STATE OF MICHIGAN

COURT OF APPEALS

WANDA G. WILLIAMS,

Plaintiff-Appellant,

and

LOUIS WILLIAMS,

Plaintiff,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

BILL BROWN FORD, INC.,

Defendant-Appellee/Cross-Appellant,

and

FORD MOTOR COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 15, 1997

No. 171658
Wayne Circuit Court
LC No. 90-026774-NP
Oakland Circuit Court
LC No. 91-406982-NP

ON REHEARING

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,* JJ.

PER CURIAM.

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* Circuit judge, sitting on the Court of Appeals by assignment.

This case is before us on rehearing. We originally affirmed the grant of summary disposition in favor of defendant Ford Motor Company on the basis of a release and affirmed the jury's verdict of no cause of action in favor of defendant Bill Brown Ford, Inc. *Williams v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 171658) (Jansen, P.J., dissenting in part). In the motion for rehearing, plaintiff[1] Wanda Williams argues only that the trial court erred in granting summary disposition in favor of Ford Motor Company. She raises no issues with respect to our affirmance of the jury verdict in favor of Bill Brown Ford. Therefore, the jury's verdict in favor of Bill Brown Ford is affirmed for the reasons set forth in our previous opinion. However, we now reverse the grant of summary disposition in favor of Ford Motor Company (Ford) and remand for further proceedings.

I

This case arises from an automobile collision which occurred on November 11, 1987. Wanda Williams and her husband, Louis, purchased a Ford Taurus station wagon from Bill Brown Ford in April 1987. A witness to the accident (a mechanic working on a disabled truck on the right shoulder near Wanda's accident scene) observed the right front wheel come off of the Taurus, the car suddenly dropped, and it veered to the right. The car hit the right guard rail, bounced across three lanes of traffic, and hit the guard rail on the other side of the freeway. The witness observed a piece missing from the steering knuckle upon further inspection. Wanda Williams, who was driving the car, had no memory of the accident. She was taken to a hospital, received stitches in her head for a laceration, and x-rays were done to her head, neck, and back. It was not until one month later that Wanda experienced pain in her left leg. It was then discovered that she had suffered from hairline fractures in her left leg, and she subsequently had to have orthopedic surgery for the fractures. Her leg was immobilized for over one year as a result of the injuries.

Police reports indicated that the accident was caused by the dislocation of the car's right front wheel. Louis Williams, a long-time Ford employee, called several people at Ford to inform them of a possible defect.[2] Several days later, he was contacted by a claims supervisor for Ford, Don Vyhnalek. Vyhnalek and Louis met and Vyhnalek volunteered to reimburse the Williams for the difference in price between the insurance payment for the Taurus and a replacement car. Vyhnalek also offered to cover the price of a rental car until delivery of the new car. Louis stated that there was no discussion regarding any payment for Wanda's injuries. A check for $3,690.58 was issued to the Williams with an accompanying release. The release itself was not dated, but the check was drawn on December 24, 1987. The release states in pertinent part that the Williams would:

> remise, release, and forever discharge FORD MOTOR COMPANY its successors and assigns, and/or his, her, their, and each of their associates, heirs, executors and administrators, of and from any and every claim, demand, right, or cause of action, of whatsoever kind or nature, either in law or in equity, arising from or by reason of any bodily and/or personal injuries known or unknown sustained by us, and/or damage to property, or otherwise, as the result of a certain accident which happened on or about

> the eleventh (11th) day of November 1987, for which we have claimed the said Farmington Hills, MICH to be legally liable, which liability is expressly denied.

Both Louis and Wanda Williams signed the release and cashed the check.

On October 18, 1990, plaintiff filed suit against Ford and Bill Brown Ford alleging negligence and breach of express and implied warranties. The Oakland Circuit Court ultimately granted Ford's motion for summary disposition pursuant to MCR 2.116(C)(7) (claim barred because of release) in an order dated April 21, 1992.

II

We review de novo a trial court's decision on a motion for summary disposition. *Florence v Dep't of Social Services,* 215 Mich App 211, 214; 544 NW2d 723 (1996). Documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion. MCR 2.116(G)(2). The affidavits, pleadings, depositions, admission, and other documentary evidence, if submitted by the parties, must be considered by the court when ruling on a motion under MCR 2.116(C)(7). Thus, like the trial court, we will consider the documentary evidence submitted by the parties in reviewing the motion.

III

It is not contrary to this state's policy for a party to contract against liability for damages caused by its own ordinary negligence. *Skotak v Vic Tanny, Inc,* 203 Mich App 616, 617-618; 513 NW2d 428 (1994). The validity of a contract of release turns on the intent of the parties. To be valid, a release must be fairly and knowingly made. *Denton v Utley,* 350 Mich 332, 342; 86 NW2d 537 (1957). 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. *Paterek v 6600 Ltd,* 186 Mich App 445, 449; 465 NW2d 342 (1990).

