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NO. 67809-4

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ALFRED BARBER, III, Appellant,

v.

BEVERLY ANKENY and CHARLES ANKENY, Respondents.

Appeal from the Superior Court of King County
The Honorable Cheryl Carey, Department No. 2
King County Superior Court Cause No. 11-2-08033-1 KNT

AMENDED BRIEF OF APPELLANT

By:

Paul J. Landry
Attorney for Appellant
WSBA# 22175
902 South 10th Street
Tacoma, WA 98405
(253) 272-2206-Phone
(253) 272-6439-Fax

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A. ASSIGNMENTS OF ERROR:

1. The trial court erred when it found that in a claim involving concurrent defendants, a general release which contains express language preserving a claim against one defendant releases all claims.
2. The trial court erred when it ruled that the intent of the parties cannot be considered when the subject release contains more than one reasonable interpretation.
3. The trial court erred when it ruled that reasonable consideration from a tortfeasor is not required for a release to apply to such tortfeasor.
4. The trial court erred when it ruled that a tortfeasor can avail itself of a release intended for a distinct and separate tortfeasor.
5. The trial court erred when it excluded from consideration the declarations of Chad Legg and Olga Rodriguez concerning the intent of the parties to the release.
6. The trial court erred by granting summary judgment for the defendants.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR:

In a claim involving concurrent defendants, does a general release which contains express language preserving a claim against one defendant release all defendants?

Where a release contains contradictory terms, can the court consider extrinsic evidence to ascertain the intent of the parties?

Can a party who gave no consideration for a release avail itself of the benefits of the release?

C. STATEMENT OF THE CASE:

1. PROCEDURAL HISTORY

This case arises out of a motor vehicle accident in which the plaintiff was injured by the Respondent Ankeny, who was operating a motor vehicle owned and entrusted to her by the defendants Van Asperen. A Complaint for Damages was filed with King County Superior Court, Department #2 on February 28, 2011, by Mr. Barber, III, (appellant) against the Van Asperens Mr. and Ms. Ankeny (respondents). In April of 2010, Petitioner Barber settled with PEMCO, the insurer of the Van Asperens. Petitioner Barber and PEMCO executed a release which contained conflicting provisions¹. The release included language releasing all claims and parties, and language preserving a claim against Respondents

¹ Declaration of Paul J. Landry in Opposition to Summary Judgment, (CP 50-66)

Ankeny. On March 29, 2011, attorney for the respondents entered his notice of appearance. On June 22, 2011, attorney for the respondents filed a Motion for Summary Judgment and Declaration in Support for Motion for Summary Judgment. The basis for the motion was that the release pertained to all claims and parties, notwithstanding the reservation of rights language. The appellant filed his Brief in Opposition to Summary Judgment, Declaration of Counsel, and Declarations of Chad Legg and Olga Rodriguez on July 22, 2011. The Motion for Summary Judgment was scheduled for oral argument before Judge Cheryl Carey of King County Superior Court, Department 2 on August 5, 2011. The respondents and their attorney failed to appear for oral argument, and failed to notify the court or opposing counsel that they would not be present. In response to their failure to appear, counsel for the appellant moved for an Order Denying Summary Judgment. The appellant's motion was denied and Judge Carrey struck the hearing.

The respondents filed a Motion for Summary Judgment on August 16, 2011 to be set for argument on September 16, 2011. On

September 8, 2011, respondents filed a Motion to Strike Declarations of Chad J. Legg and Olga Rodriguez and Reply to Plaintiff's Opposition to Summary Judgment. Petitioner Barber filed a Motion to Strike the respondent's Reply on September 13, 2011. The summary judgment hearing was conducted on September 16, 2011. During the hearing, the trial court struck the declarations of Chad Legg and Olga Rodriguez and granted the Respondent's motion for Summary Judgment. Appellant filed a Motion for Reconsideration and submitted it to Judge Cheryl Carey on September 26, 2011 which was denied on October 17, 2011. Appellant filed his Notice of Appeal with King County Superior Court, Department 2 on October 13, 2011.

D. LAW AND ARGUMENT:

A review of the grant of a summary judgment engages in the same inquiry as the trial court. *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 685, 871 P.2d 146 (Wash. 1994)

There are four possible analytical outcomes in this matter. First, it could be held that the release effectuated a release of all claims and all parties, a result for which there is no authority or

factual basis. Second, it could be determined that the release executed by the parties is not a general release and that it preserved a claim, which was the intent of the parties. Third, it could be determined that the release is ambiguous and thus creates a question of fact for the jury. Fourth, The release could be void.

