

STATE OF MICHIGAN
COURT OF APPEALS

MARY MURRAY,

Plaintiff-Appellant,

V

J. GUADALUPE URIBE ARCE and KENNETH
LEE PENZIEN,

Defendants-Appellees.

UNPUBLISHED

May 20, 2003

No. 238757

Lapeer Circuit Court

LC No. 98-025311-NI

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from circuit court orders granting defendants' motion for leave to amend their affirmative defenses and defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first contends that the trial court erred in granting defendants' motion for leave to amend to add the defense of release to their affirmative defenses. The trial court's ruling on a motion to amend pleadings is reviewed for an abuse of discretion. *Doyle v Hutzel Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000).

Release is an affirmative defense that is generally waived [] if it is not raised in a defendant's first responsive pleading either as originally filed or as amended in accordance with MCR 2.118. MCR 2.111(F)(2), (3)(a); MCR 2.116(D)(2). After the time for amendment as of right has expired, a party may amend a pleading only by leave of the court or upon consent of the adverse party. The court shall freely grant leave when justice so requires. MCR 2.118(A)(2). Delay alone does not merit denial of a motion to amend unless the delay results in prejudice to the opposing party such that the party would be denied a fair trial. The prejudice must stem from the lateness of the allegations offered and not from the impact of those allegations on the ultimate disposition of the action. *Amburgey v Sauder*, 238 Mich App 228, 246-247; 605 NW2d 84 (1999).

Plaintiff executed a release before filing this action but did not disclose its existence to defendants despite discovery requests for such information. The plaintiff was a passenger on a motorcycle involved in a collision with defendants and she released her non-party driver among others. Once defendants learned of the release through other means, they sought and were granted leave to amend their answer to plead release as a defense. Plaintiff asserts that the delay

in seeking the amendment resulted in unfair surprise and prejudice. Plaintiff could hardly be surprised and prejudiced by defendants' reliance on information known to her from the inception of the case. We find no abuse of discretion.

Plaintiff next contends that the trial court erred in refusing to consider the intent with which she and the insurance adjuster entered into the release and to consider extrinsic evidence to prove that intent. "The interpretation of the release was a question of law for the court to decide." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

The scope of a release is governed by the intent of the parties as it is expressed in the release. *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201; 428 NW2d 26 (1988). If the language of a release is clear and unambiguous, the parties' intent is to be ascertained from the plain and ordinary meaning of the language used in the release. *Batshon v Mar-Que Gen'l Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001). A release "is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity." *Cole, supra* at 13-14 (citations omitted).

The release signed by plaintiff expressly released her driver and "any other person, firm or corporation charged or chargeable with responsibility or liability . . . from any and all claims . . . and causes of action on account of all personal injury" or other damages sustained in the accident. This court in *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 649-650; 620 NW2d 310 (2000); and *Romska v Opper*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999), reviewed the identical release language and circumstances presented in this appeal. The court held that the release language is clear and unambiguous and encompasses plaintiff's claims against unnamed parties like the instant defendants. Therefore, extrinsic evidence may not be considered. The trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Pat M. Donofrio