In *Stefanac v Cranbrook Educational Community (After Remand),* 435 Mich 155, 164-165; 458 NW2d 56 (1990), our Supreme Court held that the court is to start with the presumption that the plaintiff executed the release knowingly and that the recited consideration was received. The plaintiff has the burden of showing, by a preponderance of the evidence, that the release is unfair or incorrect on its face. *Id.,* p 165. Even in light of these presumptions and the plaintiff's burdens, the plaintiff must tender the recited consideration before there is a right to repudiate the release. *Id.* The only recognized exceptions are a waiver of the plaintiff's duty by the defendant and fraud in the execution of the release. *Id.* Our Supreme Court in *Stefanac* noted that the plaintiff had not raised either exception and was thus not relieved of the duty to tender the consideration recited in the release. *Id.*

Our Supreme Court has also recognized that where there is fraud in the execution of a release of a claim for personal injuries, a tender back of the consideration received is not a condition precedent to the avoidance of the release. *Stewart v Eldred,* 349 Mich 28, 35; 84 NW2d 496 (1957); *Randall v Port Huron, St C & M C R Co,* 215 Mich 413, 420; 184 NW 435 (1921). This is to be

distinguished from fraud in the inducement of the release, which requires a tender back of the consideration. *Stewart, supra,* p 35; *Stefanac, supra,* pp 165-166. Therefore, where there is fraud in the execution of the release, that is, where a party signs a release under the belief that she or he is signing something else, then a tender back of the consideration is not required. *Randall, supra,* p 420; *Stewart, supra,* pp 34-36; *Stefanac, supra,* p 166; *Paul v Rotman,* 50 Mich App 459, 463-464; 213 NW2d 588 (1973).

Plaintiff argues that there is a factual issue regarding the intent of the parties in executing the release. She argues that there was no intention that personal injury was to be covered by the terms of the release and that the execution of the release was fraudulent when it purported to release Ford from liability for her personal injuries. We find that plaintiff has presented a material factual dispute regarding whether there was fraud in the execution of the release such that a tender back of the consideration was not required to repudiate the release.

At his deposition, Vhynalek testified that he could not say that there was any discussion regarding bodily injury, although he stated that it was Ford's "policy" to never separate settlements for bodily injury or property damage. There is no indication that this alleged policy was ever related to the Williams. Vhynalek admitted that the "deal" was to reimburse the Williams for the out-of-pocket expenses in purchasing a new Ford Aerostar (the additional amount not paid by plaintiff's insurance) and for the cost of a rental car until delivery of the Aerostar. Louis Williams testified at his deposition that there was no discussion regarding any payment for plaintiff's injuries. Additionally, Vhynalek wrote a letter, dated November 25, 1987, in which he stated the following:

> Since Mr. Williams is a long time Ford employee and in Engineering, we made a deal with him. He is going to collect from this Insurance Company, Safeco, approximately $13,000 for a total loss. I agreed to make up the difference in a new 1988 purchase of a Ford Aerostar which will run about $3,000. I also gave him permission to rent a vehicle for 2 weeks and we will pick that up.

There is no indication in this letter that Ford agreed that the deal would include coverage for any of plaintiff's personal injuries. In fact, the full extent of plaintiff's injuries were not known at the time that the letter was written.

There is also evidence that plaintiff did not read the terms of the release, although Louis Williams did. In any event, the testimony of both Louis and Wanda Williams was that there was no intent to release her potential claims for personal injury, which were not fully known at the time the release was signed, and that the discussion and consideration related solely to the purchase of a new car.

Accordingly, this evidence, taken in a light most favorable to plaintiff, is sufficient to raise a material factual dispute regarding whether there was fraud in the execution of the release. See, e.g., *Stewart, supra,* p 37; *Denton, supra,* pp 343-344. A jury will have to resolve whether there was fraud in the execution of the release, and then determine liability, if any, on the part of Ford. Because there is a factual dispute regarding whether there was fraud in the execution of the release, we further

order that the amount of $3,690.58 received by plaintiffs from the release be held in an escrow account by the trial court until this case is decided.

The jury's verdict in favor of Bill Brown Ford is affirmed. The trial court's order granting summary disposition in favor of Ford Motor Company pursuant to MCR 2.116(C)(7) is reversed and we remand for further proceedings. No further jurisdiction is retained.

/s/ Kathleen Jansen
/s/ Denise Langford-Morris

[1] Although Louis Williams was originally a plaintiff in this action, the parties stipulated to dismiss his claim on May 2, 1992. Therefore, "plaintiff" as used in this opinion will refer solely to Wanda Williams.

[2] Ron Ehlert, an engineer with Ford, testified that he examined the parts of the car that plaintiff claimed caused the accident. He stated that the physical damage evident on the ball stud and cross-bolt indicated that the steering knuckle had to have been intact at the time of the impact with the guard rail.