

STATE OF MICHIGAN
COURT OF APPEALS

SHERRY SAMUEL, Personal Representative of
the Estate of JOSIE MORRIS, Deceased,

UNPUBLISHED
May 24, 2002

Plaintiff-Appellant,

v

MORAN MITSUBISHI,

No. 229464
Oakland Circuit Court
LC No. 99-014822-NP

Defendant-Appellee.

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). The trial court ruled that plaintiff's action was barred because of prior release. We affirm.

In a previous action not involving defendant, plaintiff filed suit against the driver of a motor vehicle that crashed into the decedent's vehicle, resulting in decedent's death. Plaintiff settled that case, and she executed a settlement-release agreement, which provided that in consideration for the settlement payment, plaintiff released the driver and the insurance company from liability, along with

all other persons, firms or corporations who are or might be liable, from all claims of any kind or character which she or the estate has or might have against them, and especially because of all damages, losses or injuries to persons or property, or both, whether developed or undeveloped, resulting to or to result from an accident which occurred on December 28, 1997[.]

Subsequently, plaintiff filed this wrongful death action against defendant, alleging negligence in connection with brake work performed on the vehicle which struck the decedent's vehicle. The trial court dismissed the action based on the all-encompassing release executed in the underlying lawsuit.

On appeal, plaintiff argues that her testimony at the settlement hearing established an intent to only release the driver and the insurance company, not any third parties, that the wrongful death statute, MCL 600.2922, precluded the trial court from enforcing the release beyond the scope of the settlement approved on the record, and that Michigan's tort reform

legislation of 1995 renders void the release language concerning third parties. We reject plaintiff's arguments.

MCR 2.116(C)(7) provides for summary disposition where the claim is barred by prior release. This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence, and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001).

The validity of a release is dependent on the intent of the parties, and the release must be entered into fairly and knowingly. *Batshon v Mar-Que General Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001). Where the language of a release is clear and unambiguous, the intent of the parties is ascertained from the plain and ordinary meaning of the language. *Id.*

In *Romska v Oppper*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999), this Court, addressing broad language contained in a release, stated:

Because defendant clearly fits within the class of "all other parties, firms or corporations who are or might be liable," we see no need to look beyond the plain, explicit, and unambiguous language of the release in order to conclude that he has been released from liability. "There cannot be any broader classification than the word 'all,' and 'all' leaves room for no exceptions." *Calladine v Hyster Co*, 155 Mich App 175, 182; 399 NW2d 404 (1986).

Here, the broad language clearly and unambiguously releases defendant from liability; therefore, we are precluded from looking outside the document regarding the intent of the parties. *Romska, supra* at 516-519.

We also reject plaintiff's contention that MCL 600.2922 dictates that the release was invalid. MCL 600.2922(5) does not require that a settlement be approved by the circuit court, but only requires that the court hold a hearing and accept or reject the settlement if the personal representative files a motion seeking approval of the proposed settlement. However, MCL 600.2922(6)(a) requires a personal representative to file a motion for authority to distribute the proceeds. The record is unclear regarding whether the circuit court in the underlying action had been presented with the specific language of the release at issue. If that information was presented to the court in plaintiff's motion, then the court's approval of the settlement and disbursement provides no grounds for nullifying the release. If plaintiff failed to present that language to the court in her motion, then plaintiff has waived any challenge to collaterally attack the validity of the release language, where court approval was unnecessary in the first place.

Moreover, our Supreme Court in *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 159; 458 NW2d 56 (1990), held:

The issues presented in this case are whether a plaintiff, before commencing a suit which disregards the terms of a release, must tender the

consideration recited in the release and, if so, at what point before or during the proceedings must this tender take place. We hold that when a plaintiff has entered into a settlement agreement tender of consideration recited in the agreement must occur not only within a reasonable time after execution of the agreement, but in all cases prior to or simultaneously with the commencement of any proceeding raising a legal claim in contravention of the agreement.¹

Here, plaintiff seeks to disregard the terms of the release based on the argument that failure to fully comply with MCL 600.2922 renders the release invalid; however, there is no evidence that plaintiff ever tendered back any of the settlement funds in the underlying suit, nor any evidence that plaintiff has attempted to reopen that case to set aside the dismissal and challenge the agreement.² Plaintiff, in essence, seeks to retain the full financial benefit of the settlement agreement while disregarding her own obligations and restrictions under the agreement.

For the same reason, we reject plaintiff's argument concerning the impact of tort reform legislation, and specifically the argument that the general abolition of joint and several liability renders the release void as to third parties. Additionally, plaintiff cites no authority holding that tort reform legislation so impacts releases. An appellant cannot leave it to the appellate court to search for authority in support of the appellant's position. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Moreover, case law issued after tort reform legislation regarding releases and third parties has not indicated in any manner that cases can be simply disposed of on the basis that the release of a third party is void because of the legislation. *Batshon, supra*; *Romska, supra*.

Plaintiff's waiver and estoppel argument is insufficiently briefed, *Mudge, supra* at 105, and not contained in the statement of questions presented, *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001); therefore, the issue is waived. Plaintiff's argument that she did not fairly and knowingly execute the release was also not contained in the statement of questions presented, and thus it is waived. *Id.* Additionally, the heart of the argument is that plaintiff did not intend to release third parties, and we have rejected that argument, as opined above, based on the clear and unambiguous language of the release. Moreover, there was no tender back of the settlement consideration before or at the time the present suit was filed.

"A release is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct." *Skotak v Vic Tanny International, Inc*, 203 Mich App 616, 618; 513 NW2d 428 (1994), mod on other grounds in *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994)(citations omitted). None of these circumstances exist in the instant case.

¹ Our Supreme Court also stated that "[i]t is a well-settled principle of Michigan law that settlement agreements are binding until rescinded for cause[, and] . . . tender of consideration received is a condition precedent to the right to repudiate a contract of settlement." *Stefanac, supra* at 163 (citations omitted); see also *Taylor Group v ANR Storage Co*, 452 Mich 561, 565 n 7; 550 NW2d 258 (1996).

² Plaintiff makes no such claims in responding to the "tender back" argument in her reply brief.

Therefore, the release is valid, and the trial court did not err in dismissing plaintiff's action based on prior release.

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly