NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 1702

JANET ZERINGUE

VERSUS

DANIEL LEDET AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: MAR 2 6 2008

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Appealed from the
17th Judicial District Court
In and for the Parish of Lafourche, Louisiana
Case No. 102616

The Honorable Jerome J. Barbera, III, Judge Presiding

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Charles C. Bourque, Jr. **Houma, Louisiana**	**Counsel for Plaintiff/Appellee** **Janet Zeringue**
Michael G. Gee **Thibodaux, Louisiana**	**Counsel for Defendants/Appellants** **Daniel Ledet and State Farm Mutual Automobile Insurance Company**

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs.

GAIDRY, J.

Following a judgment on the merits, an automobile liability insurer and its insured appeal that judgment, as well as a prior interlocutory judgment of the trial court overruling their peremptory exception of *res judicata* and related motion for summary judgment. For the following reasons, we affirm both judgments.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiff, Janet Zeringue, was injured in an automobile accident that occurred on December 7, 2004 on Louisiana Highway 308 in Lafourche Parish. The accident occurred when the defendant, Daniel Ledet, driving a pickup truck owned by Chris Folse, exited a private drive onto the highway, directly in the path of Ms. Zeringue's automobile. At the time of the accident, Allstate Insurance Company (Allstate) provided automobile liability coverage arising from the use of Mr. Folse's truck, and State Farm Mutual Automobile Insurance Company (State Farm) was Mr. Ledet's own automobile liability insurer.[1]

Ms. Zeringue's attorney notified both insurers of his client's claims, and eventually negotiated the settlement of her claims against Allstate and its insureds, Mr. Folse and Mr. Ledet, for its liability coverage limits of $10,000.00. He wrote to State Farm on April 6, 2005, advising of the proposed compromise with Allstate "for the $10,000 policy limits carried [*sic*] by Chris Folse," stating that he would forward a copy of the executed release, and requesting a copy of the declarations page of Mr. Ledet's policy. By letter dated April 10, 2005, State Farm acknowledged receipt of the prior

[1] It is undisputed that Mr. Ledet, as a permissive user of Mr. Folse's truck, was considered an "omnibus insured" under Allstate's policy. Similarly, no issue has been raised as to the respective ranking of Allstate's liability coverage as primary and State Farm's as excess.

letter, confirmed that it was Mr. Ledet's insurer, and requested copies of medical records and bills.

On May 18, 2005, Ms. Zeringue appeared at her attorney's office and executed a document entitled, "RELEASE OF ALL CLAIMS," compromising her claims against Allstate, Mr. Folse, and Mr. Ledet for the sum of $10,000.00. On September 29, 2005, Ms. Zeringue's attorney again wrote to State Farm, discussing her claims in detail, enclosing copies of the release and Allstate's policy declarations page, and presenting a settlement offer.

On November 22, 2005, Ms. Zeringue filed suit against Mr. Ledet and State Farm. The defendants answered the suit with a general denial, and pleaded the affirmative defenses of comparative fault, third-party fault, failure to reasonably mitigate damages, and Ms. Zeringue's uninsured status in the event the determinative facts supported them.

On June 13, 2006, the defendants filed a peremptory exception of *res judicata* and a separate motion for summary judgment, both pleadings asserting the prior compromise as barring Ms. Zeringue's claims against them. A pretrial conference was held on June 16, 2006, and a trial date of November 20, 2006, was selected. On the defendants' motion, the trial date was later continued to January 31, 2007.

The defendants' exception and motion for summary judgment were eventually set for hearing on January 11, 2007. The parties submitted the exception and motion for the trial court's determination on the memoranda previously submitted, together with the attached exhibits.

Based upon the parties' stipulation of submission, the trial court admitted the parties' exhibits into evidence and ruled that it would overrule

the exception and deny the motion.[2] The trial court's judgment in that regard was signed on January 19, 2007. On January 29, 2007, the defendants requested written reasons for judgment.

