STATE OF MICHIGAN

COURT OF APPEALS

ROSE MISCUK,

Plaintiff-Appellant,

v

HORTON AUTOMATICS, INC., d/b/a THE DALLAS CORPORATION, INC., and MARY RORHOFF, d/b/a ABLE-I DOOR SYSTEMS,

Defendants,

and

NORTHWEST AIRLINES, INC.,

Defendant-Appellee.

UNPUBLISHED
January 16, 1998

No. 198098
Wayne Circuit Court
LC No. 90-025820-NI

Before: Michael J. Kelly, P.J., and Cavanagh and N.J. Lambros*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting a motion for summary disposition for defendant Northwest Airlines, Inc. (hereinafter NWA), in this premises liability action. We reverse.

Plaintiff filed suit for injuries sustained entering an allegedly defective automatic revolving door at Detroit Metropolitan Airport, claiming, *inter alia*, that NWA had breached its duty to exercise reasonable care for the protection of its invitees. The trial court granted NWA's motion for summary disposition on the basis of a prior release, entered into between plaintiff, defendant Rohroff, d/b/a Able-I Door Systems (hereinafter defendant Rohroff), and The State Farm Fire and Casualty Company (hereinafter State Farm), pursuant to MCR 2.116(C)(7).

On appeal, plaintiff argues that summary disposition was inappropriate because NWA could not be deemed a releasee when NWA was not a party to the litigation specifically referenced in the release.

Although we disagree that the parties to the release agreement intended to narrow the scope of the releasees by making a reference to a civil tort action, stemming from the same incident, we agree, in general, that the release agreement read as a whole is ambiguous as to whether NWA was an intended releasee.

"This Court reviews a summary disposition ruling de novo." *Bommarito v Detroit Golf Club*, 210 Mich App 287, 291; 532 NW2d 923 (1995), citing *Merrilat v Michigan State Univ*, 207 Mich App 240, 245; 523 NW2d 802 (1994). When reviewing a motion for summary disposition under MCR 2.116(C)(7), "this Court must accept as true plaintiff's well-pleaded allegations, and construe them in a light most favorable to plaintiff." *Florence v Dep't of Social Servs*, 215 Mich App 211, 213; 544 NW2d 723 (1996) (citation omitted). "The motion should not be granted unless no factual development could provide a basis for recovery." *Id*. at 213-214 (citation omitted). "The pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties must be considered." *Frommert v Boston Constr*, 219 Mich App 735, 737; 558 NW2d 239 (1996), citing MCR 2.116(G)(5).

"The scope of the release is governed by the intent of the parties as it is expressed in the release." *Wyrembelski v City of St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996), citing *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201; 428 NW2d 26 (1988). Where a release specifies that the defendant is to be released from " 'any claim . . . of any kind whatsoever,' " there exists no ambiguity in this broad all-encompassing language. *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 541; 549 NW2d 612 (1996). "However, a contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Id*. "The question of intention of the parties, where the language of the release is ambiguous, is normally one to be determined by the trier of fact." *Stitt v Mahaney*, 403 Mich 711, 718; 272 NW2d 526 (1978), overruled in part by *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 702 (1982).

The phrase "which forms the basis of a civil complaint . . . under civil action number: 92 213 603," in the first paragraph, appears to relate to the preceding phrase "a [sic] automatic door accident." We agree with the trial court which concluded that the reference to the 1992 civil action did not intend to narrow the scope of releasees. Rather, the 1992 civil action was seemingly referenced in order to exactly describe the incident and, thereby, delineate the possible claims stemming therefrom for which the persons and entities would be released from liability. Therefore, as to paragraph one of the release, the language specifying a release of "all other persons, firms, or corporations . . . from any and all claims" is all-encompassing (i.e., it includes NWA) and unambiguous.

Although plaintiff narrowly phrased her first claim on appeal, we believe that this issue poses the general question of whether NWA was an intended releasee under the release agreement between plaintiff and defendant Rohroff. See *Schlientz v Schlientz*, 329 Mich 53, 55; 45 NW2d 183 (1950) (if an issue is suggested in the statement of questions involved, it should be considered). Therefore, a close reading of the remaining release agreement is in order to determine whether plaintiff intended to release NWA.

" 'The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.' " *Piper Aircraft Corp v Dumon*, 421 Mich 445, 458; 364 NW2d 647 (1984). Under MCL 600.2925d(c); MSA 27A.2925(4)(c), in effect at the time of the signing of the release agreement, the settling tort-feasor is not subject to claims of contribution by other tort-feasors. As to indemnification, "[t]his Court has repeatedly defined common-law indemnification as the equitable right to restitution of a party *held liable for another's wrongdoing*." *N Community Healthcare v Telford*, 219 Mich App 225, 229; 556 NW2d 180 (1996), citing *Paul v Boyle*, 193 Mich App 479, 497; 484 NW2d 728 (1992) (emphasis in original). However, a party may not bring a claim for indemnification if it is actively negligent which is ascertained from the allegation in the primary plaintiff's complaint. *Hadley v Trio Tool Co*, 143 Mich App 319, 331; 372 NW2d 537 (1985).

Paragraph four's reference to defendant Rohroff's indemnification by plaintiff for a possible claim of contribution by, *inter alia*, NWA is contradictory to the reading of paragraph one. If NWA had been an intended releasee, it could not subsequently be compelled to pay on plaintiff's claim. Therefore, NWA could not bring a claim of contribution against defendant Rohroff. However, we note that even if paragraph one functioned to limit the release of only defendant Rohroff and State Farm, defendant Rohroff, as the *settling* tort-feasor, would not be subject to claims of contribution by other tort-feasors, including NWA. See 600.2925d(c); MSA 27A.2925(4)(c). Likewise, paragraph four's reference to defendant Rohroff's indemnification by plaintiff for a possible claim of indemnity or indemnification by, *inter alia*, NWA is troubling. If NWA is correct in claiming that paragraph one intended to release it as well, defendant Rohroff's concern over indemnification is inexplicable because NWA's claim for indemnification would only arise if NWA would be held liable for the wrongdoing of defendant Rohroff. However, we note that as plaintiff alleged in her complaint against NWA that NWA had been actively negligent, NWA could not be entitled to indemnification irrespective of whether NWA had been intended as a releasee.

Thus, the language of the release agreement is reasonably susceptible to the following interpretations: One, plaintiff and defendant Rohroff intended to release all persons and entities, including NWA, from liability, through the operation of paragraph one, and paragraph four merely represented an oversight. Two, NWA was not an intended releasee under paragraph one, and paragraph four unnecessarily attempted to assure that defendant Rohroff, the settling tort-feasor, would not be subjected to claims of contribution or indemnification by NWA. As the release is reasonably susceptible to more than one interpretation, the language of the release read in its entirety is ambiguous. Therefore, the trial court erred in granting NWA's motion for summary disposition on the basis of a prior release pursuant to MCR 2.116(C)(7) as the question of the parties' intent was a question of fact for the jury.

Having determined that the release read in its entirety is ambiguous, we do not need to address plaintiff's final issue of whether the release agreement was fairly and knowingly made. We do note that plaintiff failed to preserve the issue of the release's validity for review as she did not raise it before the

trial court. *Burgess v Clark*, 215 Mich App 542, 548; 547 NW2d 59 (1996), citing *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995); *Vargo v Sauer*, 215 Mich App 389, 393; 547 NW2d 40 (1996), citing *Michigan Up & Out Of Poverty Now Coalition v Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995).

Reversed and remanded.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros