

FILED: April 15, 1998

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JAMES RUGEMER,

Appellant,

v.

LYNDIE ANN RHEA,

Respondent.

(9412-08574; CA A91878)

Appeal from Circuit Court, Multnomah County.

Donald A. W. Piper, Senior Judge.

Argued and submitted May 12, 1997.

Paul J. Dodds argued the cause for appellant. With him on the briefs was Brownstein, Rask, Arenz, Sweeney, Kerr & Grim, LLP.

Thomas W. Brown argued the cause for respondent. With him on the brief were Wendy M. Margolis and Cosgrave, Vergeer & Kester, LLP.

Before Deits, Chief Judge, and De Muniz and Haselton, Judges.

DE MUNIZ, J.

Reversed and remanded.

DE MUNIZ, J.

Plaintiff appeals from a judgment based on a jury verdict upholding a release agreement. In the first stage of a bifurcated trial, the jury concluded that plaintiff was bound by a release agreement that he had entered into with defendant's insurer and thus was precluded from recovering damages. On appeal, plaintiff claims that the trial judge erred in granting defendant's two motions *in limine*, the first to exclude evidence of the extent of plaintiff's personal injuries and the second to exclude evidence of the insurance adjuster's conduct with respect to another claimant involved in the same accident. We reverse and remand.

On appeal from a jury verdict, we view the evidence in the light most favorable to the prevailing party, in this case defendant. *Holmes v. Morgan*, 135 Or App 617, 619, 899 P2d 738, *rev den* 322 Or 193 (1995). On March 6, 1994, plaintiff was driving his car through an intersection with a green light when defendant ran a red light, hitting plaintiff's car after glancing off another vehicle. Karrie Moore, plaintiff's girlfriend, and her son Danny were passengers in plaintiff's car. Plaintiff's lower neck, Moore's hip, and Danny's jaw were injured in the accident.

Defendant was insured by State Farm. Vanderwood, a State Farm claims adjuster, investigated the

accident and determined that liability for the accident was not at issue; defendant was at fault. Vanderwood then attempted to settle the insurance claims in the case by contacting plaintiff and his girlfriend by telephone and having another adjuster meet with plaintiff at the State Farm office. On March 15, 1994, nine days after the accident, Vanderwood met with plaintiff and settled the claim for the property damage to his car for \$1,046 and suggested settling the personal injury claim for \$500. Plaintiff had seen a doctor about his accident injuries five days earlier. At that time, the doctor was not sure of plaintiff's medical condition. He gave plaintiff some pain medication and asked to see him again the following week. Plaintiff had not had a follow-up visit with the doctor at the time of settlement. When plaintiff told Vanderwood that he was still sore, but that the soreness went away with Tylenol or aspirin, Vanderwood offered plaintiff \$800 for his personal injuries. Plaintiff accepted the settlement, signing a complete release. According to plaintiff and Moore, at the time of the settlement, plaintiff felt fine and, according to plaintiff, he "wanted to get it over with."

At trial, plaintiff testified that, during the settlement meeting, Vanderwood stated that he had a doctor's report indicating that plaintiff was "okay." Plaintiff testified that he signed the release only because he relied on Vanderwood's representation. Vanderwood denied making such representations. It is uncontested that Vanderwood did not have, and had not seen, a doctor's report on plaintiff. Immediately after obtaining plaintiff's release, Vanderwood telephoned Moore and then met with her at her home a few days later to settle her son's claim. She also signed a release. In an offer of proof at trial, Moore testified that Vanderwood told her that he had a doctor's report that indicated that her son and plaintiff were okay. Vanderwood denied making that statement to Moore.

Plaintiff testified in an offer of proof that after he signed the release his neck condition grew worse. He underwent neck fusion surgery for two severed disks, incurring \$30,000 to \$35,000 in medical expenses and missing three-and-one-half months of work. He then filed this lawsuit seeking damages for his injuries caused by defendant's negligence. Defendant relied on the release as an affirmative defense. Plaintiff's reply alleged that the release was invalid because it had been obtained by misrepresentation and in violation of the Unfair Claim Settlement Practices Act. ORS 746.230(1)(f).