The matter proceeded to trial on the merits on January 31, 2007. At the conclusion of the trial, the trial court left the record open for the submission of the deposition of State Farm's claims adjuster into evidence.[3] The matter was then taken under advisement. In the meantime, the trial court's written reasons for its judgment on the defendants' exception and motion were issued by the trial court on April 9, 2007. In its reasons, the trial court stated:

> [T]he facts constitute substantial evidence that the releasor (the plaintiff, Janet Zeringue) did not intend to release certain aspects of her claim, the part of the claim against Ledet as an insured of State Farm and against State Farm. . . . In this case, the intent of the releasor, the plaintiff, is clear. She knew that her lawyer had settled the claim with Allstate and that he had proceeded to make State Farm aware of the claim. She also knew that the Allstate policy of $10,000 would barely cover her medical expenses that exceeded $8,000. It is not reasonable to conclude that Ms. Zeringue intended to release Ledet other than as the Allstate insured driving the Folse vehicle which triggered coverage under the Allstate policy.

On May 30, 2007, the trial court rendered judgment in favor of Ms. Zeringue and against the defendants for the sum of $34,456.31, "subject to

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[2] The plaintiff's exhibits included the correspondence between Ms. Zeringue's attorney and State Farm and her affidavit, in which she stated that "it was her intent to release Mr. Ledet only to the extent that he was an omnibus insured of Allstate, and she intended to retain her rights against Mr. Ledet individually and State Farm to the extent that State Farm provided coverage to Mr. Ledet for his negligence in the referenced motor vehicle accident." State Farm's sole exhibit was the release signed by Ms. Zeringue. No other evidence disputing Ms. Zeringue's claimed intent as to the release was presented to the trial court.

[3] On February 6, 2007, the defendants filed a notice of their intention to apply for supervisory writs on the interlocutory judgment overruling their exception and denying their motion, and obtained an order setting the return date. On May 14, 2007, this court declined to exercise our supervisory jurisdiction and denied the writ, on the grounds that the trial on the merits had already taken place and the defendants had an adequate remedy by review on appeal.

whatever credit the defendants are entitled to by law."[4] The defendants now appeal that judgment against them on the issue of the effect of the release, also contending that the trial court's interlocutory judgment overruling their peremptory exception and denying their motion for summary judgment was in error.[5]

DISCUSSION

The release at issue bears the caption, "RELEASE OF ALL CLAIMS." Immediately beneath and to the right of the caption is the prominent notation, "CLAIM NO. 1646217222/RST."[6] The release sets forth the following pertinent terms:

> [I]n consideration of the sum of ten thousand & 00/100 Dollars ($10,000.00), receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge Chris Folse, Danny Ledet & Allstate Ins. Co. and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs, representatives and assigns, from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damages, loss or damages of any kind already sustained or that I may hereafter sustain in consequence of an accident that occurred on or about this 7th

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[4] The trial court's judgment on the merits and written reasons for judgment make no reference to the nature or amount of any credits against the judgment to which State Farm would be entitled. Allstate's policy was not introduced into evidence, although the trial court found, and the parties concede, that its applicable liability coverage limits were $10,000.00, the amount of the prior compromise. The judgment on its face holds State Farm and its insured, Daniel Ledet, liable for the total sum of $34,456.31, including $25,000.00 in general damages, although that sum is in excess of State Farm's liability coverage limits of $25,000.00. Neither State Farm nor Mr. Ledet affirmatively pleaded a partial extinguishment of the obligation or a credit in the amount of Allstate's liability limits or for any other sums, and State Farm does not challenge on appeal the judgment against it in excess of its limits. But as the amount of final judgment itself was not raised as an issue by either defendant, we pretermit further discussion on this point.

[5] When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *Judson v. Davis*, 04-1699, p. 8 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1112-13, *writ denied*, 05-1998 (La. 2/10/06), 924 So.2d 167.

[6] State Farm's claim number was 18-1085-179, as documented in its correspondence in the record.

> day of December, 2004, at or near La. Hwy. 308 near La. Hwy. 3185, Lafourche Parish, La.
>
> To procure payment of the said sum, I hereby declare: that I am more than 18 years of age; that no representation about the nature and extent of said injuries, disabilities or damages made by a physician, attorney or agent of any party hereby released, nor any representation regarding the nature and extent of legal liability or financial responsibility of any of the parties hereby released, have induced me to make this settlement . . .

Interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. This is an objective inquiry; thus, "a party's declaration of will becomes an integral part of his will." La. C.C. art. 2045, Revision Comments – 1984, (b). When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046.

In *Moak v. American Auto. Ins. Co.,* 242 La. 160, 134 So.2d 911 (La. 1961), the Louisiana Supreme Court held that when a dispute arises as to the scope of a compromise agreement, extrinsic evidence can be considered to determine exactly what differences the parties intended to settle. This rule is a special exception to the general rule of La. C.C. art. 2046, based upon a supplementary rule of construction in La. C.C. art. 3073 stating that compromises "do not extend to differences which the parties never intended to include in them." *See Brown v. Drillers, Inc.,* 93-1019 (La. 1/14/94), 630 So.2d 741, 748-49.

Under *Moak* and its progeny, the parties to a release or compromise are permitted to raise a factual issue as to whether unequivocal language in the instrument was intended to be unequivocal. *Brown,* 93-1019, 630 So.2d at 749. Thus, in the case of a compromise agreement, the intent which its words express in light of the surrounding circumstances at the time of

execution of the agreement is controlling. *Brown,* 93-1019, 630 So.2d at 748. However, the jurisprudential rule of *Moak* has since been tempered by the qualification that there must be some substantiating evidence of mistaken intent as to the nature of the rights being released or the aspects of the claim being released. *Brown,* 93-1019, 630 So.2d at 749. Thus, where substantiating evidence is presented to establish that (1) the releasor was mistaken as to what he was signing, even though fraud may be absent; or (2) that the releasor did not fully understand the nature of the rights being released or did not intend to release certain aspects of his claim, extrinsic evidence may be considered to determine exactly what differences the parties intended to settle. *Id.*

The facts of this case present a close question on this point. State Farm contends that although it was not specifically named in the release, it was released in its capacity as "any other person, firm or corporation charged or chargeable with responsibility or liability," and by virtue of its insured's release. A strict reading of the body of the release, without more, suggests an unequivocal release of all claims arising from the accident against all persons. Certainly, the failure of Ms. Zeringue's attorney to insert or require a reservation of rights in the release against State Farm and Mr. Ledet, in his capacity as State Farm's insured, supports State Farm's position that it was released, along with its insured. *See, e.g., Boatman v. Gorman*, 05-1369 (La. App. 1st Cir. 2/7/06), 935 So.2d 696, *writ denied*, 06-0539 (La. 5/5/06), 927 So.2d 323.[7] On the other hand, the inclusion of Allstate's "claim number" beneath the title of the release raises some ambiguity as to the nature and scope of the "claims" intended to be included in the compromise. That fact, combined with the evidence submitted to the

[7] In *Boatman*, however, the plaintiff did not raise any issue as to the intent of the release.

trial court showing the factual context of the compromise, clearly fulfilled the requirement of "substantiating evidence of mistaken intent" as to the nature of the rights being released or the aspects of the claim being released. *See Brown,* 93-1019, 630 So.2d at 749.

Before considering the issue of the underlying intent of the compromise, we should review the related issue of whether a partial settlement such as that found by the trial court here is legally valid. It is well settled that the law favors compromise and voluntary settlement of disputes out of court with the attendant saving of time and expense to both the litigants and the court. *Honeycutt v. Town of Boyce*, 341 So.2d 327, 331 (La. 1976).

As a practical matter, an automobile liability insurer generally has the duty to continue to defend its insured, even an omnibus insured, unless it secures a complete release of its insured from any personal liability. In situations where there are multiple layers of liability coverage provided by different insurers to an insured, it is not uncommon for the primary insurer to attempt to compromise a damages claim that appears to exceed its coverage limits and to secure a release for its insured of any personal liability, with the claimant free to assert his remaining claims against the excess liability insurer. But the Louisiana direct action statute, La. R.S. 22:655, would at first glance appear to impose an impediment to such a compromise if the claimant chooses to pursue excess coverage, as a strict reading of the statute would require the insured to be named as a defendant along with his excess liability insurer.[8] Additionally, such a partial

[8] Louisiana Revised Statutes 22:655(B)(1) provides that although an injured person has a right of direct action against the liability insurer of a tortfeasor and may bring an action against the insurer alone, or against both the insured and insurer, "such action may be brought against the insurer alone" only when: (a) the insured is bankrupt or when proceedings to declare him bankrupt have been commenced; (b) the insured is insolvent;

settlement might be interpreted as violating the procedural probation against splitting of causes of action, embodied in La. C.C.P. art. 425(A) and La. R.S. 13:4231, the statute defining *res judicata.*

If the entirety of the direct action statute, La. R.S. 22:655, is considered, however, it must be concluded that it was not intended to preclude a partial settlement as to only the primary layer of multiple liability coverages. This conclusion is supported by the express statement of intent in paragraph D of the statute:

> It is also the intent of this Section that all liability policies *within their terms and limits* are executed for the benefit of all injured persons . . . to whom the insured is liable; and, that it is the purpose of all liability policies to give protection and coverage to all insureds, *whether they are named insured or additional insureds under the omnibus clause*, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy. (Emphasis supplied.)

