

STATE OF MICHIGAN
IN THE SUPREME COURT

ORIGINAL

THOMAS JOHN SHAY,

Plaintiff-Appellant,

vs.

JOHN ALDRICH, WILLIAM PLEMONS,
and J. MILLER,

Defendants-Appellees,

and

~~ALLEN PART POLICE OFFICERS~~
ALBRIGHT and LOCKLEAR,

^{OFFICER}
Defendants.

Supreme Court Docket
No:

Court of Appeals Docket
No: 282550

*Op 3-5-09
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Lower Court (Wayne Cty)
No: 06-608275-NZ

P. Edwards

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

BRIEF IN SUPPORT OF APPLICATION

EXHIBITS

PROOF OF SERVICE

FILED

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MICHIGAN SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL

“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.” *McIntosh v Groomes*, 227 Mich 215, 218 (1924).

In its Opinion of March 5, 2009 (Ex. 1), the Court of Appeals construed a Release (Ex. 8, Ex. 9) as accomplishing a result entirely contrary to the undeniable actual intent of the contracting parties, who intended to preserve Plaintiff's claims against the non-settling Melvindale officers (Ex. 6, 7, 10, 11, 12). By this ruling, Plaintiff is required to forego causes of action for which he rejected a case evaluation of \$1,450,000 (Ex. 5), because he executed a Release for the \$25,000 that the settling Allen Park officers were already required to pay under **MCR 2.403(M)** for the accepted case evaluation. This outcome allows grotesque police misconduct (Ex. 3, Ex. 4) to escape accountability, as punishment for his counsel extending a professional courtesy to the attorney for the settling Allen Park officers, who sought to avoid an adverse judgment, the ordinary consequence of case evaluation acceptance under **MCR 2.403(M)**. Plaintiff seeks leave to appeal from the Court of Appeals Opinion of March 5, 2009 (Ex. 1) and its Order of April 10, 2009 (Ex. 2) denying his timely Motion for Rehearing.

CONCISE STATEMENT OF MATERIAL FACTS
AND PROCEEDINGS

Overview

In this police misconduct case, Plaintiff rejected a case evaluation of \$1,450,000 for his claims against Defendants-Appellees Aldrich, Plemons and Miller, all Melvindale police officers (Ex. 5). He settled with Allen Park police officers Albright¹ and Locklear, following acceptance of a \$25,000 case evaluation against them. The actual intent of the settling parties was to preserve Plaintiff's claim against the non-settling Melvindale officers (Ex. 6, 7, 10, 11, 12). The Melvindale officers sought dismissal of the pending claims against them, arguing that the effect of the Plaintiff-Allen Park settlement was to release the claims against them as well.

The trial court denied Appellees' Motion for Summary Disposition and for rehearing (Ex. 14, 15). The court also denied their later Motion to Amend (Ex. 17). In the trial court, Plaintiff filed a Motion for Reformation of the Release, but, before the trial court could decide that Motion, the Court of Appeals granted Defendants' Application for Leave. On leave granted, the Court of Appeals reversed, concluding that the Allen Park Settlement released the claims against the Melvindale officers and itself deciding and denying the Motion for Reformation (Ex. 1). Follow-

¹ Defendant Albright's name is spelled with two "l"s in the Complaint and caption, but other writings use a single "l". The "Albright" spelling is used in the Brief.

ing denial of his Motion for Reconsideration (Ex. 2), Plaintiff now seeks Supreme Court review.

The Factual Background

On the afternoon of September 9, 2004, Melvindale police officers Plemons and Aldrich went to the home of Plaintiff Tom Shay because his car alarm went off (Ex. 3).² Even before speaking to Mr. Shay, officer Plemons stated they would, “beat him to death” [and] “shove this flashlight right up his asshole” (Ex. 3, p. 3). Following a heated verbal exchange, the officers left.

Later, officers Plemons and Aldrich returned, accompanied by two other Melvindale officers, Defendant Miller and officer Cadez. Two Allen Park officers, Kevin Locklear and Wayne Albright, were also in attendance. Ostensibly, the officers came to complain about the noise. Before seeing Plaintiff, one announced, “We’re gonna have fun today” (Ex. 4, p. 2).³ A verbal exchange took place, during which an officer threatened, “I will definitely shoot you if I have to” . . . “I will shoot you” (*Id.*). Eventually, Plaintiff’s car was towed away. As Plaintiff stood on his lawn, failing to

² Exhibits 3 and 4 are transcripts of the events of September 9, 2004, prepared by Plaintiff’s counsel’s office from videotapes of the events. These two transcripts were filed with the trial court as Exhibit 6 to a Motion filed on July 20, 2007, and were incorporated in a December 28, 2007 Motion in Limine. At trial, Plaintiff expects to present the videotape of the beating but, since it was not filed in the trial court, it is not presented with this Application.

³ The transcript of the second encounter does not identify which of the officers said what.

return to his house, Melvindale officers Plemons, Aldrich and Miller maced, beat, kicked, and punched him (Ex. 4, pp. 9, 11).

B. The Suit

This suit was filed against the three Defendant-Appellee Melvindale officers who participated in the beating. It was also filed against Locklear and Albright, the Allen Park officers who failed to intervene. Each municipality's officers was insured by a separate insurer, and each group was represented by a different law firm (the Allen Park officers by the Garan, Lucow firm, and the Melvindale officers by the Plunkett, Cooney firm).

C. The Case Evaluation

Eventually, the case proceeded to case evaluation on June 11, 2006: \$12,500 against each of the two Allen Park officers, and \$1,450,000 against the Melvindale Defendants (\$450,000 against Miller; \$500,00 against Plemons; \$500,000 against Aldrich) (Ex. 5). Plaintiff accepted as against the Allen Park officers, and the Allen Park officers likewise accepted. Plaintiff accepted as to Melvindale officer Miller, rejected as to the other Melvindale officers,⁴ and all three Melvindale officers rejected (*Id*). Thus, by operation of **MCR 2.403(M)**, the case was settled as between Plaintiff and the Allen Park Defendants, but not as between Plaintiff and the Melvindale

⁴ For purposes of simplicity, since the Melvindale officers are insured and represented collectively, this Application will refer to Plaintiff as having rejected the aggregate \$1,450,000 evaluation against the Melvindale officers.

Defendants. If not paid within 28 days, a judgment would enter for Plaintiff against Allen Park officers Albright and Locklear, MCR 2.403(M)(1).

**D. The Settlement With Allen Park In Accord
With The Case Evaluation**

Counsel for the Allen Park officers confirmed the case evaluation settlement (Ex. 6). To spare the Allen Park officers from the obloquoy and financial risk of an adverse money judgment, their counsel asked to have the case evaluation settlement accomplished by “Release” and Stipulation and Order of Dismissal, with “the case evaluation award (\$12,500.00) as consideration” (Ex. 6). Plaintiff accommodated this requested courtesy. The settlement amount was paid by the insurer of Allen Park and forwarded with a letter by their counsel, beginning, “This will confirm receipt of the executed Releases of All Claims and Indemnity Agreements for Derivative Claims referable to my clients, Allen Park Police Officer Wayne Albright and Allen Park Police Officer Kevin Locklear” (Ex. 7).

E. The Language Of The Release

Two documents captioned “Release of All Claims and Indemnity Agreement for Derivative Claims” were executed, each naming one of the two Allen Park officers; otherwise identical (Ex. 8, Ex. 9). In addition to a recital regarding the settlement (¶ 2), a recital that the payment was to be made by the insurer, not the individual officers (p. 2), and directions regarding payment (p. 2), the Release contains

three substantive provisions here in issue (with pertinent language underlined and with bold face and capitalization in the original). The first provides:

“For the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 (\$12,500.00) DOLLARS to me⁵ in hand paid by **Michigan Liability and Property Pool** do for ourselves,⁶ executors, administrators, successors, and assigns, discharge, ALLEN PARK POLICE OFFICER KEVIN LOCKLEAR and Michigan Municipal Liability and Property Pool, insurer, together with all other persons, firms and corporations, from any and all claims, demands and actions which I have now or may have arising out of any and all damages, expenses, and any loss or damage resulting from an incident occurring on September 8, 2004.”