1. **The trial court erred when it found that in a claim involving concurrent defendants, a general release which contains express language preserving a claim against one defendant releases all defendants.**

Releases are contracts and their construction is governed by the legal principles applicable to contracts; they are subject to judicial interpretation in light of the language used. *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 488, 756 P.2d 111 (Wash. 1988); *Stottlemyre v. Reed*, 35 Wash.App. 169, 171, 665 P.2d 1383, *review denied*, 100 Wash.2d 1015 (1983). Contract language is interpreted to ascertain the intent of the parties as reflected by the entire circumstances under which the contract was made. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990); *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn.App. 299, 311, 57 P.3d 300 (Wash.App. Div. 3 2002). “The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention

of the parties." *Berg* at 663, quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 162 (1964-1965).

In the instant case, the release contains language which objectively manifests the intent of the parties: "Nothing in this General Release of All Claims applies to the liability insurance applicable to this claim provided by GMAC, the insurance company of Beverly Ankeny and Charles Ankeny²." Clearly, the intent of the parties was not to effect a complete release of all claims and all parties. The intent was to insulate PEMCO from further liability based on the Ankenys' negligence. The specific inclusion of language limiting the release to a partial release of only those claims PEMCO covered demonstrates this intent. Even if the release is viewed as unclear on the intent of the parties, the declarations of the parties to the release demonstrate a synonymous intent to preserve a claim. However, the trial court struck the

² Declaration of Paul J. Landry in Opposition to Summary Judgment, (CP 59-60)

declarations of the parties who negotiated the release. This was in error.

2. **The trial court erred when it excluded from consideration the declarations of Chad Legg and Olga Rodriguez concerning the intent of the parties to the release.**

While the court did not express its rationale for the exclusion of the declarations of Chad J. Legg and Olga Rodriguez, the Respondent urged that the parol evidence rule prohibits the consideration of extrinsic evidence in contract construction³. This is not the correct state of the law, for the parol evidence rule was abrogated in Washington in 1990. In *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222 (1990), the Washington Supreme Court held that ambiguity in the meaning of contract language need not exist before evidence of the circumstances surrounding the making of the contract could be admissible: "We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled." *Berg* at 669. As such, the trial court

³ Respondents' Motion to Strike, (CP 76) citing *Fleetham v. Schneekloth*, 52 Wn. 2d 176, 179, 324, P.2d 429 (1958)

was in error when it struck the declarations of Chad J. Legg and Olga Rodriguez.

Although⁴ the language of the release contains an express provision which aims to preserve Petitioner Barber's claim for which GMAC is the insurer, the intent to do so is further demonstrated by the declarations of Olga Rodriguez and Chad Legg⁴. As is clear from the declarations, a full release of all the claims against the Ankenys was never contemplated. When questions arise concerning the credibility of extrinsic evidence, or a choice among reasonable inferences to be drawn from extrinsic evidence, is it an issue for the trier of fact. *Avery*, at 311; *Berg* at 667-68, adopting RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981). This case should have gone to a jury.

⁴ Declaration of Paul J. Landry in Opposition to Summary Judgment, (CP 62-71)

3. **The trial court erred when it ruled that reasonable consideration from a tortfeasor is not required for a release to apply to such tortfeasor.**

While a release of one joint tortfeasor is a release of all, the release of a concurrent tortfeasor does not release other concurrent tortfeasors unless 1) the claimant intended to release all tortfeasors, or 2) the release constituted a satisfaction of the entire obligation.

Vanderpool v. Grange Ins. Ass'n at 501; *Callan v. O'Neil*, 20 Wn.App. 32, 35, 578 P.2d 890 (Wash.App. Div. 1 1978). The Court of Appeals has discussed the distinction between joint and concurrent tortfeasors:

“Joint tort-feasors must act in concert in committing the wrong, or their acts, if independent of each other, must breach a joint duty and unite in causing a single injury. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 235, 588 P.2d 1308 (1978); *Young v. Dille*, 127 Wash. 398, 404, 220 P. 782 (1923). If two or more individuals commit independent acts of negligence that concurrently produce the proximate cause of a third party's injury, they are regarded as concurrent tort-feasors. *Mason v. Bitton*, 85 Wash.2d 321, 534 P.2d 1360 (1975).”