Mr. Ledet, as a permissive user of Mr. Folse's automobile, was an omnibus insured under Allstate's policy. *See* La. R.S. 32:900(B)(2). He was also the named insured in the State Farm policy. Both policies, within their respective layers of coverage, were by law executed for the benefit of Ms. Zeringue as an injured person to whom the insured, Mr. Ledet, was liable. Both policies, within their respective terms and limits, afford protection and coverage to Mr. Ledet. Permitting partial settlements relating to different policies and coverages promotes the concept of compromise, while at the same time according with the express intent of La. R.S. 22:655(D).

In *Rodriguez v. La. Tank, Inc.*, 94-0200 (La. App. 1st Cir. 6/23/95), 657 So.2d 1363, *writ denied*, 95-2268 (La. 11/27/95), 663 So.2d 739, the plaintiffs compromised their claims asserted in an action against the

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(c) the insured cannot be served; (d) the cause of action is for damages and between children and parents or between spouses; (e) the insurer is an uninsured motorist carrier; or (f) the insured is deceased.

defendant truck driver and his employer's liability insurer, and executed a release in favor of the truck driver, acknowledging that it was "specifically understood and agreed . . . that [the truck driver] is personally and otherwise fully released . . . ." The plaintiffs then instituted separate litigation naming both the truck driver and his personal liability insurer as defendants, "apparently in an attempt to comply with the dictates of the [d]irect [a]ction [s]tatute." *Id.*, 94-0200 at p. 7, 657 So.2d at 1367. Reversing the trial court, we held that the release of the truck driver in the first action did not serve to relieve his personal insurer from liability. After observing that the personal insurer did not fall into any of the statutory exceptions allowing suit against it without joining its insured, we observed:

> Under the facts before us, we find that plaintiffs have complied with LSA-R.S. 22:655. The statute provides that a direct action be *brought* against an insurer alone or against both the insured and insurer jointly and in solido. In the present case, the action was *brought* against the insured . . . and the insurer . . . .

Id., 94-0200 at p. 7, 657 So.2d at 1368.

Louisiana Code of Civil Procedure article 425(A) provides that "[a] party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." By its terms and its context, the article applies only to claims and causes of action asserted in litigation. Here, the partial settlement took place before any litigation was instituted. In the *Honeycutt* case, the supreme court expressly held that article 425 "speaks of asserting *separate claims in courts of law*." 341 So.2d at 331. (Emphasis supplied.) The court also significantly observed:

> A compromise need not necessarily settle all differences between parties. Disputants frequently settle some of their differences and mutually consent to litigate remaining issues on which they cannot agree.

Id.

The preponderance of the evidence supports the trial court's conclusion that the actual intent of the parties to the compromise (Ms. Zeringue, Allstate, and its insureds) was to settle Ms. Zeringue's claims against those parties and any related persons insured by Allstate to the extent of Allstate's liability coverage limits, but not to settle Ms. Zeringue's claim against Mr. Ledet and State Farm, to the extent of its coverage limits as excess liability insurer, and the trial court so concluded. The trial court further concluded that State Farm was never intended to be a party released under the compromise. As previously observed, this partial compromise does not run afoul of the procedural prohibition of splitting a cause of action, as suit had not yet been instituted when the compromise was made.

The trial court's finding as to the intent of the parties in entering into a compromise agreement is a finding of fact that will not be disturbed by an appellate court in the absence of manifest error. *Drapcho v. Drapcho*, 05-0003, p. 9 (La. App. 1st Cir. 2/10/06), 928 So.2d 559, 564-65, *writ denied*, 06-0580 (La. 5/5/06), 927 So.2d 324. Based upon our review of the record, we find no manifest error by the trial court on the issue of intent.

The interlocutory judgment of the trial court overruling the defendants' peremptory exception of *res judicata* and denying their motion for summary judgment and its final judgment in favor of Ms. Zeringue and the defendants, reaffirming its prior interlocutory judgment, are affirmed. All costs of this appeal are assessed to the defendants, Daniel Ledet and State Farm Mutual Insurance Company.

AFFIRMED.