Another paragraph contemplates suit for indemnity or contribution against, “the parties herein released” by “any other parties”.⁷ Only in the event of such a liability (“to the extent that such other parties are or may be entitled to recovery”) would the Release satisfy Plaintiff’s claims against those “other parties”:

“**IT IS FURTHER AGREED** that in the event the parties herein released may be liable, by way of contribution, indemnity, lien or otherwise, to any other parties as a result of this incident, that the execution of this agreement shall operate as a satisfaction of my claims against such other

⁵ While the form uses both the singular (“to me”) and plural (“for ourselves”), the sole signator (besides a witness and notary) was Mr. Shay.

⁶ See fn. 4.

⁷ The “Release” does not state whether the “other parties” referred to means those not “parties” to the Release or “other parties” to the lawsuit, *i.e.* the Melvindale Defendants.

parties to the extent that such other parties are or may be entitled to recover, by way of contribution, indemnity, lien or otherwise, from the parties herein released.”

Another provision discusses indemnification, likewise contemplating claims against the settling Allen Park officers by others. The agreement to release and hold harmless is provided only to, “the above-named released and discharged parties” and their related entities:

“IT IS FURTHER AGREED that the undersigned agrees to indemnify and save harmless the parties herein released from all further claims or demands, costs or expenses arising out of the damages sustained.

The undersigned further specifically agrees for and in consideration of the payment made hereunder that the undersigned shall indemnify and hold harmless the above-named released and discharged parties, and/or their executors, administrators, successors, assigns, heirs, agents, employers, firms, employees, corporations, partnerships from and for any and all damages, liens, legal fees or expenses, fees and costs, actual attorney fees, judgments, verdicts or awards, demands, rights, causes for action, losses and claims.”

F. The Stipulated Dismissal Orders

As part of the settlement transaction, a Stipulation (Ex. 10) and Order (Ex. 11) were entered. The Stipulation called for dismissal “as to Defendants, ALLEN PARK POLICE OFFICER ALBRIGHT AND ALLEN PARK POLICE OFFICER LOCKLEAR, only” (Ex. 10). The Order likewise dismissed the case, “as

to Defendants, ALLEN PARK POLICE OFFICER ALBRIGHT AND ALLEN PARK POLICE OFFICER LOCKLEAR, only” (Ex. 11). Confirming that the suit continued against the non-settling Melvindale officers, the Order further provided, “The entry of this Order does not resolve the last pending claim between the parties and does not close the case” (*Id*).

G. Confirmation By Counsel For Allen Park Regarding The Intent Of The Contracting Parties

When a dispute arose regarding the meaning of the transactions, counsel for the Allen Park Defendants provided his Affidavit (Ex. 12). He confirmed that the settlement arose from acceptance of the case evaluation (§ 2), that it was his request to proceed by Release rather than Judgment (§ 3), and that he never represented the interests of the Melvindale Defendants (§ 7), who were not involved in the negotiations (§ 5). Counsel for the Allen Park Defendants negotiated solely on behalf of that City’s officers, Albright and Locklear (§ 6), as explained in paragraph 8:

“My only intent with regard to the Release, Settlement and Order of Dismissal was to release my clients, defendant Allen Park police officers Albright and Locklear, from liability in this matter for the consideration of the \$25,000.00 Case Evaluation Award.”

H. The Melvindale Motion For Summary Disposition

Following the case evaluation, a settlement conference was held on July 23, 2007 [Tr. 11/9/07 (Ex. 13), p. 9]. At that time, trial was set for January 14, 2008 (*Id*).

Defendants-Appellees filed a Motion for Summary Disposition on October 19, 2007, citing **MCR 2.116(C)(7)**,⁸ arguing that the phrase “all other persons” in the first paragraph of the Release constituted an agreement by which the non-settling Melvindale officers were released. However, “release” is an affirmative defense under **MCR 2.111(F)(3)(a)**.⁹ Under **Rule 2.111(F)(2)**, “A defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . .”. Appellees had neither pleaded release nor sought leave to amend when their summary disposition motion was filed and argued.

At the hearing of November 9, 2007, the trial judge (Hon. Prentis Edwards, Wayne County Circuit Court Judge) noted that Defendants had failed to preserve an affirmative defense of release, and that they had failed to satisfy the “before commencement of the action” requirement of **Rule 2.116(C)(7)** (Tr. 11/9/07, pp. 9-10). An Order denying the motion was entered that day (Ex. 14), and a Motion for

⁸ With the critical language emphasized, **Rule 2.116(C)(7)** permits summary disposition when:

“The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.”

⁹ **Rule 2.111(F)** states that, “affirmative defenses must be stated in a party’s responsive pleading as originally filed or as amended in accordance with MCR 2.118”. The affirmative defenses identified in subsection (3)(a) include “release”, “satisfaction” and “discharge”.

Reconsideration was also denied by Order of November 26, 2007 (Ex. 15).

With trial scheduled to begin in less than two months, Defendants finally filed a Motion to Amend. Following argument on November 30, 2007 (transcript found as Ex. 16), Judge Edwards issued an Opinion and Order on December 6, 2007 (Ex. 17). The court concluded that the language of the Releases was ambiguous (Ex. 17, p. 5), but the circumstances as a whole revealed no intent to release the non-settling Melvindale Defendants (*Id.*, pp. 5-7). Citing the language of **Rule 2.118(A)(2)**, the court denied the Motion to Amend, “In this case, justice requires that the Plaintiff’s case go forward in conformity with the intention of the parties” (Ex. 17, p. 7).

To put any lingering doubt to rest, on December 18, 2007, Plaintiff filed an Emergency Motion for Reformation of Release (Ex. 18). Before that Motion could be decided by the trial court,¹⁰ and with trial slated to begin one week later, the Court of Appeals issued an Order on January 7, 2008 granting Defendants leave to appeal and staying all further proceedings (Ex. 20). By Order of March 14, 2008 (Ex. 21), the Court denied Plaintiff’s Motion for Remand, which sought to allow the trial court to decide the pending Motion for Reformation. In accord with the leave grant,

¹⁰Judge Edwards was unavailable when the Motion for Reformation came for hearing, so the Motion was heard by Hon. Kathleen McDonald [Tr. 12/20/07 (Ex. 19)]. Although counsel for the Allen Park officers did not oppose the Motion (Tr. 12/20/07, p. 3), and while Judge McDonald would have granted the Motion if the decision was hers to make (*Id.*, p. 12), she declined to rule in Judge Edwards’ stead (*Id.*, pp. 10-11). Before the Motion could be considered by Judge Edwards, the Court of Appeals issued a Stay Order.

Defendants filed their Brief as Appellants, and Plaintiff filed his Brief as Appellee.

I. The Court of Appeals Decision And Denial
Of Reconsideration

The appeal was assigned to a Court of Appeals panel comprised of Judges Jansen, Meter, and Fort Hood. On March 5, 2009, the Court issued its unpublished *per curiam* Opinion (Ex. 1). In addition to addressing the procedural issues,¹¹ the Court delivered a series of substantive rulings which are discussed at greater length in the Argument section of this Application which follows.

1. The Interpretation Approach To Be Taken

The Court of Appeals relied heavily on *Romska v Oppen*, 234 Mich App 512 (1999) (Ex. 1, pp. 3, 4, 5), a case which addressed the approach to be taken in

¹¹ Plaintiff has argued that the trial judge correctly denied the Motion for Summary Disposition, as Defendants never pleaded the Affirmative Defense of “Release”. He also argued that the trial court did not abuse his discretion in denying the Motion to Amend, which was filed just prior to trial, after the Motion for Summary Disposition had already been denied. Plaintiff also argued that MCR 2.116(C)(7) was inapplicable because the “release” relied on was not an “other disposition of the claim before commencement of the action” [see *Kinney v Owens*, Ct. of App. # 211786, *rel’d* 8/3/99 (Ex. 23)].

This Application focuses primarily on the substantive rulings of the Court of Appeals. However, Plaintiff does not waive his objection to the procedural rulings on the points discussed in the preceding paragraph. On those points, he relies on his Court of Appeals Brief, pp. 15-23 (Ex. 24), and invites the Court to consider the procedural issues as well as the substantive questions on which this Application focuses.

assessing the effect of a release which contains “all other” language.¹² In *Romska*, the dissent (Judge Hoekstra) reviewed three rules, or approaches, adopted in different States: the “flat bar rule”, “specific identity rule” and the “intent rule” (234 Mich App at 524-526). The dissent would adopt the “intent rule”, which permits extrinsic evidence to show the actual intent of the settling parties (234 Mich App at 531-533). The *Romska* majority (Judge, now Justice, Markman and Judge Saad) adopted the so-called “flat bar” rule; in effect, that the use of “all other” language is conclusive, even if the actual intent of the contracting parties is different.

2. Whether The Releases Were Ambiguous

Plaintiff argued that the Releases were internally ambiguous or contradictory, particularly in the contrasting language and the fact that the Releases discussed what would happen if other tortfeasors sued the Allen Park Defendants for contribution - - an event that could never occur if all others were released. The Court of Appeals disagreed, deeming the Releases “unambiguous” (Ex. 1, p. 4).

¹² It is Plaintiff’s position, discussed *infra*, that this case is readily distinguishable from *Romska* in several important respects. If so, the Court need not address the broader “approach” question to reverse.

If *Romska* were not distinguishable, Plaintiff would not fault the Court of Appeals for relying on *Romska* on the broad “approach” question. *Romska* is concededly controlling on other Court of Appeals panels under 7.215(J)(1). Whether *Romska* was correctly decided on the “approach” issue is an open question for this Court.

3. The Absence Of A Merger Or Integration Clause

In *Romska*, the Release had an “integration” or “merger” clause, excluding consideration of other writings, a fact stressed by the *Romska* majority (234 Mich App at 516-517). The Releases in this case had no such clause. Accordingly, Plaintiff argued, the meaning of the Releases was to be determined from the writings as a whole, not by the Release, or a clause of the Release, in isolation. The Court of Appeals nonetheless applied *Romska* to foreclose consideration of other writings or evidence (Ex. 1, pp. 3-4).

4. The Lack of Consideration

With the case evaluation acceptance, the Allen Park officers were already obligated to pay Plaintiff \$25,000.00, MCR 2.403(M)(1). Thus, Plaintiff argued, he received no “consideration” from the release beyond what the settlors had a pre-existing duty to pay. The Court of Appeals characterized the argument as one of “inadequate consideration” (Ex. 1, p. 4). It held that the payment of the case evaluation award constituted “consideration” for the release of the Melvindale officers (Ex. 1, pp. 4-5).

5. Unavailability of Reformation

Plaintiff argued that, if the “Releases” were construed to release the

Melvindale Defendants, even though the settling parties actually intended otherwise, the document could be equitably reformed to more accurately express the intent of the parties. The Court of Appeals rejected this contention, deciding the issue itself rather than remanding to the trial court (Ex. 1, p. 5):

“Plaintiff contends that, if we find the releases applicable to defendants, the proper remedy is to allow a reformation of the releases. We disagree. The releases must be applied as written. *Romska, supra* at 515. ‘This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in terms.’ *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999) (internal citation and quotation marks omitted).”

Following issuance of the Opinion, Plaintiff filed a timely Motion for Reconsideration. By Order of April 10, 2009 (Ex. 2), the Court denied reconsideration. Plaintiff now seeks leave to appeal.

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BRIEF IN SUPPORT OF APPLICATION

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STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD LEAVE TO APPEAL BE GRANTED TO REVIEW THE COURT OF APPEALS DECISION WHICH HOLDS, IN EFFECT, THAT THE ACTUAL INTENT OF PARTIES TO A RELEASE SHOULD BE IGNORED, SO THAT SUIT AGAINST NON-SETTLING TORTFEASORS IS BARRED EVEN IF THE SETTLORS MUTUALLY INTENDED TO PRESERVE THE PENDING SUIT AGAINST THE NON-SETTLORS?

Plaintiff-Appellant answers “YES”.

- A. IS THE BOILERPLATE, “ANY OTHER PERSON . . .” LANGUAGE LARGELY AN HISTORIC ANACHRONISM SERVING NO PURPOSE IN MODERN MICHIGAN TORT LAW, WHICH DOES NOT OFTEN SERVE TO EXPRESS THE INTENT OF THE CONTRACTING PARTIES?

Plaintiff-Appellant answers “YES”.

- B. IN THE INSTANT CASE, WAS THE ACTUAL INTENT OF THE SETTLING PARTIES INDISPUTABLY TO PRESERVE PLAINTIFF’S CLAIMS AGAINST THE NON-SETTLING MELVINDALE DEFENDANTS?

Plaintiff-Appellant answers “YES”.

- C. DOES THE “INTENT RULE”, OR THE “SPECIFIC NAME”, RULE BETTER COM-
PORT WITH MICHIGAN LAW AND
POLICY THAN THE “FLAT BAR” RULE?

Plaintiff-Appellant answers “YES”.

- D. SHOULD LEAVE TO APPEAL BE
GRANTED?

Plaintiff-Appellant answers “YES”.

- II. EVEN UNDER THE APPROACH OF *ROMSKA v
OPPER*, 234 MICH APP 512 (1999), DID THE COURT
OF APPEALS MAKE SEVERAL OUTCOME-DETER-
MINATIVE ERRORS WHICH THIS COURT
SHOULD REVIEW AND CORRECT?

Plaintiff-Appellant answers “YES”.

- A. SHOULD LEAVE BE GRANTED TO
CONSIDER WHETHER, IN REVIEWING
A CONTRACT IN WHICH THE PARTIES
HAVE NOT INCLUDED AN “INTEGRA-
TION CLAUSE” OR “MERGER CLAUSE”,
OTHER DOCUMENTS RELATED TO
THE TRANSACTION MAY BE CONSI-
DERED?

Plaintiff-Appellant answers “YES”.

B. IS THE RELEASE IN THIS CASE INTERNALLY INCONSISTENT OR AMBIGUOUS, MAKING IT APPROPRIATE TO CONSIDER OTHER INDICIA OF INTENT?

Plaintiff-Appellant answers "YES".

C. IF CONSTRUED AS WAIVING PLAINTIFF'S CAUSE OF ACTION AGAINST THE NON-SETTLORS, ARE THE RELEASES UNENFORCEABLE AS PLAINTIFF RECEIVED NO CONSIDERATION EXCEPT WHAT THE SETTLORS HAD A PRE-EXISTING DUTY TO PAY UNDER MCR 2.403(M)?

Plaintiff-Appellant answers "YES".

D. DID THE COURT OF APPEALS ERR IN SUMMARILY HOLDING THAT REFORMATION IS NOT AVAILABLE TO CORRECT A WRITING TO BETTER REFLECT THE ACTUAL INTENT OF THE PARTIES?

Plaintiff-Appellant answers "YES".

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS DECISION WHICH HOLDS, IN EFFECT, THAT THE ACTUAL INTENT OF PARTIES TO A RELEASE SHOULD BE IGNORED, SO THAT SUIT AGAINST NON-SETTLING TORTFEASORS IS BARRED EVEN IF THE SETTLORS MUTUALLY INTENDED TO PRESERVE THE PENDING SUIT AGAINST THE NON-SETTLORS

The Court of Appeals relied heavily on *Romska*, despite several critical distinctions (see Issue II). For reasons discussed later, in Issue II, even if the *Romska* approach is adopted, the Release in this case does not require dismissal of the suit against the Melvindale Defendants. Beyond that, this case presents the broader, jurisprudentially significant, issue of what approach is to be taken in construing a Release. Plaintiff submits that the intent of the contracting parties, discerned from all available information and evidence, is crucial. The Court should reject an approach that focuses myopically on a single document or, as here, one short phrase of a single document.

The “all other parties” language, in form releases from many decades ago, once served a purpose that has ceased to have any meaning with the abolition of joint

and several liability. That language may be an important piece of the “intent” inquiry, but it must never displace the focus on intent. This Court should grant leave and, on review, hold that the actual intent of the settling parties is controlling.

A. THE BOILERPLATE, “ANY OTHER PERSON . . .” LANGUAGE IS LARGELY AN HISTORIC ANACHRONISM SERVING NO PURPOSE IN MODERN MICHIGAN TORT LAW, WHICH DOES NOT OFTEN SERVE TO EXPRESS THE INTENT OF THE CONTRACTING PARTIES

The “any other person” language may be a throwback to the common law doctrine that release of one tortfeasor automatically releases all others. *Zenith Radio Corp v Hazeltine Research*, 401 US 321, 343 (1971). That doctrine has been abrogated by the Michigan Legislature’s adoption of MCLA 600.2925d, by which, “The release [of any tortfeasor] does not discharge 1 or more of the other persons from liability . . . unless its terms so provide”.

Under an earlier state of the law, the issue of whether others were released determined which of the parties to the settlement - - the plaintiff or the settling defendant - - was entitled to sue the non-settling tortfeasor. In the past, a defendant who paid the entirety of the loss, obtaining the release of others, reserved the right to recoup part of the settlement payment by an action for contribution. See *Lorimer v*

Julius Knack Coal Co, 246 Mich 214, 217-218 (1929); *Moyses v Spartan Asphalt*, 383 Mich 314, 335-336 (1975). In that era, use of a term like “any other person” or the like might express the intent of the parties to the settlement to allocate to the settlor the right to pursue non-settling wrongdoers.

That purpose no longer exists under current Michigan law. With the abolition of joint and several liability, the adoption of “non-party” fault, and the like, every litigant is responsible for solely his, her or its own share of the fault. See MCLA 600.6304(1)(b); *Smiley v Corrigan*, 248 Mich App 51, 55 (2001). Since a settlement under this scheme resolves only the settlor’s share, there is no longer any right of contribution available to a settlor. *Kokx v Bylenga*, 241 Mich App 655, 662-663 (2000).

In short, boilerplate language such as that relied on by Defendants is likely not to express the actual intent of the settling parties. Boilerplate language may be enforceable in the absence of any language to the contrary, as where it expresses the intent of the contracting parties to allocate between them the right to sue non-settling tortfeasors. However, the boilerplate “any person” language is likely not to reflect the real intent, especially with the abolition of joint and several liability. It is altogether appropriate, indeed necessary, to consider the actual intent of the contracting parties.

B. IN THE INSTANT CASE, THE ACTUAL INTENT OF THE SETTLING PARTIES WAS INDISPUTABLY TO PRESERVE PLAINTIFF'S CLAIMS AGAINST THE NON-SETTLING MELVINDALE DEFENDANTS

In a dispute over the meaning of a contract, the foremost consideration, above all others, is the intent of the parties themselves. As this Court put it in *McIntosh v Groomes*, 227 Mich 215, 218 (1924):

“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.”

That formulation has been repeatedly embraced as the overriding determinant of a contract's meaning. See *e.g. Grosse Pointe Park v Liability Pool*, 473 Mich 188, 197 (2005); *Goodwin, Inc v Coe Pontiac*, 392 Mich 195, 209 (1974); *Klever v Klever*, 333 Mich 179, 186 (1952); *Zurich Ins Co v CCR & Co*, 220 Mich App 599, 603 (1997).

When the contracting parties themselves disagree about their intent, the dispute may entail resort to a variety of sources of interpretation to discern what was meant. Here, however, Plaintiff and the settling Allen Park Defendants are in full agreement over their intent: they meant to resolve the differences between themselves in accord with the Case Evaluation without affecting Plaintiff's ongoing cause of action against the Melvindale Defendants. The meaning attached to an agreement by the

contracting parties is a uniquely reliable reflection of their intent. See *Merdler v Detroit Board of Education*, 77 Mich App 740, 744 (1977) (“This interpretation [by ‘the parties to the contract’] is entitled to great weight”); *Big Rapids v Mich Con*, 324 Mich 358, 367 (1949); *Fireman’s Fund v Cadillac Insurance Agency*, 272 Mich 606, 609 (1935).

The surrounding circumstances make it clear that the actual agreement between Plaintiff and the Allen Park Defendants was that, in exchange for the accepted case evaluation amount, Plaintiff would dismiss the Allen Park Defendants from the case. The writings (Ex. 6, Ex. 7) leading up to execution of Releases (Ex. 8, Ex. 9) show precisely that. The dismissal Order effectuating the agreement confirms precisely that (Ex. 10, Ex. 11). Plaintiff’s rejection of the \$1,450,000 case evaluation against the Melvindale Defendants makes it obvious that he did not intend to dismiss them for free. The Affidavit of counsel for the Allen Park Defendants (Ex. 12) establishes this agreement and intent. Indeed, Defendants did not even seriously dispute that the actual intent and agreement was to leave Plaintiff’s ongoing suit against the Melvindale Defendants unaffected.

The argument of the Melvindale officers, and the decision of the Court of Appeals, reduces to the proposition that, in construing the agreement between Plaintiff and the Allen Park Defendants, the judiciary is required to ignore the undeniable intent of the contracting parties. According to that argument, the Melvindale Defendants,

strangers to the agreement, are entitled to escape accountability because of the inclusion of five words - - “together with all other persons” - - considered out of context in the form release, a single document of the many which comprise the transaction or agreement. The contention that the intent of the contracting parties must be ignored in this fashion, bestowing an unintended windfall on the tortfeasors against whom Plaintiff rejected a \$1,450,000 case evaluation, is at odds with the “cardinal rule” to which “all others are subordinate” explained in *McIntosh, Grosse Pointe Park, Goodwin, Klever*, and *Zurich*. Leave to appeal should be granted to review this perverse result and the “flat bar” approach of *Romska* which was deemed to compel this result.

C. THE “INTENT RULE”, OR THE
“SPECIFIC NAME”, RULE BETTER
COMPORT WITH MICHIGAN LAW
AND POLICY THAN THE “FLAT BAR”
RULE

The *Romska* dissent discusses the three general approaches. The majority adopted the “flat bar” rule which views only the “all other persons” clause in isolation. In fairness to the *Romska* majority, the result may have been based on the particular facts of that case [*e.g.* lack of internal ambiguity, an “integration” or “merger” clause, no pre-existing duty to pay per **Rule 2.403**, settlement before commencement of suit against non-settlor, and the lack of a pending reformation motion (see Issue II, *infra*)]

which distinguish it from this. To the extent that *Romska* means to consider only a few words out of context - - ignoring all other documents and evidence and reaching an outcome contrary to the actual intent of the contracting parties - - its “flat bar” approach should be rejected in favor of the “intent rule” or “specific name” rule.

Plaintiff readily acknowledges the importance of considering the language of contracts. Indeed, the language of the Releases, even viewed standing alone, yet considered in full, wholly supports the result reached by the trial court [Issues II, *infra*]. Defendants are in error, however, in surmising that isolated words or phrases, taken out of context, are the sole determinants of an agreement’s meaning, even to the exclusion of the actual intent of the participants in the agreement.

Ordinarily, contract disputes take place between the contracting parties themselves, each, predictably, offering a self-serving view of what was intended. To resolve this dispute over “intent”, courts understandably look primarily - - though not exclusively - - to the language used. In that context, the words do not override the intent of the parties. Rather, they help to resolve a dispute over the meaning by looking to the objective manifestations of “intent”, used contemporaneously, before the dispute surfaced. In the context of a dispute between contracting parties who differ regarding their “intent”, words take on significance not as a substitute for intent, but

as an objective gauge of which party's version of "intent" is the more persuasive.

In most of the other cases cited by Defendants, where a stranger to the contract disputes its intent with one of the participants, the other contracting party is no longer involved in the case, was never a party to the case, or is otherwise unavailable to offer its view of the meaning.¹³ In that context, where there is no confirmation by both participants as to what was meant, the writing serves as a check on parties who offer an opportunistic construction, knowing that their version is safe from contradiction by the other participant. In that context as well, resort to the writing serves as a means of discerning intent, not of overcoming the mutual understanding of both contracting parties.

The unique feature of this case is that Plaintiff and his contracting counterparts, the Allen Park Defendants, agree on what they meant. They agree that they did not intend dismissal of the suit against their co-Defendants, the Melvindale Appellants. They confirm their actual agreement.

This appeal represents the attempt of non-participants in a contract to have

¹³ *Romska* is one such case. Here, in sharp contrast to *Romska*, there is confirmation from the other participants, the Allen Park officers, through their counsel, regarding the mutual intent not to discharge the claims against Melvindale.

it construed contrary to the actual intent of those who entered into the agreement. Neither Defendants nor the Court of Appeals were able to cite any authority where the actual intent of the contracting parties, confirmed by both, has been successfully overridden by a stranger. The result which Defendants sought, and the appellate court reached, would clash with the core obligation of a court to construe and apply an agreement in accord with the meaning ascribed to it by the contracting parties themselves. A balanced view of Michigan contract law reveals that the literal terms of a writing, while significant, do not substitute for the intent of the parties to a contract.

The “specific name” approach would release only those persons specifically identified by name in a release. Several courts have recognized that omnibus clauses like this are not to be construed as releasing tortfeasors not specifically named in the release. See *e.g.* *McInnis v Harley-Davidson*, 625 F Supp 943, 954-955 (D RI, 1986); *Moore v Missouri P R Co*, 773 SW2d 78 (Ark, 1989); *Sarnellio v Silva*, 889 P2d 685 (Hawaii, 1995); *Alsap v Firestone Tire & Rubber Co*, 461 NE2d 361 (Ill, 1984); *Bjork v Chrysler Corp*, 702 P2d 146 (Wyo, 1985); *Beck v Cincinnati*, 439 NE2d 417 (Ohio, 1982).

This approach finds support in MCLA 600.2925d, which addresses the effect of a release given to one or more, but not all, of multiple tortfeasors. MCLA

600.2925d(b) absolves the settlor of any contribution liability [*i.e.*, the Melvindale Defendants have no contribution claim against the settling Allen Park Defendants].

Subsection (a) seeks to assure that non-settlors are not released inadvertently:

“If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 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.”**
(emphasis supplied)

The Releases do not explicitly provide for the release of the Melvindale officers, who are not even mentioned. Under the “specifically named” approach, and under the Michigan statute, the Releases do not discharge Plaintiffs’ claims against the Melvindale officers, as they are not specifically named in the Releases.

In candor, one shortcoming of the “specifically named” approach is that it would make it difficult to effectively release claims against a class of persons. For example, a corporation which settles a suit brought against it for the negligence of its employees may wish to secure a release of those employees. When it is difficult to identify every member of the class by name, yet the parties indisputably seek to settle claims against members of that class (typically affiliates of the settlor), a “specifically named” approach might make it difficult to accomplish that intent.

Plaintiff advocates a middle ground - - “intent of the settling parties” - - approach. Under that approach, it is possible to release claims against a clearly defined class without naming every member by name, so long as that is the actual intent. The language of the Release document is important in discerning that intent, but is not the exclusive determinant. The ultimate judicial objective should be to determine and effectuate that intent, not to undermine that intent.

The overarching task in contract interpretation is discerning the intent of the parties to a contract. That principle applies to a contract of release as well. The effect of a release or other agreed upon disposition of claims has been viewed as a matter of contract. Under that view, a settlement or release has no greater effect than that intended by the parties to the agreement. *Harris v Lapeer Public School System*, 114 Mich App 107, 115 (1982); *Jaffa v Shachot*, 114 Mich App 626, 637 (1982); *Grzekik v Kerr*, 91 Mich App 482, 486 (1979).

The “intent of the settling parties” approach effectuates this principle of *Harris*, *Jaffa* and *Grzekik*. A “flat bar” rule, which reaches a result contrary to actual intent, clashes with this core principal of law.

The *Romska* majority relied on the possibility that, unless the release was construed broadly, the settlor would be left open to claims for contribution or indemnity by the non-settlor [234 Mich App at 517-518, quoting *Douglas v United States Tobacco Co*, 670 F2d 791, 794 (CA 8, 1982)]. In the instant case, it is

unnecessary to construe the Release broadly to protect the settlors from a suit for indemnity or contribution. Under current Michigan law, a settlor is discharged of liability to another tortfeasor [MCLA 600. 2925d], and the replacement of joint and several liability with allocation of fault leaves no viable contribution claim. *Kokx v Bylenga*, 241 Mich App 655, 662-664 (2000). Moreover, this Release (unlike that in *Romska*) explicitly considered and addressed the prospect of a contribution or indemnity suit by non-settlors against the settlors (Ex. 8, ¶ 4) - - language which creates an inherent ambiguity or inconsistency in the Release (see Issue II below).

As the principal focus is on the intent of the parties, the construction placed on the agreement by those parties is particularly probative. Under ordinary contract principles, when there is room for doubt about the meaning, the construction adopted by the parties may be considered. *Davis v Kramer Bros Freight Lines*, 361 Mich 371, 375-376 (1960); *C & O R Co v Public Service Commission*, 347 Mich 234, 240 (1956); *Barnes Co, Inc v Folsinski*, 337 Mich 370, 382 (1953); *Merdler v Bd of Education*, 77 Mich App 740, 744 (1977).

Here, the contracting parties, Plaintiff and Allen Park, agree that it was their mutual intent to resolve only Plaintiff's claims against the settling Allen Park Defendants. That potent evidence of the intended meaning of the Release is properly considered.

It has also been held that the meaning of a contract or transaction cannot be divorced from the surrounding circumstances which give it context. As noted in *Taylor v Taylor*, 310 Mich 544, 545 (1945), “the courts will consider the situation of the parties, the subject matter, and the acts, conduct and dealings of the parties with respect to the instrument”. See also *Sobczak v Kotwicki*, 347 Mich 242, 251 (1956) (“construing the agreement in light of the circumstances existing at the time it was made . . .”). In other words, “In construing a contract, all circumstances accompanying the transaction must be taken into consideration”, *Seaboard Surety Co v Bachinger*, 313 Mich 174, 179 (1945). Thus, courts may properly consider the surrounding circumstances to determine the true intentions of the parties or to understand the sense in which the language of the instrument was used by the parties. *Hustina v The Radwood Company*, 303 Mich 581, 587 (1942) (“we are satisfied from the language of the deed as quoted and the surrounding circumstances . . .”).

In the past, this Court has held that the literal language must yield to the actual intent of the parties. *Moulton v Lordell-Emery Mfg Co*, 322 Mich 307, 310 (1948) (“manifest intent must prevail over the literal sense of terms”; “There is no requirement to adhere to the literal terms in derogation of the interior sense of the transaction”); *Twp of Stambaugh v Iron County Treasurer*, 153 Mich 104, 107 (1908); *Stuart v Worden*, 42 Mich 154, 160 (1979). The current emphasis on text has not gone so far as to substitute the dictionary definition of a term, taken out of

context, for a meaningful inquiry into the intent of the contracting parties.

D. LEAVE TO APPEAL SHOULD BE GRANTED

The decision below clashes with several principles of contract law discussed above. This Court has never addressed the “approach” dispute which divided the Court of Appeals in *Romska*. It should do so.

The issue is of particular timeliness. The historic purpose of an “all persons” clause in allocating the right to sue non-settlers has no application in the context of current Michigan law abolishing joint and several liability. Since there is no benefit to the settlor to secure the release of strangers, a rule of interpretative approach such as the “flat bar” rule serves no constructive modern purpose.

Perhaps the most striking flaw in *Romska*, and the most compelling reason for granting leave, is that it is grossly unfair and irrational. This case is a poster child for that point. With the case evaluation, Plaintiff sought to provide the Allen Park officers with a release, rather than an adverse judgment, solely as a favor, to spare them the obloquoy of an adverse judgment on their records.¹⁴ Plaintiff had already rejected a seven figure case evaluation against the Melvindale Defendants and assuredly did not

¹⁴ One is reminded of the adage, “No good deed goes unpunished”.

intend to give up his right of action to obtain the \$25,000 already due him from the Allen Park officers.

In the final analysis, contract law is all about discerning and effectuating the intent of the parties. The ruling below, which purports to apply contract law by ignoring that intent, turns the law on its ear. That ruling and rationale should be reversed.

II. EVEN UNDER THE APPROACH OF *ROMSKA v OPPER*, 234 MICH APP 512 (1999), THE COURT OF APPEALS MADE SEVERAL OUTCOME-DETERMINATIVE ERRORS WHICH THIS COURT SHOULD REVIEW AND CORRECT

The Court of Appeals was required to follow the rule of law of *Romska*.

In doing so, it lost sight of the many critical distinctions between that case and this; outcome-determinative distinctions that require a different result. The Court need not overrule the *Romska* approach, because there are several independent grounds for reversal. These grounds, individually and collectively, provide alternative, jurisprudentially significant, issues warranting Supreme Court review.

A. LEAVE SHOULD BE GRANTED TO CONSIDER WHETHER, IN REVIEWING A CONTRACT IN WHICH THE PARTIES HAVE NOT INCLUDED AN “INTEGRATION CLAUSE” OR “MERGER CLAUSE”, OTHER DOCUMENTS RELATED TO THE TRANSACTION MAY BE CONSIDERED

In *Romska*, the Court based its refusal to consider extrinsic evidence on the fact that the release in that case, “contains an explicit merger clause that independently precludes resort to parol evidence” (234 Mich App at 516). Where such a clause exists, by which the parties agree that a single writing supersedes all other

dealings, the courts will honor that agreement and confine their review to the single “integrated” or “merged” writing. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 493-495 (1998). Otherwise, “there would be little distinction between contracts that include a integration clause and those that do not” (228 Mich App at 495).

Here, in sharp contrast, the Release does not include an “integration” or “merger” clause. That choice, which the Court of Appeals should have respected, can only mean that the participants in the contract did not intend to prohibit consideration of related transactional documents.

Here, the Release documents are not isolated or independent writings. They are part of a group of writings establishing a broad transaction. In this context, related writings - - such as the case evaluation acceptance (Ex. 5), the letters of Allen Park counsel (Ex. 6, Ex. 7), and the Stipulation and Order (Ex. 10, Ex. 11) - - are properly considered. *Culver v Castro*, 126 Mich App 824, 826 (1983) (“[w]here there are several agreements relating to the same subject matter the intention of the parties must be gleaned from all the agreements”); *West Madison Investment Co v Fileccia*, 58 Mich App 100, 106 (1975) (“... in order to determine the intention of the parties, separate instruments executed at about the same time, in relation to the same matter and between the same parties and made as elements of one transaction may be examined together and construed as one instrument”); *Nogaj v Nogaj*, 352 Mich

223, 231 (1958) (same); *CJ Rogers, Inc v Highway Dept*, 36 Mich App 620, 626 (1971).

The existence of a “merger” clause, absent in this case, was critical to the *Romska* majority’s view that extrinsic evidence of actual intent had to be ignored. The *Romska* majority criticized the dissent, precisely because, “The dissent gives no effect at all to the merger clause by allowing resort to exactly the same extrinsic evidence as might be allowed absent the merger clause” and because, “it refuses to give effect to the parties’ own merger clause, which specifies that disputes concerning the release are to be resolved exclusively by resort to the language of the release itself” (234 Mich App at 517; emphasis supplied). Thus, *Romska* acknowledges that, “extrinsic evidence . . . might be allowed” “absent a merger clause” in a case such as this. Here, in contrast to *Romska*, there was no merger clause. The parties here chose not to “specif[y]” that disputes could be resolved “exclusively by resort to the language itself”. The Court of Appeals in this case erred in overlooking the contracting parties’ decision not to include a “merger” clause. This absence, under *Romska*, “allow[s] resort to . . . extrinsic evidence”.

According to the *Romska* majority, the dissent in that case impermissibly ignored the decision of the contracting parties whether to include an “integration” clause. The majority in this case - - in the factually opposite context - - committed that very error. It decided the case as if the parties had included an integration clause. In

doing so, it disrespected the contracting parties' choice not to include an integration or merger clause, a decision (opposite that in *Romska*) which can only reflect their agreement not to confine analysis of their intent to a single document.

B. THE RELEASE IN THIS CASE IS INTERNALLY INCONSISTENT OR AMBIGUOUS, MAKING IT APPROPRIATE TO CONSIDER OTHER INDICIA OF INTENT

The *Romska* decision was explicitly based on the Court's view that the release in that case, "is unambiguous and thereby precludes resort to allegedly contradictory parol evidence" (234 Mich App at 516). Conversely, as a matter of elementary contract law, a court may consider extrinsic evidence of intent where the document is internally inconsistent, contradictory, or ambiguous. *Grosse Pointe Park v Liability Pool*, 472 Mich 188, 198 (2005); *Stine v Continental Casualty Co*, 419 Mich 89, 112 (1984); *Goodwin v Coe Pontiac*, 392 Mich 195, 204-209 (1974); *Provelle v Murray*, 139 Mich App 639, 642-645 (1984); *Henry v JB Publishing Co*, 54 Mich App 409, 412 (1974).

The term "all other persons", which might be all encompassing in isolation, requires further consideration when used in an instrument containing different, or inconsistent, terms. An example of this principle, directly on point, is

Herrick v Sosnowski, Ct. of App. # 252299, *rel'd* 5/24/05 (Ex. 22). There, as here, the plaintiff sued multiple defendants, and settled with one (Hales) on the basis of an accepted case evaluation. The settlement document referred to both the active settlors and “any other persons”.¹⁵ The non-settlor (against whom a higher case evaluation had been returned but rejected) argued that the use of this phrase required dismissal of the claim against him.

The Court of Appeals rejected the non-settlor’s reliance on *Romska v Opper*, 234 Mich App 512 (1999). In doing so, it held that the presence of a single word in the instrument, “only”, which was inconsistent with the defendant’s proposed interpretation, allowed consideration of the actual intent of the settlor (Ex. 22, p. 2):

“Both parties cite to or attempt to distinguish *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999), and *Ruppel v Carlson*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2002 (Docket No. 235266). Those cases are distinguishable from the case at

¹⁵ The critical language in *Herrick* provided:

“THIS INDENTURE WITNESSETH that, in consideration of the sum of **FIVE THOUSAND (\$5,000.000) DOLLARS**, receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge **Georges Hales and Encompass Insurance Company, formerly known as CNA Insurance Companies, only**, and any other person, firm or corporation charged or chargeable with responsibility of liability, their heirs, representatives and assigns, from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action . . .”.

bar because the language in the original release was different from the language of the two releases in those cases. The original release stated ‘**George Hales and Encompass Insurance Company, formerly known as CNA Insurance Companies, only . . .**’ The use of the word ‘only’ followed by ‘and any other person, firm or corporation charged or chargeable with responsibility or liability’ created an ambiguity that did not exist in the other cases. The print was in bold type, indicating an emphasis on the limited nature of the release. Simply looking to the word ‘and’ would result in ignoring the word ‘only.’ Similarly, a focus on the word ‘only’ would render the following clause nugatory. The language is simply unclear. *Romska* and *Rappel* do not prevent the use of parol evidence in all cases where a release is signed; rather, the cases prevent the use of parole (*sic*) evidence where the release is unambiguous. Having found the original release to be ambiguous, it is permissible to look to the intent of the parties.”

Having eschewed myopic focus on “any other person”, the *Herrick* Court looked to the very circumstances present in this case to effectuate the actual intent of the settling parties - - to preserve the cause of action against the non-settling defendant:

“It is difficult to imagine plaintiff meant to forego further action against defendant for \$5,000. Plaintiff’s affidavit, which was attached to his motion for reconsideration, provided that his intention was to discharge Hales only. In fact, counsel for Hales even agreed to enter into a new, amended release. Additionally, the stipulated dismissal provided that the dismissal was as to Hales, only. The language of the dismissal was further evidence of the limited nature of the release.”

As this discussion reflects, even under *Romska*, other documents and

external evidence may be considered if the Release is internally inconsistent or ambiguous. This case is precisely that.¹⁶ Other portions clash with the notion that the case against the Melvindale Defendants was to be dismissed.

¹⁶ In the Court of Appeals, Defendants argued that Plaintiff conceded that the Release was not ambiguous, barring the Court from ruling otherwise (D. Brief, pp. 3-4, fn. 6). In his initial Brief in response to the summary disposition motion, Plaintiff offered multiple alternative arguments, just as he does here. He noted that, “If there is any ambiguity on the face of the document, it would be in paragraph one” (Brief in Response, p. 9). In conclusion (*Id.*, p. 19), he argued that:

“The Release, by itself, is unambiguous, and the intention of the parties thereto is clear. If this Court finds that there is more than one reasonable interpretation, that is, Melvindale’s interpretation, then where such an ambiguity exists, this Court must look to the circumstances surrounding the Release along with the circumstances of the parties and any other supporting documentation to deduce the intentions of the parties.”

There is nothing remarkable about Plaintiff offering alternative grounds for construing the Release. Nor is he barred from the current argument.

Moreover, whether a contract is ambiguous is an issue of law. *Brucker v McKinley Transport*, 225 Mich App 442, 447-448 (1997); *Port Huron Educational Ass’n v Port Huron Area School District*, 452 Mich 309, 323 (1996). While parties may enter into binding stipulations of fact, they cannot bind the court by a stipulation of law. *Mack v City of Detroit*, 467 Mich 1211, 1213 (2003) (Young, J. concurring); *Bradway v Miller*, 200 Mich 648, 655 (1918).