DeMaris v. Brown, 27 Wn.App. 932, 621 P.2d 201 (Wash.App. Div. 1 1980). The distinguishing factor between these types of tortfeasors is the duty breached. Joint tortfeasors breach a joint duty whereas concurrent tortfeasors breach separate duties. *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (Wash. 1978).

The Ankenys and Van Asperens are concurrent tortfeasors and not joint tortfeasors. They involve separate acts of negligence (negligent entrustment of a motor vehicle and negligent operation of a motor vehicle), separate theories of liability, and they were not acting in concert. There is no vicarious liability between them, as in an agent/principal or employer / employee relationship. Because they are concurrent tortfeasors, the rule set forth above applies and the inquiry turns on the intent of the parties and whether the release constituted a satisfaction of the entire obligation. The intent of the parties in this case has been demonstrated above; the remaining question is whether Mr. Barber was reasonably compensated.

4. **The trial court erred when it ruled that a tortfeasor can avail himself of a release intended for a distinct and separate tortfeasor.**

If payment received by the plaintiff from one tortfeasor constitutes the full satisfaction of the obligation, he cannot thereafter proceed against the other tortfeasors. A release of one tortfeasor is a release of all tortfeasors if reasonably compensatory consideration has been paid by one or more tortfeasors to the plaintiff. *Monjay v. Evergreen Sch. Dist.* 114, 13 Wash.App. 654, 658-59, 537 P.2d 825 (1975).

In the instant case, plaintiff Barber has incurred medical expenses to date in excess of \$40,000.00. Mr. Barber's physician has indicated that a surgery will be required. Mr. Barber's claim against the Van Asperens settled for policy limits of \$50,000.00. This amount is not full compensation, as it does not even cover Petitioner's medical special damages, let alone general damages. As such, the plaintiff has not been reasonably compensated by the settlement with one tortfeasor. Thus, under the test set forth in *Vanderpool* and *Callan*, supra, the release executed in this case does not release all tortfeasors.

5. **The trial court erred by granting summary judgment in favor of the defendants.**

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*. "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, all facts and reasonable inferences must be construed in the light most favorable to the nonmoving party. *Lybbert*, 141 Wn.2d at 34. Factual issues may be decided as a matter of law only if reasonable minds could reach but one conclusion. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

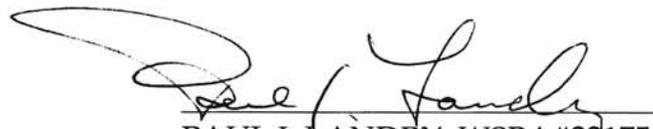
In the instant case, the release clearly evinced the intent of the parties to preserve a claim under the Respondent's GMAC policy. The language to that effect is clear and unambiguous. If the release is to be construed in the light most favorable to the nonmoving party, as it should have been at the trial court, then the matter goes to trial. If the release is found to contain conflicting provisions

which create an ambiguity, then the matter is for the trier of fact and was not appropriate for summary judgment.

E. CONCLUSION

For the foregoing reasons, Mr. Barber respectfully asks this court to reverse the Order Granting Summary Judgment entered in this case, find that the intent of the parties is a question of fact for the jury and to remand for trial.

Respectfully Submitted this 2 day of April, 2012.


PAUL J. LANDRY, WSBA#22175
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 2 day of April, 2012, I sent the Original Appellant's Brief to the Washington State Court of Appeals, Division I, and a copy of the same to the following recipient via ABC LEGAL MESSENGER:

THE COURT OF APPEALS, DIVISION I

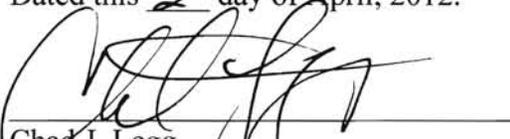
One Union Square
600 University Street
Seattle, WA 98101

and to

MR. ROBERT RICHARDS

Attorney at Law
11625 Rainier Ave. South, Ste., 102
Seattle, WA 98178

Dated this 2 day of April, 2012.



Chad J. Legg
Paralegal to Attorney Paul J. Landry