STATE OF MICHIGAN

COURT OF APPEALS

MERIDIAN MUTUAL INSURANCE COMPANY and ESTATE DESIGN & FORMS, INC.,

Plaintiffs-Appellees,

v

MASON DIXON LINES, INC.,

Defendant-Appellant.

UNPUBLISHED
February 2, 1999

No. 199797
Macomb Circuit Court
LC No. 96-004394 AV

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

HOEKSTRA, J. (concurring).

I agree with the opinion of the majority in this case and write only to elucidate its interpretation of the general release in this case because it concerns an area of the law not fully addressed by Michigan courts. The analysis of general releases by other state courts has resulted in three distinct approaches toward interpreting a release that contains the at-issue omnibus language, "any and all persons," with no majority rule emerging. Some courts have adopted the common law view or flat bar rule, which holds that a general release unambiguously releases "any and all parties." Other courts have adopted the specific identity rule, which holds that a general release releases only those tortfeasors specifically named. Last, some courts have adopted a middle approach, the intent rule, which holds that parol evidence of the parties' intent may be admitted to determine the intended scope of a document.

Michigan courts have neither acknowledged nor analyzed these three approaches and have interpreted general releases with varying results. Compare *Grzebik v Kerr,* 91 Mich App 482; 283 NW2d 654 (1979) with *Harris v Lapeer Public School System,* 114 Mich App 107, 115; 318 NW2d 621 (1982). My review of this area of the law in Michigan convinces me that our approach toward interpreting general releases, including the approach taken by the majority in this case, has been most consistent with the policies of the intent rule.

First, the justification for the flat bar rule is based on an ancient principle that Michigan no longer acknowledges, namely, that a plaintiff suffers only a single and indivisible wrong and therefore the release of one joint tortfeasor is the release of all. See *Neves v Potter,* 769 P2d 1047, 1049-1050

(Co 1989). Our Legislature abolished this common-law principle when it enacted Michigan's release-contribution statute, MCL 600.2925d; MSA 27A.2925(4), that allows a plaintiff to settle with less than all of the alleged tortfeasors without discharging her claim against the remaining tortfeasors.[1] *Theophelis v Lansing General Hosp*, 430 Mich 473, 480-483, 491; 424 NW2d 478 (1988). The statute was apparently derived from section 6 of the Uniform Comparative Fault Act (UCFA),[2] and as several state courts have held, by enacting a state statute based upon either the UCFA or the Uniform Contribution Among Tortfeasors Act (UCATA), legislatures intend to abolish the common law principle; otherwise, there would be no reason for enacting the statutes.[3] Similarly, Michigan's judicial adoption of a pure comparative negligence scheme, which is based on the concept that damages may be apportioned among joint tortfeasors, contradicts the common-law principle justifying application of the flat bar rule. See generally *Mayhew v Berrien Co Road Comm*, 414 Mich 399; 326 NW2d 366 (1982) (discussing the contribution and comparative negligence schemes).

Second, Michigan case law leads me to conclude that our approach toward interpreting general releases is most consistent with the intent rule. Only the intent rule permits the actual intent of the parties to control, abandoning the unwarranted fictitious presumptions that the parties either intended to release seemingly the whole world or that only those parties named or discernible from the document's language are released. *McInnis v Harley-Davidson Motor Co*, 625 F Supp 943, 949 (D RI, 1986). The majority in this case joins a multitude of other panels in repeating the proposition of our Supreme Court in *Denton v Utley*, 350 Mich 332, 342; 86 NW2d 537 (1957), that to be valid, a release must be "fairly and knowingly made."[4] Within context, our Supreme Court stated:

> In the particular case before us, involving a release, we confront merely a specialized application of the overriding principle that in its accomplishment of its mission, equity will strike down without hesitation any agreement resulting from oppression, fraud, mutual mistake of the contracting parties, or other evil. The cases rest upon this great principle, not upon the minutiae urged. It matters not how sweeping are the words involved. When their content cloaks iniquity they shall be vacated and held for naught. To put it affirmatively, any release, to be sustained, must be '*fairly and knowingly*' made. [*Id.* at 342 (emphasis added).]

The Court also made the following apt comment at the start of the opinion, cautioning practitioners to read its decision with "great care."

> We are not saying that all releases are vulnerable. What we are saying is that releases have no particular immunity of their own to attack on the ground of mistake or fraud. There is no form of words, there is no formula, no instrument, no transaction, that rises above the chancellor's scrutiny or resists his intervention. [*Id.* at 333.]

Consequently, several decisions of this Court have included the statement that Michigan courts are willing to "go beyond the broad language of a release to determine the fairness of a release and the intent of the parties in executing it."[5] Indeed, "*Denton v Utley* lays the foundation for the broad line of

cases concerning the equitable reformation of releases." *Bartrand v Chesapeake & Ohio Rwy Co*, 87 Mich App 466, 470; 274 NW2d 822 (1978).

This "fair and knowing test" from *Denton* appears to be directly contrary to the flat bar rule of interpretation holding that a general release unambiguously releases "any and all parties," regardless of the risk that a plaintiff is not fully compensated for injuries or the risk of enforcing a settlement unintended by the parties. Similarly, this "fair and knowing" test appears to be directly contrary to the specific identity rule of interpretation requiring specificity that may trap unwary plaintiffs. Rather, in order to determine whether a release has been made fairly and knowingly necessitates an application of the intent rule, which does not elevate form over substance but recognizes that the touchstone in any agreement is the parties' intent.