(1) There Is An Inconsistency Between The First Paragraph, Which Refers To “All Other Persons”, And The Indemnification Language, Which Applies To, “Above-Named Released And Discharged Parties”

While the first paragraph refers to discharging “all other persons”, the fourth recital agrees to hold harmless the “the above-named released and discharged parties”¹⁷ and their related entities. Focusing on this language, those “released and discharged” are the “above-named” and those related. The term “named” requires no further explanation, it is those whose names are used: “ALLEN PARK POLICE OFFICER KEVIN LOCKLEAR”¹⁸ [or, in the other version, “ALLEN PARK POLICE OFFICER WAYNE ALBRIGHT”] and Michigan Mutual Liability and Property

¹⁷ The second paragraph of the fourth recital states in full:

“The undersigned further specifically agrees for and in consideration of the payment made hereunder that the undersigned shall indemnify and hold harmless the above-named released and discharged parties, and/or their executors, administrators, successors, assigns, heirs, agents, employers, firms, employees, corporations, partnerships from and for any and all damages, liens, legal fees or expenses, fees and costs, actual attorney fees, judgments, verdicts or awards, demands, rights, causes of action, losses and claims” (emphasis supplied).

¹⁸ The fact that two separate Releases were executed confirms the understanding of the settling parties that the individual documents released only those explicitly “named” in that document; hence the need for a separate document for each Allen Park officer not named in the other.

Pool”. The “names” of the Melvindale Defendants are conspicuously absent from the document. They are undisputably not “above-named released and discharged parties”. This language makes clear that the Melvindale officers are not “released and discharged” as they are neither “above-named” nor within the class of those related to the “above-named”.

The writing is inconsistent in another respect. Other than the “named” Allen Park officers, the Melvindale officers are the only other defendant “parties” to the lawsuit. The first paragraph uses the term “persons”, while the later clause refers to “parties”. The use of the two separate terms, “parties” and “persons” must have some significance. It suggests that as to those already involved in the lawsuit (“parties”), claims are foregone only if they are “above-named released and discharged”. As to non-parties (“other persons”), the release is the broader version of the first paragraph.

Just as in *Herrick*, two inconsistent descriptions of the persons released are used in the instrument (“all . . . persons” and “above-named released . . . parties”). Thus, neither can be considered in isolation, and the court must implement the actual intent of the participants in the settlement, discerned in light of all the surrounding circumstances.

(2) Defendants' View - - That Plaintiff Is Barred From Suing Or Continuing Suit Against Anyone - - Is Inconsistent With The Provisions Which Envision A Contribution Or Indemnity Suit Against The Settlers, And Which Identify Two Separate Classes of "Parties", "Parties Herein Released" and "Other Parties"

The legal prerequisite to a suit for contribution or indemnity is that the party seeking recoupment must have made payments to the injured party. If, as Defendants posit, the Releases absolved the Melvindale officers of liability to Plaintiff, those officers - - having paid nothing - - would have no conceivable claim for contribution or indemnity against the settling Allen Park officers.¹⁹ Thus, provision for a contribution or indemnity claim against the Allen Park settlers necessarily implies that there are others against whom Plaintiff's claims are preserved who might have standing to seek contribution or indemnity. In particular, provision for an indemnity or contribution suit against the Allen Park officers by the Melvindale officers (the only "parties" to the lawsuit remaining) necessarily reflects the intent to preserve Plaintiff's claims against the Melvindale officers.

Notably, that is precisely what is contemplated by the third paragraph:

¹⁹ For a variety of other, unrelated, reasons, the Melvindale officers would not have any viable contribution or indemnity claim against Allen Park under the circumstances of this case. See *e.g. Kokx v Bylenga, supra*; MCLA 600.2925d(b).

“IT IS FURTHER AGREED that in the event the parties herein released may be liable, by way of contribution, indemnity, lien or otherwise, to any other parties as a result of this incident, that the execution of this agreement shall operate as a satisfaction of my claims against such other parties to the extent that such other parties are or may be entitled to recover, by way of contribution, indemnity, lien or otherwise, from the parties herein released.”

Stated differently, this document “shall operate as a satisfaction of my claims against such other parties” (*i.e.* the Melvindale Defendants), but only “to the extent that such other parties may be entitled to recover . . . from the parties herein released”. Since there is no entitlement by Melvindale officers to recover against the Allen Park officers, the plain language of this paragraph means that Plaintiff’s claims “against such other parties” are not satisfied. Defendants’ position is belied by the language of this paragraph, which states, in substance, that claims against “other parties” are not discharged unless those “other parties” are entitled to recover from “the parties herein released”.

Additionally, this paragraph is inconsistent with Defendants’ argument that the Releases operated to dismiss the case against all parties to the suit. The paragraph uses two separate descriptions of “parties”, the “parties herein released” and “other parties”. That language demonstrates that, of all “parties” sued, there are two mutually exclusive sub-classes, “the parties herein released” [Allen Park] and “other

parties”. The fact that there are “other parties” besides “the parties herein released”, necessarily means that some “parties” - - the Melvindale Defendants - - are not released.

(3) Defendants’ Argument Clashes With The Principle That Provisions Are To Be Construed Harmoniously, Rendering Neither Nugatory

As a matter of elementary contract law, contractual provisions are to be construed harmoniously if possible. *Leon v Detroit Harvester Co*, 363 Mich 366, 370 (1961); *Burton v Travelers Ins Co*, 341 Mich 30, 32 (1954); *Murphy v Seed-Roberts Agency*, 79 Mich App 1, 8 (1977); *Associated Truck Lines v Baer*, 346 Mich 106, 110 (1956).

Defendants’ proposed construction would offend these principles. It would ignore the contractual distinction between “the parties herein released” and “other parties”. It would render the third paragraph meaningless. It would contradict the provision that claims against the Melvindale officers are not discharged unless they would be entitled to recover from the settling Allen Park officers. It would overlook the reference to those “released and discharged” as being the “above-named”, and the use of the separate terms “persons” and “parties”.

The document is much more plausibly construed as the contracting parties agree. The “persons” released are the “named” Allen Park officers, their insurer, and “all other persons” related to them. The “other parties” not “named” - - *i.e.* Appellees

-- are not released except to the extent they would be entitled to recoupment from the Allen Park settlors.

Even looking only at the four corners of the Releases themselves, they are internally inconsistent or ambiguous. They are properly construed and applied in accord with the actual intent of the participants in the settlement and execution of the documents.

C. IF CONSTRUED AS WAIVING PLAINTIFF'S CAUSE OF ACTION AGAINST THE NON-SETTLORS, THE RELEASES ARE UNENFORCEABLE, AS PLAINTIFF RECEIVED NO CONSIDERATION EXCEPT WHAT THE SETTLORS HAD A PRE-EXISTING DUTY TO PAY UNDER MCR 2.403(M)

Plaintiff and Allen Park officers Albright and Locklear all accepted the case evaluation of \$12,500 against each Allen Park officer- Defendant (Ex. 5).²⁰ By operation of **MCR 2.403(M)**,²¹ Plaintiff was already entitled to a Judgment of

²⁰ The Case Evaluation acceptance readily distinguishes this case from *Romska*, where there was no pre-existing duty to pay.

²¹ **Rule 2.403(M)(1)** provides that, upon acceptance, if the amount of the evaluation is paid within 28 days, the action is dismissed with prejudice, otherwise, "judgment will be entered in accordance with the evaluation". **Rule 2.403(M)(2)**, applicable to multiple party cases, calls for judgment or dismissal, "as to those opposing parties who have accepted the
(continued...)

\$12,500 against each, with the case going forward against the Melvindale Defendants, with whom there was no case evaluation acceptance. The writings (Ex. 8, Ex. 9) provided Plaintiff with not one cent more than what was already due under **MCR 2.403(M)**. Similarly, the Allen Park officers gave up nothing beyond what they were already obligated by **Rule 2.403(M)** to pay.²² In short, Ex. 8 and 9 provide Plaintiff with nothing, and cost the settlors nothing, beyond the pre-existing duty arising under **MCR 2.403(M)**.

It is fundamental that a contract, including an agreement to forego rights, requires “consideration”. *Babcock v Public Bank*, 366 Mich 124, 135 (1962) (“... waiver of a substantial right, like release thereof, is a matter of contract which requires a consideration”); *Kirchhoff v Morris*, 282 Mich 90, 95 (1937); *Hisaw v Hayes*, 133 Mich App 639, 643 (1984); *Matson v State Farm Ins Co*, 65 Mich App 713, 717 (1975).

