21, 21 (1981) (citing Short v. Hotel Riviera, Inc., 79 Nev. 94, 378 P.2d 979 (1963)).

genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."[3]

"[I]n deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought and the factual allegations of that party must be presumed correct."[4] "However, the non-moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him."[5] "Where an issue of material fact exists, summary judgment should not be granted."[6]

Harris argues that the district court erred in granting summary judgment against her by finding that the parties had reached an accord and satisfaction. She asserts that there was no meeting of the minds between the parties due to State Farm's non-disclosure of a one million dollar umbrella policy.

State Farm argues that Harris was informed that by cashing the $100,000 check, she agreed that she would be settling all potential

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[3]Coury v. Robison, 115 Nev. 84, 87, 976 P.2d 518, 520 (2000) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993)).

[4]Ferreira v. P.C.H. Inc., 105 Nev. 305, 306, 774 P.2d 1041, 1042 (1989) (citing Pacific Pools Constr. Co. v. McClain's Concrete, 101 Nev. 557, 559, 706 P.2d 849, 851 (1985)).

[5]Posadas, 109 Nev. at 452, 851 P.2d at 442 (citing Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 294, 662 P.2d 610, 618-19 (1983)).

[6]Casarotto v. Mortensen, 99 Nev. 392, 394, 663 P.2d 353, 353 (1983) (citing McPherron, 97 Nev. 78, 624 P.2d 21).

claims arising out of the accident with Nestaval. State Farm contends that when Harris cashed the check and retained the proceeds, the parties reached an accord and satisfaction, and therefore summary judgment was appropriate.

"Nevada has a strong public policy interest in assuring that individuals who are injured in motor vehicle accidents have a source of indemnification."[7] "[A]n accord and satisfaction should not be maintained as a 'pitfall into which the unwary might fall by some act wholly unintended to express his acquiescence in a transaction, wherein his lack of experience or lack of knowledge of technical law might debar him from a right of action.'"[8]

"A finding of an accord and satisfaction requires a 'meeting of the minds' of the parties on the terms of the agreement."[9] "It must clearly appear from the evidence that there was in fact and in reality a meeting of the minds before we will consider an agreement an accord and satisfaction."[10] "The law of Nevada requires that the party availing himself of a plea of accord and satisfaction must bear the burden of proof and must establish clearly that there was a meeting of the minds of the

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[7]Hartz v. Mitchell, 107 Nev. 893, 896, 822 P.2d 667, 669 (1991).

[8]DeLee v. Cost Reduction Engineering, 101 Nev. 484, 486, 705 P.2d 161, 163 (1985) (quoting Western Nat'l Ins. Co. v. Trent, 69 Nev. 239, 244, 247 P.2d 208, 210 (1952) (citing Wolf v. Humbolt County, 36 Nev. 26, 31, 131 P. 964, 965 (1913))).

[9]Id. at 486, 705 P2d at 163 (quoting Pederson v. First Nat'l Bank of Nevada, 93 Nev. 388, 392, 566 P.2d 89 (1977)).

[10]Id. (citing Adelman v. Arthur, 83 Nev. 436, 441, 433 P.2d 841, 844 (1967)).

parties, accompanied by sufficient consideration."[11] "While certain conduct by a creditor may imply an accord and satisfaction as a matter of law, the intent of the parties to make a settlement is generally a question of fact."[12]

Here, Harris presented evidence that she did not accept the check offered by State Farm in full satisfaction of her claim. Harris had medical bills that exceeded the amount of the policy limits of Nestaval's primary coverage. Additionally, Harris repeatedly requested information from State Farm regarding the existence of Nestaval's umbrella policy in order to further compensate her for her injuries. Although Nestaval and State Farm argue otherwise, these facts create a genuine dispute as to whether the parties reached a meeting of the minds with respect to the alleged accord and satisfaction. The genuine issue of material fact as to Nestaval's affirmative defense of accord and satisfaction should have precluded the district court from granting summary judgment.

However, it is undisputed that Harris cashed the $100,000 check issued by State Farm and used the proceeds to pay creditors. On remand, Nestaval is entitled to an equitable offset of $100,000 against any judgment Harris may eventually be awarded.[13]

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[11]Walden v. Backus, 81 Nev. 634, 637, 408 P.2d 712, 713-14 (1965) (citing Wolf, 36 Nev. at 30, 131 P. at 965); Western Nat'l Ins. Co. v. Trent, 69 Nev. 239, 244, 247 P.2d 208, 210 (1952); see also Pierce Lathing Co. v. ISEC, Inc., 114 Nev. 291, 297, 956 P.2d 93, 96 (1998) (The party asserting accord and satisfaction must "prove that an accord and satisfaction occurred to overcome the burden that the claim has not been discharged.").

[12]Pierce Lathing, 114 Nev. at 298, 956 P.2d at 97.

[13]See Muije v. A North Las Vegas Cab Co. Inc., 106 Nev. 664, 666, 779 P.2d 559, 560 (1990) (citing Salaman v. Bolt, 141 Cal. Rptr. 841, 847

continued on next page . . .

CONCLUSION

The district court erroneously concluded as a matter of law that the parties reached a meeting of the minds with respect to a settlement of Harris's claims. Because Harris presented evidence that she did not intend the $100,000 to be an accord and satisfaction of her claim against Nestaval, summary judgment should not have been granted. However, in light of her use of the $100,000 already disbursed, should Harris be awarded further damages, Nestaval is entitled to offset the $100,000 from the potential judgment. Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter for further proceedings.

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

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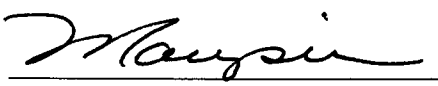
(Ct. App. 1977) ("The right [to an equitable offset] exists independently of statute and rests upon the inherent power of the court to do justice to the parties before it."); see also Krusi v. Bear, Sterns & Co., 192 Cal. Rptr. 793, 799 (Ct. App. 1983) ("It makes no difference whether the payment comes directly from the tortfeasor or from the tortfeasor's insurance carrier; in either circumstance, a credit must be given.") (citing Dodds v. Bucknum, 29 Cal. Rptr. 393 (1963)); Durando v. Mapes Enterprises, Inc., 79 Nev. 251, 252, 381 P.2d 683, 683-84 (1963) ("[R]eceipt by plaintiff of [$750] was 'admissible in evidence to be considered by the above entitled court for the purpose of mitigating or reducing damages sustained by said plaintiff.'").

cc: Hon. Steven P. Elliott, District Judge
Edmund C. Botha
Lemons Grundy & Eisenberg
Mainor Eglet Cottle, LLP
Edwards, Hale, Sturman, Atkin & Cushing, Ltd.
Washoe District Court Clerk

MAUPIN, J., concurring in part and dissenting in part:

I agree with the majority that the interactions of these parties do not support the district court's conclusion that the parties below reached an accord and satisfaction. The majority, however, improperly implies that the question of whether appellant agreed to an accord and satisfaction in connection with her claim against respondent must be resolved by the jury along with the basic claims of liability and damages. In my view, appellant has demonstrated that no accord and satisfaction occurred as a matter of law.[1] Neither party proceeded to a settlement with a full understanding of the facts—here the full extent of insurance coverages available for payment for the claim of appellant against respondent. Thus, the litigation should proceed to judgment or settlement as if the payment of primary policy limits was an advance, subject to equitable set-off.

 , J.

Maupin

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[1]Cf. Sims v. Veneman, 94 Nev. 344, 580 P.2d 466 (1978), Von Zehner v. Truck Ins. Exch., 99 Nev. 152, 659 P.2d 879 (1983) (upholding summary judgment were claim of misunderstanding of release was belied by the record).