Additionally revealing to Michigan's position on this issue is how courts have endeavored to ascertain the fairness of a release and the intent of the parties in executing it. The issue has been resolved by considering one or both of the following lists of appropriate factors regarding intent.[6]

> A release is not fairly made and 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. [*Thiesen, supra* at 582-583.]
>
> Factors having a bearing on the issue of intent include (1) the haste (or lack thereof) with which the release was obtained, (2) the amount of consideration, (3) the circumstances surrounding the release, including the conduct and intelligence of both the releasor and the releasee, and (4) the actual presence of an issue of liability. [*Denton, supra* at 345.]

Because these factors would necessarily require an examination of evidence outside the four corners of the document or "beyond the broad language of a release," the repeated use of these factors also appears to support application of the intent rule.

For these reasons, I am persuaded that the intent rule best represents the policies expressed by the Legislature and the decisions issued by the courts. Applying the intent rule to the facts of this case, I agree with the majority that the lower court did not err in denying defendant's motion for summary disposition based on the release executed between plaintiffs.

/s/ Joel P. Hoekstra

[1] Michigan's contribution-release statute states the following:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons for the same injury or the same wrongful death, both of the following apply:

> (a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death *unless its terms so provide*.
>
> (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death. [MCL 600.2925d; MSA 27A.2925(4) (emphasis added).]

Although its enactment is significant in recognizing legislative intent to abrogate the common-law view, the statute itself does not alone resolve the dispute over which of the two remaining rules the Legislature intended courts to apply, if either. The operative phrase, "unless its terms so provide," can arguably support application of either the specific identity rule or the intent rule.

[2] In *Michigan Dep't of Transportation v Thrasher,* 446 Mich 61, 64-68; 521 NW2d 214 (1994), our Supreme Court discussed how the Legislature's effort at tort reform was loosely based on a blend of UCFA sections, including § 6, which provides the following:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

[3] More specifically, these courts found that the wording of their statutes indicated the legislatures' intent not only to abolish the common law rule of flat bar but also to adopt the specific identity rule. See *Beck v Cianchetti,* 1 Ohio St 3d 231; 439 NE2d 417, 420 (1982); *Alsup v Firestone Tire & Rubber Co,* 101 Ill2d 196; 461 NE2d 361 (1984); *Saranillio v Silva,* 78 Hawai'i 1; 889 P2d 685, 700 (1995); *Aid Ins Co v Davis County,* 426 NW2d 631, 634 (Iowa 1988); *Moore v Missouri Pacific RR,* 299 Ark 232; 773 SW2d 78, 81-82 (1989); *Bjork v Chrysler Corp,* 702 P2d 146, 161-162 (Wy 1985). Of course, many other courts have adopted the policies of the intent rule. See, e.g., *McInnis v Harley-Davidson Motor Co,* 625 F Supp 943, 957 (D RI, 1986); *Sellon v General Motors Co,* 521 F Supp 978, 983-984 (D Del, 1981); *Manos v Trans World Airlines, Inc,* 295 F Supp 1166, 1669-1170 (ND Ill, 1968) (applying California law); *Neves v Potter,* 769 P2d 1047, 1053 (Co 1989); *Chakov v Outboard Marine Corp,* 429 A2d 984 (Del 1981); *Hurt v Leatherby Ins Co,* 380 So2d 432, 433-434 (Fla 1980).

[4] Citing this statement from *Denton* in various release contexts are *Dombrowski v City of Omer,* 199 Mich App 705, 709; 502 NW2d 707 (1993); *Adell v Sommers Schwartz Silver & Schwartz, PC,* 170 Mich App 196, 201; 428 NW2d 26 (1988); *Brooks v Holmes,* 163 Mich App 143, 145; 413 NW2d 688 (1987); *Binard v Carrington,* 163 Mich App 599, 603; 414 NW2d 900 (1987); *Trongo v Trongo,* 124 Mich App 432, 435; 335 NW2d 60 (1983); *Theisen v Kroger Co,* 107 Mich App 580, 582-583; 309 NW2d 676 (1981); *Gzerbik, supra* at 486; *McElmurry v Nine,* 89 Mich App 290, 292; 279 NW2d 301 (1979); *Tate v Town & Country Lanes,* 79 Mich App 89, 91; 261 NW2d 220 (1978); *Chuby v General Motors Corp,* 69 Mich App 563, 566; 245 NW2d 134

(1976); *Farwell v Neal*, 40 Mich App 351, 355; 198 NW2d 801 (1972); *Van Avery v Seiter*, 13 Mich App 88, 93; 163 NW2d 643 (1969), aff'd 383 Mich 486; 175 NW2d 744 (1970).

[5] See, e.g., *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 496; 478 NW2d 914 (1991), cited by the majority in this case; *Trongo, supra*; *Harris v Lapeer Public School System*, 114 Mich App 107, 115; 318 NW2d 621 (1982); *Theisen, supra.*

[6] See, e.g., *Dombrowski, supra* at 709 (first list); *Paterek v 6600 Ltd*, 186 Mich App 445, 448-449; 465 NW2d 342 (1990) (first list); *Harris, supra* at 709 (both lists); *Trongo, supra* at 435 (both lists); *Binard, supra* at 603-604 (both lists); *Brooks, supra* at 145 (first list); *Theisen, supra* at 583 (both lists).