STATE OF MICHIGAN

COURT OF APPEALS

JODI NEWHOUSE, f/k/a JODI STURRUS, Plaintiff-Appellant,	UNPUBLISHED December 21, 2010
v	No. 294734 Kent Circuit Court
JAMES STURRUS, Defendant-Appellee.	LC No. 09-006451-CZ

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7). Because we conclude that plaintiff's claims are barred by the release that plaintiff signed in a previous case against defendant, we affirm.

I. BASIC FACTS

In 1999, plaintiff sued defendant, her former stepfather, for assault and battery, intentional and negligent infliction of emotional distress, and breach of fiduciary duty. Plaintiff alleged that in 1981, when she was 11 years old, defendant began to engage in sexual activity with her. The sexual activity continued between defendant and plaintiff over the following years.

The trial court granted summary disposition to defendant on the basis that the claims were barred by the statute of limitations. Plaintiff appealed the trial court's order to this Court. However, the appeal was dismissed on the parties' stipulation.[1] Six days before the order of dismissal was entered, plaintiff had signed the following release:

> IN CONSIDERATION of the payment of Fifteen Thousand and No/100 Dollars ($15,000.00) to Jodi Sturrus, a/k/a Jodi Newhouse, the receipt of which is

[1] *Sturrus v Sturrus*, unpublished order of the Court of Appeals, entered October 23, 2001 (Docket No. 227011).

> hereby acknowledged, the undersigned do for herself . . . release[,] acquit and forever discharge James P. Sturrus . . . of and from any and all manner of actions, causes of action, suits[,] debts, accounts, judgments, rights, damages, costs, or claims and demands whatsoever in law or equity which the undersigned now has or which may hereafter accrue or result, regardless whether the injury or injuries or damage or damages to person or property or otherwise is known or unknown, foreseen or unforeseen, growing out of or in any manner connected with the claims asserted in the Complaint filed in the Kent County Circuit Court, Case Number 99-08119-NO.
>
> I understand that this settlement is the compromise of a disputed claim, and that the payment is not to be construed as an admission of liability on the part of the person, party or parties hereby released, by whom liability is expressly denied.
>
> This release contains the ENTIRE AGREEMENT between the parties hereto and there is absolutely no agreement on the part of any person, firm or corporation to make any payment or to do any act or thing other than that which is herein expressly stated.
>
> I further state that I have carefully read the foregoing release and know the contents thereof, and I sign the same on my own free act.

In 2007, plaintiff filed a complaint with the Kent County Sheriff's Department regarding defendant's alleged sexual abuse. While speaking with a detective in September 2007, defendant admitted that he had engaged in inappropriate sexual activity with plaintiff, including one instance where he digitally penetrated her vagina.

In June 2009, plaintiff sued defendant for breach of contract, negligence per se, and fraudulent concealment. Plaintiff alleged that after she appealed the order granting summary disposition to defendant in the 1999 case, defendant "proposed an 'off the record' contract settlement," in which he proposed to pay her $300,000, to include her as a "full heir" in his will, to pay her outstanding attorney fees, and to make a full and formal apology. Plaintiff further alleged that from 2001 to 2005, defendant made cash payments of $1,000 to $2,000, totaling $40,000, to her. Plaintiff claimed that defendant breached this contract when he stopped making payments in 2005. Plaintiff also claimed that defendant's admitted sexual activity with her constituted the crime of first-degree criminal sexual conduct, MCL 750.520b(1), and was, therefore, negligence per se. In addition, she alleged that defendant's "repeated affirmative misrepresentations" that he had never engaged in sexual activity with her left her ignorant of, or induced her to abandon, any criminal or civil remedies that would have been available to her.

The trial court granted summary disposition to defendant under MCR 2.116(C)(7) on the basis that the release signed by plaintiff in the 1999 case barred plaintiff's claims. It reasoned that because the underlying basis for the 1999 case and the present lawsuit was defendant's alleged sexual abuse, plaintiff's present claims grew out of or were connected with the claims asserted in the 1999 case. It further reasoned that "the explicit and unambiguous language" of the release specifically disproved plaintiff's allegations of a side agreement. The trial court also

noted that nothing in the record supported repudiation of the release. Plaintiff had not tendered back the $15,000 that she received from defendant, and plaintiff was represented by counsel when she signed the release and did not claim that she did not understand what she was signing.

II. ANALYSIS

Plaintiff argues that the trial court erred in its determination that the release she signed in the 1999 case barred her claims for breach of contract, negligence per se, and fraudulent concealment. We disagree.[2]

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of release . . . ." "In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008).[3] The interpretation of a release is a question of law, *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000), which we review de novo, *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 492; 776 NW2d 387 (2009).

"A release of liability is valid if it is fairly and knowingly made." *Wyrembelski v St. Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996) (quotation omitted). "The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Cole*, 241 Mich App at 13.

We agree with the trial court that the plain and unambiguous language of the release specifically disproves plaintiff's allegation that there was an "'off the record' contract settlement." The release provides that it "*contains the ENTIRE AGREEMENT* between the parties hereto and *there is absolutely no agreement* on the part of any person, firm or corporation to make any payment or to do any act or thing other than that which is herein expressly stated"

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[2] We do not address plaintiff's argument that summary disposition was premature because discovery was not yet complete. The issue is neither properly preserved nor properly presented for appellate review, as the issue was raised for the very first time in plaintiff's reply brief. See *Ligon v Detroit*, 276 Mich App 120, 129; 739 NW2d 900 (2007); *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

[3] Based on this standard of review, we reject plaintiff's claim that we must accept as true the allegations in her complaint. The court rules require us to consider the documentary evidence that defendant presented in support of his motion for summary disposition. See MCR 2.116(C)(5) ("The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10).").

(emphasis added). This language clearly and unambiguously states that the release was the entire and sole agreement between the parties in the 1999 case. Accordingly, plaintiff cannot now claim that there was an additional agreement between her and defendant.

Plaintiff claims that, in signing the release, she was only releasing defendant from the claims asserted in the 1999 case. Similarly, she argues that because her claims in the present case did not accrue until 2005, when defendant breached the "'off the record' contract settlement, or 2007, when defendant admitted to engaging in sexual activity with her, the release could not have covered the present claims. Plaintiff's arguments are contrary to the plain language of the release. The release states that plaintiff was releasing defendant "from *any and all* manners of actions, causes of action . . . [plaintiff] *now has or which may hereafter accrue or result* . . . growing out of or in any manner connected with the claims asserted in the [1999 case]" (emphasis added). Pursuant to this language, plaintiff released not only the claims she asserted in the 1999 case but also any claims that could accrue in the future and which are related to the claims in the 1999 case.

It is clear that the claims asserted in the present case are ones "growing out of or in any manner connected with the claims asserted in the [1999 case]." In her breach of contract claim, plaintiff alleged that defendant breached the "'off the record' contract settlement" that induced plaintiff to dismiss the claims in the 1999 case. The sexual activity that forms the basis for the negligence per se claim is the same activity that plaintiff complained of in the 1999 case. Similarly, the sexual activity that plaintiff alleged defendant concealed in her fraudulent concealment claim is the sexual activity that was the basis of the 1999 claims. Accordingly, the trial court did not err in concluding that plaintiff's claims for breach of contract, negligence per se, and fraudulent concealment were barred by the release.

Plaintiff asserts that the trial court erred in not repudiating the release. She claims that there was fraud in the execution of the release because she never received $15,000 from defendant.

"The Michigan Supreme Court has held that a plaintiff must tender any consideration received in exchange for a release before or simultaneously with the filing of a suit that contravenes that release." *Rinke v Auto Moulding Co*, 226 Mich App 432, 436; 573 NW2d 344 (1997), citing *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155, 176; 458 NW2d 56 (1990). There are two exceptions to this rule: (1) the defendant waives the plaintiff's duty to tender back, or (2) there is fraud in the execution. *Stefanac*, 435 Mich at 165.

Fraud in the execution occurs when a party is led to believe that she is signing something other than the release. *Id.* at 166-167; see also *Paul v Rotman*, 50 Mich App 459, 463-464; 213 NW2d 588 (1973) ("'Fraud in the execution' or factum means the proponent of the instrument told the signatory thereof that the instrument really didn't mean what it clearly said, and that the

signatory relied on this fraud to his detriment.").[4] As fraud in the execution has been defined by Michigan appellate courts, defendant's alleged failure to pay plaintiff $15,000 is not fraud in the execution. Plaintiff has never argued that she was led to believe that the release was anything other than what it was.

To the extent that plaintiff argues that the tender back rule should not even apply because she had nothing to tender back as she *herself* was not paid the $15,000, we find no merit to the argument. The purpose of the tender back rule is to place the parties *in statu quo*, so that a plaintiff may not maintain the benefit of an agreement and, at the same time, bring suit in contravention of the agreement. *Stefanac*, 435 Mich at 165; *Hammond v United of Oakland, Inc*, 193 Mich App 146, 149; 483 NW2d 652 (1992). The consideration that must be tendered back is the consideration stated in the release. *Stefanac*, 435 Mich at 159, 167. Here, the consideration stated in the release was $15,000, and plaintiff acknowledged receipt of the money. Thus, pursuant to the rule established by our Supreme Court, plaintiff was required to tender back the $15,000 to defendant. While the $15,000 may have bypassed plaintiff to her attorney, plaintiff received the benefit of payment of her outstanding attorney fees, and defendant was out of $15,000. The trial court did not err in refusing to repudiate the release.[5]

Finally, we refuse to exercise our equitable powers to grant plaintiff a cause of action against defendant. Plaintiff, in signing the release, gave up her right to seek any compensation from defendant for the alleged sexual abuse. Moreover, although defendant denied the sexual abuse until 2007, his denial of the abuse did not conceal any claims from plaintiff. Plaintiff, as the victim of the inappropriate conduct, always knew what defendant had done to her, and she even sued defendant before defendant made his admissions. There was no fraudulent concealment by defendant. See *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005).

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

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[4] According to Black's Law Dictionary (7th ed), fraud in the execution "occurs only rarely, as when a blind person signs a mortgage when misleadingly told that it's just a letter."

[5] Because the trial court correctly concluded that plaintiff's claims were barred by the release, we need not address plaintiff's argument that her claims were not barred by the applicable statutes of limitations.