

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN MARSTON,

Plaintiff-Appellant,

v

STEVEN M. RENZ, Individually and as Next Friend
of JEFFREY RENZ, and MARLENE RENZ,

Defendants-Appellees.

UNPUBLISHED

November 18, 1997

No. 198713

Ottawa Circuit

LC No. 93-019790-NI

Before: White, P.J., and Cavanagh and Reilly, JJ.

PER CURIAM.

This case arises out of a collision between plaintiff's bicycle and defendants' motor vehicle. Plaintiff appeals as of right the trial court's judgment of no cause for action following a bench trial on plaintiff's claim that defendants' insurer engaged in fraud, misrepresentation, and overreaching conduct in securing his execution of a release of his potential liability claim against defendants in exchange for \$250. We affirm.

I

Plaintiff claims that the trial court erred in determining that the release was valid, finding no misrepresentation or overreaching conduct. We disagree.

This Court reviews a trial court's findings of fact for clear error. *In Re Forfeiture of \$25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996). A trial court's findings are clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Boyd v Civil Service Comm*, 220 Mich App 226, 235; 559 NW2d 342 (1996).

Plaintiff testified that he was very concerned about unwittingly signing away his rights, and was on notice of this potential hazard from a personal friend. He acknowledged the importance of reading and understanding something before signing it. Yet, he also testified that when he received the release, he only glanced at it and did not really understand it. When asked why he had not telephoned

defendant's insurer for clarification, plaintiff responded that he trusted the insurance agent. However, plaintiff earlier testified that he questioned the agent because he was wary of signing away his rights.

Plaintiff acknowledged that "there's nothing difficult" about the language of the release stating that plaintiff cannot sue defendants. Further, the settlement check signed and negotiated by plaintiff plainly states that it is a full and final settlement of bodily injury and liability claims.

The defense contention that the \$250 was a nuisance value settlement is supported by the police report assessing fault to plaintiff and not to defendant. It is also supported by plaintiff's recorded interview regarding the accident where he admitted several times that he was not paying attention to defendant's vehicle.

Further, the court expressly found the agent's account to be more credible than plaintiff's. In light of the evidence presented, we are not left with a definite and firm conviction that a mistake has been made. The trial court's findings regarding the validity of the release are not clearly erroneous.

II

Plaintiff next claims the trial court erred in upholding the release where the \$250 settlement amount was grossly inadequate in light of the severity of the injury -- a fractured knee cap that has required several surgeries and still is not back to normal. We disagree.

A reviewing court will set aside a release based upon the inadequacy of consideration supporting its execution only where the consideration is so grossly inadequate as to shock the conscience of the court. *Binard v Carington*, 163 Mich App 599, 605; 414 NW2d 900 (1987). Citing *Binard*, plaintiff argues that the circumstances surrounding plaintiff's execution of the release demonstrate the inadequacy of the consideration supporting it. In *Binard*, this Court rejected a challenge to the adequacy of a \$90,000 settlement in a wrongful death case. Plaintiff argues that this Court did so "primarily due to the fact the liability of the defendant was not established, which is not true here." However, plaintiff does not demonstrate why he feels liability is established here against defendant, and the record does not support plaintiff's position. As indicated above, the police report places fault for the accident exclusively with plaintiff and the transcript of the recorded interview contains plaintiff's repeated admission that he was not paying attention as he approached the intersection. Although plaintiff sets forth a detailed account of his medical treatment concerning his knee, he has not supported his contention that defendant is liable for that injury.

III

Finally, plaintiff argues that the trial court erred when it held him to a clear and convincing standard of proof regarding the misrepresentation allegations. We find any error to have been harmless.

Plaintiff relies on *Binard, supra*, where this Court stated, "When a release is challenged, the party seeking to avoid the release must prove by a preponderance of the evidence that the release should be set aside" to support his argument that the court erred in applying the higher clear and convincing standard. However, this Court in *Jim-Bob, Inc v Mehling*, 178 Mich App 71; 443 NW2d

451 (1989), the case relied upon by the trial court, indicated that fraud and misrepresentation must be proven by clear and convincing evidence.

We need not determine whether these two cases conflict because we conclude that any error was harmless. An error does not justify reversal if that error was harmless, i.e., not prejudicial, in that it would not have changed the result. *People v Clark*, 453 Mich 572; 556 NW2d 820, 839, n 13 (1996). It is clear from the court's decision that it would have reached the same conclusion even if it had applied the less exacting preponderance standard to plaintiff's misrepresentation claim.

Affirmed.

/s/ Helene N. White

/s/ Mark J. Cavanagh

/s/ Maureen Pulte Reilly