The parties agreed to bifurcate the trial, with the first stage determining the validity of the release and the second stage, if necessary, determining damages. Before the first stage of trial, the court granted defendant's two motions *in limine*, the first to exclude evidence of the extent of plaintiff's injuries and the second to exclude evidence of Vanderwood's dealings with Moore. Following trial, the jury found that the release was valid and rendered a verdict for defendant.

Plaintiff first assigns error to the trial court's grant of defendant's motion *in limine* to exclude evidence of the extent of his injuries discovered after the release was signed. Defendant argued that, because the trial was bifurcated, evidence of the extent of plaintiff's injuries should not be allowed until the second stage of the trial on damages. The trial court accepted defendant's argument and excluded the evidence. Although it is not entirely clear from the record, it appears that the trial court determined that the evidence was irrelevant to the first stage of the trial.

We review rulings on relevance for errors of law. *Lakin v. Senco Products, Inc.*, 144 Or App 52, 70 n 14, 925 P2d 107 (1996), *rev allowed* 325 Or 438 (1997); *Fugate v. Safeway Stores, Inc.*, 135 Or App 168, 173, 897 P2d 328 (1995). Under OEC 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence is not relevant if it is not probative of the fact or proposition at which it is directed. *Holger v. Irish*, 316 Or 402, 419, 851 P2d 1122 (1993) (Unis, J., concurring).

Plaintiff claims that the release he signed was voidable as an illegal contract⁽¹⁾ because it violated the

Unfair Claim Settlement Practices Act, which provides:

"No insurer or other person shall commit or perform any of the following unfair claim settlement practices:

"* * * * *

"(f) Not attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear[.]" ORS 746.230(1)(f).

Plaintiff claims that the full extent of his injuries is relevant to whether Vanderwood attempted to "equitably settle" his claim.⁽²⁾ Plaintiff argues that the disparity between the amount of the settlement and the actual medical costs incurred by him tends to show that the settlement was not equitable. We disagree.

The equity of a settlement is judged as of the time it is made. In *Raymond v. Feldmann*, 120 Or App 452, 853 P2d 297, *on recons* 124 Or App 543, 863 P2d 1269 (1993), *rev den* 318 Or 381 (1994), we held that a release is not voidable on the ground of mutual mistake simply because, at the time of settlement, the plaintiff did not realize the nature and extent of her injuries. Without a showing that the agreement was obtained by misrepresentation or unconscionable conduct, an improvident agreement may not be voided. *Wheeler v. White Rock Bottling Co.*, 229 Or 360, 366 P2d 527 (1961). The mere disparity between the amount of a settlement and the actual damages suffered by a party does not make that settlement invalid or inequitable. Plaintiff presents no other theory as to why evidence of his actual injuries is relevant to the validity of the release. Because plaintiff fails to show how evidence of the extent of his injuries discovered after settlement is relevant to prove that Vanderwood did not "equitably settle" plaintiff's claim, it was properly excluded.

Plaintiff contends in his second assignment of error that the trial court erred in excluding evidence of Vanderwood's dealings with Moore. Plaintiff made an offer of proof that Moore would testify that Vanderwood untruthfully told her that he had a doctor's report indicating that her son was okay in order to induce her to sign a release. The trial court excluded the evidence under OEC 404(3), which provides:

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In *State v. Johnson*, 313 Or 189, 195, 832 P2d 443 (1992), the Supreme Court formulated a three-part test for determining the admissibility of "other act" evidence under OEC 404(3):

"(1) The evidence must be independently relevant for a noncharacter purpose; (2) the proponent of the evidence must offer sufficient proof that the uncharged misconduct was committed and that defendant committed it; and (3) the probative value of the uncharged misconduct evidence must not be substantially outweighed by the dangers or considerations set forth in OEC 403." (Footnotes omitted.)

The trial court here ruled under the first part of this test, stating that plaintiff's evidence did not meet any of the statutory exceptions. We review this issue as a question of law. *State v. Westby*, 117 Or App 14, 17-18, 843 P2d 973 (1992), *on recons* 124 Or App 265, 862 P2d 1318 (1993), *rev den* 318 Or 351 (1994).