It is likewise settled that the performance which was already required does not constitute “consideration”. *Borg-Warner v Dept of State*, 433 Mich 16, 21 (1989) (citing a sister state case holding, “a subsequent promise to pay by [one] who was already bound to pay the plaintiff... was not adequate consideration upon which

²¹(...continued)
portions of the evaluation that apply to them.”

²² The actual payor, the Michigan Municipal Liability and Property Pool, was likewise already obligated by the insurance contract to pay the liability of its insureds.

a valid contract could be based”); *Andrews v Prent*, 280 Mich 324, 325 (1937) (“ . . . a promise to do nothing more than one is already legally bound to do is not consideration for a promise given in return . . .”); *DeSanchez v Genoves-Andrews*, 161 Mich App 245, 254 (1987); *In re Easterbrook Estate*, 114 Mich App 739, 748 (1982) (citing the, “general rule that a promise to do that which the promisor legally is bound to do does not constitute consideration, or sufficient consideration, for a new contract”).

If the Releases were viewed as a promise by Plaintiff to release persons other than the Allen Park Defendants entitled to dismissal under MCR 2.403 (M), there is no “consideration” for that purported promise, as Plaintiff received nothing beyond what he was already entitled to under the case evaluation acceptance. For this reason, the claimed “contract” postulated by the Melvindale Defendants is unenforceable.

The Court of Appeals Opinion addressed “consideration” without regard to the “pre-existing duty” rule (Ex. 1, p. 5):

“Plaintiff additionally contends that there was no consideration for the promise to release persons other than the Allen Park officers from liability. We also reject this argument. As noted in *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005), the basic rule of contract law is that whatever consideration is paid for all of the promises is consideration for each one . . . (internal citation and quotation marks omitted).”

That analysis would be undeniably cogent in the context of a case like *Romska* where there was no duty to pay or dismiss separate from the Release itself. In that context, the Release itself provides “consideration” not otherwise existing.

Here, however, the accepted case evaluation already created a duty in the Allen Park officers to pay \$25,000, and a duty in Plaintiff to dismiss the suit against them. Where, as here, there is a pre-existing duty, the “consideration” analysis hinges on whether the contract provides additional consideration to the plaintiff beyond that required by the pre-existing duty.

In the context of this case, unlike *Romska*, there is no “consideration”. This Court should review the Court of Appeals decision and hold that, under the “pre-existing duty” rule, there is no “consideration” for a Release which provides nothing more than what is already required by a pre-existing duty.

D. THE COURT OF APPEALS ERRED IN SUMMARILY HOLDING THAT REFORMATION IS NOT AVAILABLE TO CORRECT A WRITING TO BETTER REFLECT THE ACTUAL INTENT OF THE PARTIES

Defendants’ argument was based on the language of the Releases in their current form. At the time leave was granted, Plaintiff’s Motion for Reformation (Ex.

18) was pending.²³ If granted, it would have reformed the Releases so that the language would more clearly reflect the actual intent of the contracting parties.

As an initial point, “reformation” is a remedy available in equity, which is to be first considered by the trial court, then reviewed under a deferential standard of appellate review. *Capitol S & L Association v Przbylowicz*, 83 Mich App 404, 407 (1978) (“This Court reviews equity cases *de novo*, but does not reverse or modify unless convinced it would have reached a different result had it occupied the position of the trial court”). By taking upon itself the function of deciding reformation, rather than remanding, the Court of Appeals has circumvented the role of the trial court and the deferential standard of appellate review.

Substantively, the Court rejected the reformation argument with the following observation (Ex. 1, p. 5):

“Plaintiff contends that, if we find the releases applicable to defendants, the proper remedy is to allow a reformation of the releases. We disagree. The releases must be applied as written. *Romska, supra* at 515. ‘This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.’

²³ In *Romska*, a motion for reformation was filed in the trial court, and was denied, with the plaintiff not appealing (234 Mich App at 515, fn. 1). Here, Plaintiff filed a Motion for Reformation in the trial court, but was denied a hearing because the Court of Appeals granted Defendants’ Application for Leave to Appeal before the reformation motion could be decided.

Farm Bureau Mut Ins Co of Michigan v Nikkel, 460 Mich 558, 567-568; 596 NW2d 915 (1999) (internal citation and quotation marks omitted).”

The holding, “The releases must be applied as written”, misses the point and, if adopted, would nullify the very nature of reformation and the case law recognizing its role. The very purpose of reformation is to provide equitable relief when the contractual language, read literally, fails to express the actual intent of the contracting parties. *Raymond v Auto Owners Ins Co*, 236 Mich 393, 396 (1926) (“A court of equity has power to reform the contract to make it conform to the agreement actually made”); *Capitol S & L Association, supra* (“A written instrument may be reformed where it fails to express the intention of the parties thereto as a result of accident, inadvertence, mistake”); *Brenner Co v Brooker Engineering Co*, 301 Mich 719, 723 (1942) (“... the writing controls unless a court of equity, on invocation of its power, finds the writing does not express what the minds of the parties met on ...”).

By hypothesis, the written Release in this case fails to express the agreement actually intended and made. That is precisely what is corrected by the equitable remedy of reformation.

Although not addressed by the appellate court, Defendants sought to avoid reformation by arguing that they are “third party beneficiaries” of the contract, with independent “reliance” interests which prevent reformation of the contract to

comport with the intent of the contracting parties (D. Brief, pp. 22-25). There are several reasons why that argument does not undermine the applicability of reformation.

Contrary to Defendants' polemics, this is not a case where Plaintiff claims relief because he didn't read the document, or because of his unilateral expression of intent, or anything of the like. Rather, as in all other such situations, he seeks reformation because the writing fails to adequately or accurately reflect the mutual intent of the contracting parties. This error in the writing does not prevent equitable reformation; it is the very situation which the doctrine was intended to, and does, address.

Nor is this a situation of contracting parties seeking to modify a contract to the detriment of an intended third party beneficiary who has justifiably relied. No "modification" is sought. Instead the contracting parties seek simply to memorialize what has always been their agreement.

Moreover, the Melvindale Appellants are not "third party beneficiaries" under Michigan law. Pursuant to MCLA 600.1405(1),²⁴ "third party beneficiary" status depends on whether, "the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person". The term

²⁴ "A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person."

“directly” goes far toward explaining Michigan decisional law which holds that one does not acquire “third party beneficiary” status simply because a contract between others might provide incidental benefit. Rather, that status is acquired only when the actual contracting parties intended to benefit the third party. *Koenig v City of South Haven*, 460 Mich 667, 679-680 (1999); *Alcona Schools v Michigan*, 216 Mich App 202, 205 (1996) (“... where the contract in question is primarily for the benefit of the parties thereto, the fact that a third person is incidentally benefitted does not give that third person rights as a third party beneficiary”); *Alden Bank v Old Kent Bank*, 180 Mich App 40, 44 (1989) (same); *Paul v Bogle*, 193 Mich App 479, 492 (1992) (same; applying that principle to hold that the plaintiff was not a third party beneficiary of an indemnity agreement between others).

As discussed above, Plaintiff cannot be said to have “directly” promised a benefit to the Melvindale officers, who are not mentioned in the Release. Nor can it be said that the contracting parties intended to benefit Appellees.

Even if Appellees were intended to be statutory “third party beneficiaries”, their rights would be no greater than those of the contracting parties themselves. The body of reformation law cited above makes it clear that, even between the contracting parties, a writing may be reformed to reflect the actual intent.

In short, this case presents compelling and jurisprudentially significant issues. This Court should grant leave.

RELIEF SOUGHT

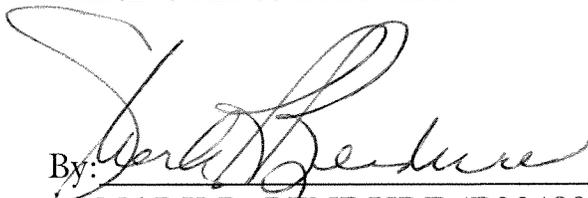
WHEREFORE Plaintiff prays that this Honorable Court grant the Application for Leave to Appeal and, on full review, reverse the Opinion of the Court of Appeals and affirm the decisions of the Circuit Court; remand for trial on the merits of Plaintiff's causes of action against the Melvindale officer Defendants; and allow Plaintiff the taxable costs and attorney fees of appellate proceedings.

Respectfully submitted,

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