

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND PETRIE,

Plaintiff-Appellant,

and

JANICE PETRIE,

Plaintiff,

v

JONES TRANSFER COMPANY, JOHN M.
FLYNN and LIBERTY MUTUAL INSURANCE
COMPANY, Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
October 24, 1997

No. 191806
Wayne Circuit Court
LC No. 93-303605-NI

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting summary disposition in favor of defendants on three of the four counts alleged in plaintiff's complaint. We affirm in part, reverse in part, and remand for further proceedings.

On February 27, 1990, plaintiff was traveling south on Telegraph Road when he collided with a truck that had jackknifed suddenly in front of him. The truck was driven by defendant Flynn, owned by defendant Jones Transfer Company, and insured by defendant Liberty Mutual Insurance Company. Plaintiff's van was totaled, and plaintiff suffered a lower back injury as a result of the accident.

On March 5, 1990, plaintiff contacted defendant Liberty Mutual to inquire whether it would replace his van or give him any money for it. Plaintiff spoke with adjuster Kim Szczepanik, who informed plaintiff that Liberty Mutual was not liable for the loss of his vehicle and that any liability on

Liberty Mutual's part was limited to plaintiff's injuries. Plaintiff and Szczepanik eventually settled the case for \$6,300, at which time plaintiff signed a release.

Thereafter plaintiff filed a four count complaint asserting that the release covered more than he had realized. Count 1 alleged negligence, count II sought rescission of the release, count III asserted a loss of consortium claim,, and count IV alleged fraud, misrepresentation, and overreaching on the part of defendant Liberty Mutual. Following an evidentiary hearing, the trial court upheld the release. Thereafter the court entered an order dismissing counts I, II, and IV. Plaintiff only challenges the court's dismissal of counts II and IV on appeal.

Plaintiff first argues that the trial court erred in refusing to rescind the release. We disagree. A trial court's findings of fact may be set aside only if they are clearly erroneous. MCR 2.613(C). A finding is clearly erroneous if, after reviewing the entire record, this Court is firmly convinced that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

A release is valid if it is fairly and knowingly made. *Denton v Utley*, 350 Mich 332, 342; 86 NW2d 537 (1957); *Brooks v Holmes*, 163 Mich App 143, 145; 413 NW2d 688 (1987). A release is not valid if: (1) it was signed under duress; (2) fraudulent or overreaching conduct was used to obtain the release; (3) there were misrepresentations about the true nature of the document; and (4) the person signing the release was dazed, in shock, or under the influence of drugs. *Denton, supra* at 343. Factors to consider in determining the validity of a release include whether the release was signed in haste, the amount of money involved in the agreement, and the circumstances surrounding the release's execution, including the conduct and intelligence of the parties involved. *Theisen v Kroger*, 107 Mich App 580, 583; 309 NW2d 676 (1981). The burden is on the plaintiff to "make out a preponderate case" for setting the release aside. *Id.* at 582.

A review of the record shows that the trial court carefully and thoroughly analyzed all of the evidence and all of these factors before making its ruling. This Court will give deference to the trial court's determinations concerning credibility. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). We cannot conclude that the trial court clearly erred in refusing to rescind the release. Therefore, we affirm the trial court's decision refusing to set aside the release.

Plaintiff also argues that even if the trial court properly upheld the release, it was improper to also dismiss the fraud and misrepresentation claim because the claim was legal in nature and independent of his equitable request to rescind the release. Plaintiff claims he was entitled to have his fraud claim tried by a jury. We agree.

First, we reject defendant's claim that this issue is not properly before us. Defendant contends that the evidentiary hearing only pertained to the release and that, after the court upheld the release, plaintiff stipulated to dismissal of the fraud claim. This claim is not supported in the record. After upholding the release the court stated that the loss of consortium claim remained. Notably absent from the court's statement was the fact that the fraud claim remained. Further, the order dismissing the fraud

claim was only approved as to form by plaintiff's counsel rather than being approved as to form and content.

We next find that summary dismissal of plaintiff's fraud claim was erroneous. Rescission is an equitable remedy. *ECCO, Ltd v Balimoy Mfg Co, Inc*, 179 Mich App 748, 750; 446 NW2d 546 (1989). Equitable claims do not present the right to a jury trial but are determined by the court. *Id.*; *Abner A Wolf, Inc v Walch*, 385 Mich 253, 260-261; 188 NW2d 544 (1971). Fraud and misrepresentation is a legal claim that presents the right to a jury trial. *Schaffer v Eight-One Hundred Jefferson Avenue East Corp*, 267 Mich 437, 448; 255 NW 324 (1934).

In cases involving both equitable and legal claims, the court may determine the sequence in which the issues are tried, but must preserve "the constitutional right to trial by jury" for those issues which allow a jury trial and for which a demand has been made. MCR 2.509(C). Achieving this balance can be particularly difficult in cases, such as this one, where the two claims are similar in nature and arise out of the same transaction. This Court has held that "in a case such as this where both equitable issues and jury submissible issues coexist, the proper procedure is to hold trial before a jury and follow presentation of evidence with two separate factual determinations: court factfinding on the equitable claims and jury factfinding on the claims of damages." *Smith v University of Detroit*, 145 Mich App 468, 479; 378 NW2d 511 (1985).

Kordis v Auto-Owners Ins Co, 311 Mich 247; 18 NW2d 811 (1945), is instructive. In *Kordis*, the plaintiff was hit by a car. *Id.* at 349. The plaintiff settled his claim and signed a release. *Id.* The plaintiff later sued the defendant insurance company for damages, contending that the defendant induced him to sign the release through fraud. *Id.* The Supreme Court reversed the trial court's dismissal of the plaintiff's complaint, stating that the plaintiff's suit was "an independent suit based upon alleged fraud and deceit claimed to have been practiced upon the plaintiff by defendant's agent" not a suit based on his right to recover damages for his injuries. *Id.* at 250. The Court stated:

But when one, as plaintiff claims in the instant case, has suffered damage by reason of fraud or deceit of another, the person so injured has the option of rescinding the transaction consummated by fraud and proceeding to recover; or the injured party may waive his right to rescind and sue to recover such damages as he may have suffered in consequence of the fraud perpetrated on him. [*Id.* at 251.]

Defendant correctly notes that the plaintiff in *Kordis* did not bring both a claim for fraud and a claim for rescission as plaintiff in the case at bar did. However, this Court has held that a plaintiff may pursue all his remedies against a defendant, even if the remedies are inconsistent, so long as the plaintiff has not elected to pursue only one remedy, and the plaintiff is not awarded a double recovery. *Walraven v Martin*, 123 Mich App 342, 347-348; 333 NW2d 569 (1983). Therefore, the plaintiff in *Walraven* was permitted to seek both rescission of the contract and damages for fraud. *Id.*

We conclude that, under the law as it stands currently, plaintiff was deprived of his right to a jury trial on his fraud claim. Therefore, we reverse the summary disposition of the fraud claim and remand for a jury trial on this issue.

Affirmed in part, reversed in part, and remanded for further proceedings.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra