

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS AND CIRCUIT COURT FOR THE
COUNTY OF WAYNE)

THOMAS JOHN SHAY,

Supreme Court No. 138908

Plaintiff-Appellant,

COA No. 282550

vs.

L.C.C. No. 06-608275-NZ

MELVINDALE POLICE OFFICERS JOHN ALDRICH,
WILLIAM PLEMONS AND J. MILLER,

Defendants-Appellees,

AND

ALLEN PARK POLICE OFFICERS ALLBRIGHT, and
LOCKLEAR,

Dismissed/Released Defendants.

138908 /
**BRIEF OF DEFENDANTS-APPELLEES, MELVINDALE POLICE OFFICERS
JOHN ALDRICH, WILLIAM PLEMONS AND J. MILLER IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

PLUNKETT COONEY

BY: ERNEST R. BAZZANA (P28442)
Attorney for Melvindale Defendants
535 Griswold St. – Suite 2400
Detroit, MI 48043
(313) 983-4798

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES i

COUNTER-STATEMENT OF THE STANDARD OF REVIEW xi

COUNTER-STATEMENT OF FACTS 1

WHY LEAVE TO APPEAL SHOULD BE DENIED 6

INTRODUCTION TO ARGUMENTS 8

ARGUMENT I..... 11

THE COURT OF APPEALS CORRECTLY DETERMINED
THAT THE TWO RELEASES EXECUTED BY PLAINTIFF - -
WITH THE ASSISTANCE OF COUNSEL - - ARE
UNAMBIGUOUS AND, THEREFORE, INTENT MUST BE
DISCERNED SOLELY AND EXCLUSIVELY FROM THE
LANGUAGE SET FORTH IN THE RELEASES.

A. Introduction.11

B. Interpretation of Release Agreements.11

C. Application of These Principles.18

 1. The Effect of a Release of “All Other Persons.”18

ARGUMENT II..... 25

THE COURT OF APPEALS CORRECTLY DETERMINED
THAT THE TWO RELEASES WERE SUPPORTED BY
CONSIDERATION.

ARGUMENT III 29

THE MELVINDALE POLICE OFFICERS WERE INTENDED
THIRD-PARTY BENEFICIARIES OF THE RELEASES.

ARGUMENT IV 31

THE COURT OF APPEALS CORRECTLY DETERMINED
THAT PLAINTIFF LOST ANY RIGHT OR ABILITY TO SEEK
REFORMATION OF THE RELEASES ON THE DAY THE

MELVINDALE POLICE OFFICERS RELIED ON THEM
WHEN THEY FILED THEIR MOTION FOR SUMMARY
DISPOSITION.

ARGUMENT V 37

THE COURT OF APPEALS CORRECTLY DETERMINED THAT
JUDGE THOMAS WAS WRONG AS A MATTER OF LAW IN HIS
INITIAL DETERMINATION THAT A DEFENDANT MAY ONLY
RELY ON RELEASES WHICH ARE ENTERED INTO PRIOR TO
THE FILING OF THE PLAINTIFF'S COMPLAINT -- AND,
CONVERSELY, MAY NOT RELY ON RELEASES WHICH ARE
EXECUTED BY THE PLAINTIFF DURING THE COURSE OF
THE LITIGATION -- BECAUSE RELEASES WHICH DO NOT
EXIST AT THE TIME THE PLAINTIFF FILES HIS COMPLAINT
OBVIOUSLY CANNOT BE RAISED IN THE DEFENDANT'S
ANSWER.

A. Introduction37
B. A Remaining Defendant is Entitled to Rely on a Release Given to a
Prior Defendant Subsequent to the Commencement of the Action.....37

ARGUMENT VI 42

THE COURT OF APPEALS CORRECTLY DETERMINED THAT
THE LOWER COURT ABUSED ITS DISCRETION IN DENYING
DEFENDANTS' MOTION TO AMEND TO SET FORTH THE
DEFENSE OF RELEASE.

CONCLUSION 44

PROOF OF SERVICE

INDEX OF AUTHORITIES

Page

MICHIGAN CASES:

Adell v Sommers, Schwartz, Silver & Schwartz, P.C.,
170 Mich App 196, 201; 428 NW2d 26 (1988)..... 11

Alcona Community Schools v State of Michigan,
216 Mich App 202, 205; 549 NW2d 356 (1996).....30

Alden State Bank v Old Kent Bank - Grand Traverse,
180 Mich App 40, 44; 446 NW2d 599 (1989).....30

Amerisure Ins Co v Graff Chevrolet, Inc.,
257 Mich App 585; 669 NW2d 304 (2003).....25

Armstrong v Commercial Carriers, Inc.,
341 Mich 45; 67 NW2d 194 (1954).....6

Assumption Greek Orthodox Church v Cincinnati Ins Co,
2008 WL 5046311 (Docket Nos. 275707 and 275733 *rel'd* November 25,
2008).....17

Barner v City of Lansing,
27 Mich App 669; 183 NW2d 877 (1970).....13

Brennan v Edward D. Jones & Co.,
245 Mich App 156; 626 NW2d 917 (2001)..... xi

Burgess v Clarke,
215 Mich App 542, 547-548; 547 NW2d 59 (1996).....13

Burkhart Associates, Inc v Nowakowski,
2008 WL 4367528 (Docket Nos. 277744 and 279402, *rel'd* Sept. 25,
2008).....32

Burns v General Motors Corp.,
950 F Supp 137, 139 (D Md 1996).....32

Calladine v Hyster Co.,
155 Mich App 175; 399 NW2d 404 (1986).....19

Cameron v Auto Ins Ass'n.,
476 Mich 55; 718 NW2d 784 (2006).....41

<i>City of Romulus v Michigan Dept of Environmental Quality,</i> 260 Mich App 54; 678 NW2d 444 (2004).....	15
<i>Coates v Bastian Bros, Inc,</i> 276 Mich App 498; 741 NW2d 539 (2007).....	12
<i>Colucci v McMillan,</i> 256 Mich App 88; 662 NW2d 87 (2003).....	15
<i>Dacon v Transue,</i> 441 Mich 315; 490 NW2d 369 (1992).....	1
<i>Dessart v Burak,</i> 470 Mich 37; 678 NW2d 615 (2004).....	41
<i>DiPonio Construction Co, Inc v Rosati Masonry Co, Inc,</i> 246 Mich App 43; 631 NW2d 59 (2001).....	xi
<i>Elliott Investment Co, Inc v Pulte Homes Sciences, LLC,</i> 2008 WL 5431169 (Docket No. 279929, rel'd December 30, 2008)	17
<i>Farm Bureau Mut Ins Co of Mich v Nikkel,</i> 460 Mich 558, 567, 568; 596 NW2d 915 (1999).....	12, 13, 34
<i>Farm Bureau Mut Ins Co of Mich v Nikkel,</i> 460 Mich 558; 596 NW2d 915 (1999).....	12
<i>Ficano v Lucas,</i> 133 Mich App 268; 351 NW2d 198 (1983).....	4
<i>General Motors Corp v City of Detroit,</i> 372 Mich 234; 126 NW2d 108 (1964).....	1, 25
<i>Gortney v Norfolk & WR Co,</i> 216 Mich App 535, 540-541; 549 NW2d 612 (1996).....	11, 13
<i>Gramer v Gramer,</i> 207 Mich App 123, 125; 523 NW2d 861 (1994).....	11
<i>Grosse Pointe Park v Michigan Municipal Liab & Prop Pool,</i> 473 Mich 188; 702 NW2d 106 (2005).....	12
<i>Guardian Depositors Corp v Brown,</i> 290 Mich 433; 287 NW 798 (1939).....	29
<i>Hall v Small,</i> 267 Mich App 330; 705 NW2d 741 (2005).....	27

<i>Haveman v Kent County Road Comm'n,</i> 356 Mich 11; 96 NW2d 153 (1959).....	41
<i>Henderson v State Farm Fire & Cas Co,</i> 460 Mich 348; 596 NW2d 190 (1999).....	15
<i>Herrick v Sosnowski,</i> 2005 WL 12244694 (Docket No. 252299 <i>rel'd</i> May 24, 2005)	22
<i>Hill v City of Warren,</i> 276 Mich App 299; 740 NW2d 706 (2007).....	40
<i>Huron Tool & Engineering Co v Precision Consulting Serv, Inc,</i> 209 Mich App 365; 532 NW2d 541 (1995).....	xi
<i>In Re Smith Trust,</i> 480 Mich 19; 745 NW2d 754 (2008).....	22
<i>Jachim v Coussens,</i> 88 Mich App 648; 278 NW2d 708 (1979).....	25, 29
<i>Jack v Hastings Mut'l Ins Co,</i> 2008 WL 4958787 (Docket No. 278109 <i>rel'd</i> November 20, 2008).....	17
<i>Johnstone v Detroit,</i> <i>G H & M R Co,</i> 245 Mich 65, 73-74, 222 NW 325 (1928).....	10
<i>Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc,</i> 387 Mich 285; 195 NW2d 865 (1972).....	12, 34
<i>Living Alternatives v DMH,</i> 207 Mich App 482; 55 NW2d 466 (1994).....	4
<i>Meridian Mut'l Ins Co v Mason-Dixon Lines, Inc,</i> 242 Mich App 645; 620 NW2d 310 (2000).....	33
<i>Michigan Chandelier Co v Morse,</i> 297 Mich 41, 49; 297 NW 64 (1941).....	12
<i>Moore v Kimball,</i> 291 Mich 455, 460-461; 289 NW 213 (1939)	13
<i>Moorehouse v Ambassador Ins Co, Inc,</i> 147 Mich App 412; 383 NW2d 219 (1986).....	38
<i>Oosterhouse v Brummel,</i> 343 Mich 283; 72 NW2d 6 (1955).....	9

<i>People v McIntire</i> , 461 Mich 147, fn 2; 599 NW2d 102 (1999)	41
<i>Quality Products and Concepts Co v Nagel Precision, Inc</i> , 469 Mich 362; 666 NW2d 251 (2003).....	9
<i>Rafferty v Markovitz</i> , 461 Mich 265; 602 NW2d 367(1999).....	40
<i>Randolph v Resig</i> , 272 Mich App 331; 727 NW2d 388 (2006).....	12
<i>Raska v Farm Bureau Mut Ins Co</i> , 412 Mich 355; 314 NW2d 440 (1982).....	13
<i>Reicher v S.E.T. Enterprises, Inc</i> , ___ Mich App ___; ___ NW2d ___; 2009 WL 1363383	15
<i>Richeson v Wagar</i> , 287 Mich 79; 282 NW 909 (1938).....	35
<i>Rowady v K Mart Corp</i> , 170 Mich App 54; 428 NW2d 22 (1988).....	27
<i>Rowady v KMart Corp</i> , 170 Mich App 54; 428 NW2d 22 (1988).....	26
<i>Ruppel v Carlson</i> , 2002 WL 31928576 (Docket No. 235266 <i>rel'd</i> November 8, 2005).....	20, 38
<i>Samuel v Moran Mitsubishi</i> , 2002 WL 1065619 (May 24, 2002)	19, 20
<i>Sanborn v Sanborn</i> , 104 Mich 180; 62 NW 371 (1895).....	35
<i>Schmalfeldt v North Point Ins Co</i> , 469 Mich 422; 670 NW2d 651 (2003).....	29
<i>Schmid v Farm Bureau Life Ins Co</i> , 2009 WL 1027539 (Docket No. 282030 <i>rel'd</i> April 16, 2009)	16
<i>Sindler v Farmers Ins Exch</i> , 2009 WL 839532 (Docket No. 282678 <i>rel'd</i> March 31, 2009)	16
<i>Skotak v Vic Tanny International, Inc</i> , 203 Mich App 616; 513 NW2d 428 (1994).....	19

<i>Sponseller v Kimball,</i> 246 Mich 255; 224 NW 359 (1929).....	35
<i>St. Clair Medical, P.C. v Borgiel,</i> 270 Mich App 260; 715 NW2d 914 (2006).....	14
<i>Stroh v Hinchman,</i> 37 Mich 490 (1887)	1
<i>Sun Valley Foods Co v Ward,</i> 460 Mich 230; 596 NW2d 119 (1999).....	41
<i>Sweitzer v Littlefield,</i> 297 Mich 356; 297 NW2d 522 (1941).....	6
<i>Talucci v Archambault,</i> 20 Mich App 153; 173 NW2d 740, 743 (1969).....	29
<i>Terrien v Zwit,</i> 467 Mich 56; 648 NW2d 602 (2002).....	9
<i>Theodore v Horenstein,</i> 2009 WL 1506791 (Docket No. 285153, <i>rel'd</i> May 26, 2009)	26
<i>Thomas v Jewell,</i> 300 Mich 556, 560-561; 2 NW2d 501 (1942)	13
<i>Upjohn Co v New Hampshire Ins Co,</i> 438 Mich 197, 207; 476 NW2d 392 (1991).....	14
<i>Venerian v Charles L. Pugh, Co, Inc,</i> 279 Mich App 431; 761 NW2d 108 (2008).....	30
<i>Warren v Federal Life Ins Co,</i> 198 Mich 343; 164 NW 449 (1917).....	35
<i>Weymers v Khera,</i> 454 Mich 639; 563 NW2d 647 (1997).....	42
<i>Whittenberg v Carnegie,</i> 328 Mich 125; 42 NW2d 900 (1950).....	1
<i>Wilkie v Auto-Owners Ins Co,</i> 469 Mich 41; 664 NW2d 776 (2003).....	9
<i>Wyrembelski v St. Clair Shores,</i> 218 Mich App 125, 127; 553 NW2d 651 (1996).....	11, 13

<i>Zurich Ins Co v CCR & Co (On Reh'g),</i> 226 Mich App 599; 576 NW2d 392 (1997).....	14
---	----

FEDERAL CASES:

<i>Anderson v Liberty Lobby, Inc,</i> 477 US 242; 106 S Ct 2505, 2510; 91 L Ed2d 202 (1986).....	1
---	---

<i>Auer v Kawasaki Motors Corp,</i> 830 F2d 535 (4 th Cir 1987)	32
---	----

<i>Green County v Quinlan,</i> 211 US 582; 29 S Ct 162, 168; 53 L Ed 335 (1909).....	8
---	---

<i>Haufle v Sboboda,</i> 416 NW2d 879, 890 (SD 1987)	36
---	----

<i>In re FPI/Agretech Securities Litigation,</i> 105 F3d 469 (9 th Cir 1997)	8
--	---

<i>Layman v Combs,</i> 981 F2d 1093 (9 th Cir 1992)	8
---	---

<i>Morta v Korea Ins Corp,</i> 840 F2d 1452 (9 th Cir 1988)	8
---	---

<i>Taggart v United States,</i> 880 F2d 867 (6 th Cir 1989)	22
---	----

<i>United Food & Commercial Workers Union v Lucky Stores, Inc,</i> 806 F2d 1385 (9 th Cir 1986)	8
---	---

OUT-OF-STATE CASES:

<i>Baldwin v Leach,</i> 115 Idaho 713; 769 P2d 590 (1989)	32
--	----

<i>Clarke v Ames,</i> 267 Mass 44; 165 NE 696 (1929).....	13
--	----

<i>Laudano v General Motors,</i> 33 Conn Supp 684; 388 A2d 842, 845 (1977).....	19
--	----

<i>Wolosoff v Gadsden Land and Building Corp,</i> 245 Ala 628; 18 So2d 568 (1944).....	32
---	----

STATUTES:

MCL 600.140525, 29, 31
MSA 27A.140529

RULES:

MCR 2.116 (C)(7).....40
MCR 2.116(C)(10).....15
MCR 2.116(C)(7)..... xi, 2, 5, 38, 39, 40, 41
MCR 2.403(M)26
MCR 7.302.....6
MRE 4011

OTHER AUTHORITIES:

1 S. Spicer, C. Kraus and A. Gands, *The American Law of Torts*.
§: 23, p 676 (1983).....36
2 A Sutherland, *Statutes and Statutory Construction*, §47.3341
15 Corbin, *Contracts* (Interim ed), ch 79, §1376, p 179
Annotation: *Mutual Rescission or Release of Contract as Affecting Rights
of Third- Party Beneficiary*,
97 ALR2d 1262.....31
Annotation, *Right of Third Persons to Enforce Contract Between Others for
His Benefit*,
81 A.L.R. 1271, 128729

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TWO RELEASES EXECUTED BY PLAINTIFF - - WITH THE ASSISTANCE OF COUNSEL - - ARE UNAMBIGUOUS AND, THEREFORE, INTENT MUST BE DISCERNED SOLELY AND EXCLUSIVELY FROM THE LANGUAGE SET FORTH IN THE RELEASES?

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

The Court of Appeals answered, "Yes."

II.

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TWO RELEASES WERE SUPPORTED BY CONSIDERATION?

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

The Court of Appeals answered, "Yes."

III.

WHETHER THE MELVINDALE POLICE OFFICERS WERE INTENDED THIRD-PARTY BENEFICIARIES OF THE RELEASES?

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

The Court of Appeals answered, "Yes."

COUNTER-STATEMENT OF QUESTIONS PRESENTED (Cont.)

IV.

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFF LOST ANY RIGHT OR ABILITY TO SEEK REFORMATION OF THE RELEASES ON THE DAY THE MELVINDALE POLICE OFFICERS RELIED ON THEM WHEN THEY FILED THEIR MOTION FOR SUMMARY DISPOSITION?

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

The Court of Appeals answered, "Yes."

V.

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT JUDGE THOMAS WAS WRONG AS A MATTER OF LAW IN HIS INITIAL DETERMINATION THAT A DEFENDANT MAY ONLY RELY ON RELEASES WHICH ARE ENTERED INTO PRIOR TO THE FILING OF THE PLAINTIFF'S COMPLAINT -- AND, CONVERSELY, MAY NOT RELY ON RELEASES WHICH ARE EXECUTED BY THE PLAINTIFF DURING THE COURSE OF THE LITIGATION?

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

The Court of Appeals answered, "Yes."

COUNTER-STATEMENT OF QUESTIONS PRESENTED (Cont.)

VI.

WHETHER THE COURT OF APPEALS CORRECTLY
DETERMINED THAT THE LOWER COURT ABUSED ITS
DISCRETION IN DENYING DEFENDANTS' MOTION TO
AMEND TO SET FORTH THE DEFENSE OF RELEASE?

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

The Court of Appeals answered, "Yes."

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

An appellate court reviews *de novo* a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). Whether a plaintiff's claim is barred is a question of law that the appellate court reviews *de novo*. *Brennan v Edward D. Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). When there is no dispute concerning the relevant and material facts, the question of whether a Plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the Court to decide. *Huron Tool & Engineering Co v Precision Consulting Serv, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995).

COUNTER-STATEMENT OF FACTS

The facts which are relevant¹ and material² to the issue presented in this appeal are undisputed.³ Those facts will be set forth on the following pages. However, before doing so, Defendants must note that Plaintiff's counsel, in a thinly-disguised attempt to influence this Court, has set forth facts having nothing whatsoever to do with the issue concerning the legal effect of the two Releases. In analyzing a case such as this, one must avoid the danger of allowing the legally irrelevant substantive facts from influencing one's assessment of the relevant, procedural facts -- and their legal consequences. Defendants are confident that this Court will focus on the relevant facts and ignore the irrelevant ones.⁴ The following are the relevant facts.

On March 21, 2006, Plaintiff, Thomas Shay, filed a Complaint against the Defendants arising out of his arrest for disorderly conduct, resisting arrest and obstructing

¹ Relevant facts are defined as those having a legitimate tendency to establish or disprove any fact that is of consequence to the determination of the action. *Stroh v Hinchman*, 37 Mich 490, 497 (1887); *Dacon v Transue*, 441 Mich 315; 490 NW2d 369 (1992); MRE 401.

² Material facts for summary disposition purposes, are only those facts that might affect the outcome of the action under governing law. *Anderson v Liberty Lobby, Inc*, 477 US 242, 248; 106 S Ct 2505, 2510; 91 L Ed2d 202 (1986).

³ Even when some (assumed) factual disputes are present, summary disposition may be granted if resolution of the disputed facts in favor of the party opposing the motion does not alter the controlling legal question. *General Motors Corp v City of Detroit*, 372 Mich 234; 126 NW2d 108 (1964); *Whittenberg v Carnegie*, 328 Mich 125; 42 NW2d 900 (1950).

justice on September 8, 2004. Plaintiff named as Defendants, Melvindale Police Officers, John Aldrich, William Plemons and J. Miller, and Allen Park Police Officers, Wayne Allbright and Kevin Locklear. The case proceeded through pre-trial proceedings until Plaintiff settled with the Allen Park Police Officers. On July 24, 2007, Plaintiff signed two separate documents both entitled: "Release of All Claims and Indemnity Agreement for Derivative Claims." Those two Releases stated that Plaintiff discharged the Allen Park Police Officers "together with all other persons . . . 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." See **Exhibits A and B**, attached hereto. On August 31, 2007, the lower court entered its Order for Dismissal with Prejudice as to Defendants, Allen Park Police Officer Albright and Allen Park Police Officer Locklear, only and the Allen Park Police Officers were dismissed with prejudice from the case.

The two Releases were not provided to counsel for Defendants until two months later, in October, 2007. On October 19, 2007, the Melvindale Police Officers filed their Motion for Summary Disposition pursuant to MCR 2.116(C)(7) based on the Releases⁵ that Plaintiff had executed in connection with the resolution of his case against the Allen

(Continued from previous page.)

⁴ The March 5, 2009 decision of the Court of the Appeals shows that that Court based its decision, and correctly so, on the relevant procedural facts. *Shay v Aldrich*, 2009 WL 562975 *1 (2009).

⁵ Defendants did not, and do not, rely on the August 31, 2007 Order as the basis for their request for summary disposition. They rely on the July 24, 2007 Releases themselves.

Park Police Officers. The Release signed by Plaintiff regarding Kevin Locklear⁶ provides in relevant part:

“For the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 (\$12,500.00) DOLLARS to me in hand paid by **Michigan Municipal Liability and Property Pool** do for ourselves, 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.” (Underlining supplied.) See **Exhibit A**, attached hereto.

The Motion was heard and denied by Wayne County Circuit Court Judge Prentis Edwards on November 9, 2007. Judge Edwards determined that a defendant may only rely on releases which are entered into prior to the filing of the plaintiff’s complaint and, conversely, may not rely on releases which are executed by plaintiffs during the course of the litigation. Tr., 11/9/07, pp 9-10. The implementing Order was entered on the same date.

On November 21, 2007, Defendants filed their Motion for Reconsideration pointing out the legal and logical absurdity of the circuit court’s determination that a defendant may not rely on a release which is executed during the course of litigation. At the same time, Defendants filed their Motion to Amend Affirmative Defenses in order to include the

⁶ The “Release of All Claims and Indemnity Agreement” relating to Wayne Allbright is identical and in the balance of this brief, they will be treated identically.

defense of release -- which, obviously, did not even exist at the time they filed their original Answer.

The Motion for Reconsideration was simply denied without affording the Defendants oral argument. That order is dated November 26, 2007.

Defendants' Motion to Amend Affirmative Defenses was heard on November 30, 2007. Apparently recognizing that his original reason for denying summary disposition had absolutely no legal basis, Judge Edwards addressed the substantive merits of the Motion for Summary Disposition, disregarded the clear and unambiguous⁷ language extending the scope of the Releases to "all other persons" and ultimately held that amendment would be futile because summary disposition was not warranted. Opinion and Order dated December 6, 2007, p 7.

The Order denying leave to amend based on the determination to reaffirm the denial of Defendants' Motion for Summary Disposition was entered on December 6, 2007. Defendants filed their Application for Leave to Appeal within 21 days of the November 26,

⁷ In his November 2, 2007 Response to Melvindale Defendants' Motion for Summary Disposition at p 19, Plaintiff conceded that:

"The Release, by itself, is unambiguous, and the intention of the parties thereto is clear." (Underlining supplied.)

A party, on appeal, cannot change or shift the position which he took in the lower court. *Ficano v Lucas*, 133 Mich App 268, 275; 351 NW2d 198 (1983); *Living Alternatives v DMH*, 207 Mich App 482, 484; 55 NW2d 466 (1994) (a party may not take a position in the trial court and subsequently seek redress on appeal based on a position contrary to that taken in the lower court). Having conceded that the Releases are unambiguous, Plaintiff is bound by that concession. Curiously, Plaintiff's Application for Leave to Appeal and Brief in Support make no mention of this concession.

2007 Order Denying their Motion for Reconsideration. On January 7, 2008, the Court of Appeals granted leave to appeal and stayed further proceedings pending resolution of this appeal.

On March 5, 2009, following briefing and arguments, the Court of Appeals issued its unanimous decision reversing the denial of summary judgment and remanding the case to the Wayne County Circuit Court for entry of judgment in favor of the Defendants. The Court of Appeals determined, first, that the two Releases were unambiguous, that, therefore, they must be applied as written and that the two Releases extended to and encompassed the Defendants. Next, the Court of Appeals rejected Plaintiff's argument that MCR 2.116(C)(7) applies only if a release is entered into before commencement of the action. Thirdly, ". . . given the applicability of the releases and the applicability of MCR 2.116(C)(7) . . .," the Court of Appeals determined that the circuit court had abused its discretion in failing to permit Defendants to amend their affirmative defenses. Next, the Court of Appeals determined that consideration had been paid to support the release of the Defendants. Lastly, the Court of Appeals determined that Plaintiff was not entitled to reform the two Releases to the detriment of the Defendants who had relied on them when they filed their Motion for Summary Disposition. Plaintiff's Motion for Rehearing was denied by the Court of Appeals on April 10, 2009.

WHY LEAVE TO APPEAL SHOULD BE DENIED

The granting of leave to appeal is in the sound discretion of the appellate court. *Armstrong v Commercial Carriers, Inc*, 341 Mich 45; 67 NW2d 194 (1954); *Sweitzer v Littlefield*, 297 Mich 356; 297 NW2d 522 (1941). Defendants contend that this Court should deny leave to appeal because not only is the result reached by the Court of Appeals correct, but this is not a case which warrants Supreme Court involvement. That much is apparent from the fact that none of the mandatory grounds which must support an application for leave to appeal, MCR 7.302(B), have been shown. While Plaintiff has asserted that the Court of Appeals' decision in this case is contrary to precedent, a review of his Application shows that he is actually complaining about the application of settled legal principles and precedent to the facts of this case.

“The grounds listed in MCR 7.302(B) reflect a basic policy of the Supreme Court that energies should be devoted to reviewing important matters and policing the administration of the judicial system, rather than be dissipated in attempts to correct every possibility of error in the decisions of the lower courts. This basic policy can be implemented effectively only through the wise exercise of the Supreme Court's discretion in its determination of which cases will be formally heard by the court.” Michigan Court Rules Practice, Authors Comment MCR 7.302.

Defendants submit that the wise discretion of this Court is best exercised by denying the Application for Leave to Appeal filed by Plaintiff. There is no reason why this Court should become involved in this case. It is not jurisprudentially significant. The

Court of Appeals decision is correct and the Court of Appeals decision does not conflict with any decision of this Court.

INTRODUCTION TO ARGUMENTS

Pacta sunt servanda – a deal is a deal. That is what this case is about. “Courts cannot make for the parties better agreements than they themselves have been satisfied to make.” *Green County v Quinlan*, 211 US 582, 596; 29 S Ct 162, 168; 53 L Ed 335 (1909). The sanctity of a contract is a fundamental concept of our legal structure. Freedom to contract includes the freedom to make a bad bargain. “It is a fundamental principle of contract law, therefore, that, wise or not, a deal is a deal.” *Morta v Korea Ins Corp*, 840 F2d 1452, 1460 (9th Cir 1988) quoting *United Food & Commercial Workers Union v Lucky Stores, Inc*, 806 F2d 1385, 1386 (9th Cir 1986).

Ninth Circuit Judge Kozinski has perhaps articulated this principle best:

“Signing a contract does not, of course, guarantee we will be better off. A system of mutual free exchange gives us only the opportunity to better ourself; business acumen, diligence and luck will affect the final tally. The right to contract therefore means the right to take chances, to play hunches, to make mistakes; it means having to live by our decisions, no matter how they turn out: “wise or not, a deal is a deal.” *Layman v Combs*, 981 F2d 1093, 1103-1104 (9th Cir 1992) (Kozinski, dissenting).

* * *

This is not an agreement entered into under duress; it is not a contract of adhesion; there was no showing of fraud; the parties were not minors or morons. All were well aware of the facts and law underlying their respective claims; they acted on the advice of counsel. There is no reason for failing to hold the parties to the deal they made.” *In re FPI/Agretech Securities Litigation*, 105 F3d 469, 478 (9th Cir 1997) (Kozinski, Judge, dissenting).

This Court has reiterated the principles associated with the freedom to contract:

“This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, §10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, *Corbin on Contracts*, as follows:

“One does not have ‘liberty of contract’ unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made.”
[15 Corbin, *Contracts* (Interim ed), ch 79, §1376, p 17.]

Wilkie v Auto-Owners Ins Co, 469 Mich 41, 51-52; 664 NW2d 776 (2003), quoted with approval in *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003).

“[I]t is not “the function of the courts to strike down private property agreements and to readjust those property rights in accordance with what seems reasonable upon a detached judicial view.” *Oosterhouse, supra* [*Oosterhouse v Brummel*, 343 Mich 283; 72 NW2d 6 (1955)] at 289-290, 72 N.W.2d 6. Rather, absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in

order to advance a particular social good.” See *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 73-74, 222 NW 325 (1928).

Terrien v Zwit, supra at p 70.

In this case, the lower Court violated these principles and failed to hold Plaintiff to the clear contractual terms of his agreement. The Court of Appeals merely corrected that error. This case is simply a situation where a lawyer made a mistake and permitted his client, twice, to sign unambiguous Releases which, by their terms, extend to and enure to the benefit of the Melvindale Police Officers. Now, Plaintiff’s circuit court counsel is doing everything in his power in an attempt to save his client, and more precisely himself, since that is where Plaintiff’s remedy now lies, from the legal consequences of that mistake. Plaintiff’s Brief on Appeal in the Court of Appeals reflected that attempt and it failed. So does his Application for Leave to Appeal to this Court.

ARGUMENT I

**THE COURT OF APPEALS CORRECTLY
DETERMINED THAT THE TWO RELEASES
EXECUTED BY PLAINTIFF - - WITH THE
ASSISTANCE OF COUNSEL - - ARE UNAMBIGUOUS
AND, THEREFORE, INTENT MUST BE DISCERNED
SOLELY AND EXCLUSIVELY FROM THE
LANGUAGE SET FORTH IN THE RELEASES.**

A. Introduction.

Defendants contend that the state of the law in Michigan is that the defense of: “I know what was written and what I signed but I really didn’t mean it” is not available to anyone.⁸

B. Interpretation of Release Agreements.

The scope of a release is governed by the intent of the parties as it is expressed in the release. *Wyrembelski v St. Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996); *Gortney v Norfolk & WR Co*, 216 Mich App 535, 540-541; 549 NW2d 612 (1996); *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994); *Adell v Sommers, Schwartz, Silver & Schwartz, P.C.*, 170 Mich App 196, 201; 428 NW2d 26 (1988). See also, *Grzebik v Kerr*, 91 Mich App 482, 486; 283 NW2d 654 (1979) (the intent of the parties to the Release, expressed in the terms of the Release, governs the scope of the Release).

The intent of the parties to an agreement must be discerned from the words used in the instrument itself. In other words, unambiguous words are reflective of the parties' intent as a matter of law.⁹ *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999). This principle was discussed in *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941):

“Whatever may be the inaccuracy of expression or the ineptness of the words used in an instrument in a legal view, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly. It must not be supposed, however, that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument.”

* * *

We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic

(Continued from previous page.)

⁸ In fact, this “defense” has never existed in Michigan. “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.” *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972).

⁹ See also, *Grosse Pointe Park v Michigan Municipal Liab & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005); *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) and *Randolph v Resig*, 272 Mich App 331, 333; 727 NW2d 388 (2006) all holding that unambiguous contractual provisions are reflective of the parties' intent as a matter of law and unambiguous contracts must be enforced as written.

testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.” (Underlining supplied.)

See also, Barner v City of Lansing, 27 Mich App 669; 183 NW2d 877 (1970).

Where, as here, the language used in a release is unambiguous,¹⁰ the parties’ intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Wyrembelski, supra*, at 127; *Gortney, supra*, at 540; *Burgess v Clarke*, 215 Mich App 542, 547-548; 547 NW2d 59 (1996). The fact that the parties may dispute the meaning of a release does not, in itself, establish an ambiguity. *See Moore v Kimball*, 291 Mich 455, 460-461; 289 NW 213 (1939). A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). If the terms of the release are unambiguous, contradictory inferences become “subjective and irrelevant”, and the legal effect of the language is a question of law to be resolved summarily. *Gortney, supra*, at 541 citing *Thomas v Jewell*, 300 Mich 556, 560-561; 2 NW2d 501 (1942).

The foregoing statement of the principles applicable to the interpretation of release agreements specifically is, of course, in accord with the principles applicable to the

¹⁰ Despite his concession that the two Releases are unambiguous, see fn. 7, *supra*, Plaintiff contends that the two Releases are ambiguous when considered in connection with the Order Dismissing the Allen Park Defendants and when considered in connection with the outcome of case evaluation. Defendants are not relying on the Order of Dismissal and are not relying on the outcome of case evaluation. Defendants are relying, as they are entitled to, solely on the two Releases executed by the Plaintiff. There is nothing ambiguous about the two Releases which include the phrase “all other persons.” Defendants contend that “all other persons” means just that: “all other persons.” There is no ambiguity whatsoever.

interpretation of contracts generally. The goal of contract interpretation is to determine, and then enforce, the intent of the parties based on the plain language of the agreement. *St. Clair Medical, P.C. v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006).¹¹ Plain and unambiguous contract language cannot be re-written by the Court “under the guise of interpretation” since the parties must live by the words of their agreement. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). A party’s unwritten intention regarding the scope of a contract is legally irrelevant and may not be considered in determining what the language actually says. *Zurich Ins Co v CCR & Co (On Reh’g)*, 226 Mich App 599, 604-605; 576 NW2d 392 (1997) (“it is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understood the import of a written contract and had the intention manifested by its terms.”)

The goal of contract construction is to determine and enforce the parties’ intent based on the plain language of the agreement. *Id.* “It is axiomatic that if a word or phrase

¹¹ Just recently, this Court, in *Zahn v Kroger Co of Michigan*, 483 Mich 34; 764 NW2d 207 (2009) a decision authored by Justice Hathaway, acknowledged and applied the rule that:

“Courts may not make a new contract for parties under the guise of a construction of the contract, if doing so will ignore the plain meaning of words chosen by the parties. *Lintern v Michigan Mut Liability Co*, 328 Mich 1, 4; 43 NW2d 42 (1950).” *Zahn, supra* at p 41.

is unambiguous [¹²] and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the property party pursuant to MCR 2.116(C)(10).” *Saint Clair Medical, PC v Borgiel, supra* at p 264 quoting, *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Michigan continuously and correctly applies these settled principles. In *Reicher v S.E.T. Enterprises, Inc*, ___ Mich App ___; ___ NW2d ___; 2009 WL 1363383, the Court of Appeals, in the course of determining that the release in that case barred the Plaintiff’s claims, stated:

“Michigan courts enforce contracts. *Coates[v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007)], *supra* at 503-504. We enforce contracts according to their terms, as a corollary of the parties' liberty of contract. *Rory v. Continental Ins Co*, 473 Mich. 457, 468; 703 NW2d 23 (2005). We examine contractual language, and give the words their plain and ordinary meanings. *Wilkie v. Auto-Owners Ins Co*, 469 Mich. 41, 47; 664 NW2d 776 (2003). An unambiguous contractual provision reflects the parties intent as a matter of law, and “[i]f the language of the contract is unambiguous, we construe and enforce the contract as written.” *Quality Products*

¹² Only where the language under review is ambiguous may a court properly go beyond the words utilized by the parties to ascertain their intent. In this regard:

“An ambiguity of . . . language does not exist merely because a reviewing court questions whether the [drafter] intended the consequences of the language under review. An ambiguity can be found only where the language . . . as used in its particular context has more than one common and accepted meaning. Thus, where common words used in their ordinary fashion lead to one reasonable interpretation [the language] cannot be found ambiguous.” *City of Romulus v Michigan Dept of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2004) quoting *Colucci v McMillan*, 256 Mich App 88, 94; 662 NW2d 87 (2003).”

& *Concepts Co v. Nagel Precision, Inc*, 469 Mich. 362, 375; 666 NW2d 251 (2003). Courts may not impose an ambiguity on clear contract language. *City of Grosse Pointe Park v. Michigan Muni Liability & Prop Pool*, 473 Mich. 188, 198; 702 NW2d 106 (2005). Rather, this Court must honor the parties' bargain, and cannot rewrite it. *McDonald v. Farm Bureau Ins Co*, 480 Mich. 191, 197; 747 NW2d 811, 816 (2008); see also *Coates, supra* at 511 n 7.”

Similarly, in *Schmid v Farm Bureau Life Ins Co*, 2009 WL 1027539 (Docket No. 282030 *rel'd* April 16, 2009), the Court of Appeals stated:

“The primary goal in contract interpretation is to honor the intent of the parties. *Royal Prop Group, supra* at 714. The language of the contract is the best way to ascertain the parties' intent, *id.*, and an unambiguous contract must be enforced as written, *Rory, supra* at 468. The fact that the parties dispute the meaning of a contract does not, by itself, establish an ambiguity. *Genesee Foods Services, Inc v. Meadowbrook, Inc*, 279 Mich App 649, 655; 760 NW2d 259 (2008).”

Likewise, in *Sindler v Farmers Ins Exch*, 2009 WL 839532 (Docket No. 282678 *rel'd* March 31, 2009), the Court of Appeals stated:

“We read contracts as a whole and accord their terms their plain and ordinary meaning.” *Scott v. Farmers Ins. Exch.*, 266 Mich.App. 557, 561, 702 N.W.2d 681 (2005). “[U]nambiguous contracts ... are to be enforced as written unless a contractual provision violates law or public policy.” *Rory v. Continental Ins. Co.*, 473 Mich. 457, 491, 703 N.W.2d 23 (2005). A court must construe a contract in its entirety and attempt to apply the plain language of the agreement if possible. *Perry v. Sied*, 461 Mich. 680, 689, 611 N.W.2d 516 (2000); *Meagher v. Wayne State University*, 222 Mich.App. 700, 721-722, 565 N.W.2d 401 (1997). And, in *Gortney v. Norfolk & Western R Co*, 216 Mich.App. 535, 540-541, 549 N.W.2d 612 (1996), this Court observed:

The scope of a release is controlled by the intent of the parties as it is expressed in the release. If the text in the

release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become "subjective, and irrelevant," and the legal effect of the language is a question of law to be resolved summarily."

See also, *Assumption Greek Orthodox Church v Cincinnati Ins Co*, 2008 WL 5046311

(Docket Nos. 275707 and 275733 *rel'd* November 25, 2008):

"There is nothing in the release that can be considered ambiguous, and we cannot look to extrinsic or parol evidence to make the initial determination of ambiguity. *Zurich Ins. Co. v. CCR & Co. (On Rehearing)*, 226 Mich.App. 599, 604, 576 N.W.2d 392 (1997)."

and, *Jack v Hastings Mut'l Ins Co*, 2008 WL 4958787 (Docket No. 278109 *rel'd*

November 20, 2008):

"Because the release was unambiguous, plaintiffs were not entitled to introduce parol evidence to vary the terms of the release. See *UAW-GM Human Resource Ctr. v. KSL Recreation Corp.*, 228 Mich.App. 486, 492, 579 N.W.2d 411 (1998)."

and, *Elliott Investment Co, Inc v Pulte Homes Sciences, LLC*, 2008 WL 5431169 (Docket

No. 279929, *rel'd* December 30, 2008):

"Thus, the "cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). Contract language must be given its ordinary and plain meaning, *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991), and this Court must construe an unambiguous contract by its terms alone. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). In other

words, if the language of the contract is clear and unambiguous, the courts must conclude as a matter of law that the contract reflects the parties' intent; extrinsic evidence thereof may only be considered if the contract is ambiguous. *In Re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

C. Application of These Principles.

1. The Effect of a Release of "All Other Persons."

Michigan law is clear that when a party signs an agreement releasing "all other persons," such a release bars any and all claims by the plaintiff against any other party from injuries arising from the incident, whether or not that party had any involvement in the prior settlement. This rule is clearly articulated in *Romska v Opper*, 234 Mich App 512, 594 NW2d 853 (1999), *lv den*, 461 Mich 927; 606 NW2d 23 (1999).

In *Romska*, plaintiff's vehicle was struck by a vehicle owned by Boyan Daskal and driven by Veliko Velikov. Defendant David Opper allegedly caused Velikov to swerve into oncoming traffic and strike plaintiff's vehicle. The plaintiff filed personal injury claims with Farm Bureau Insurance, the insurer of the Velikov vehicle, and American States Insurance Company, defendant's insurance carrier. The plaintiff ultimately settled with Farm Bureau's insureds for \$45,000. The plaintiff executed a release form, which included the following provision: "I/we hereby release and discharge Boyan Daskal and Veliko Velikov, his or her successors and assigns, and **all other parties, firms, or corporations who are or might be liable**, from all claims of any kind or character which I/we have or

might have against him/her or them, and especially because of all damages, losses or injuries to person or property, or both. . .” [emphasis added].

After the plaintiff settled with Farm Bureau’s insureds, American States would not negotiate a settlement which gave rise to litigation. Defendant Opper claimed that the clear and unambiguous language of the release discharged him from liability, too, even though there was no evidence that he had paid any consideration to plaintiff for the release from liability.

The trial court agreed with the defendant as did the Court of Appeals. The Court stated:

“Because defendant clearly fits within the class of ‘all other parties, firms or corporations who are or might be liable,’ we see no need to look beyond the plain, explicit, and unambiguous language of the release in order to conclude that he has been released from liability. There cannot be any broader classification than the word ‘all,’ and ‘all’ leaves room for no exceptions.”

See also, Skotak v Vic Tanny International, Inc, 203 Mich App 616, 619; 513 NW2d 428 (1994), *Calladine v Hyster Co*, 155 Mich App 175, 182; 399 NW2d 404 (1986) and *Laudano v General Motors*, 33 Conn Supp 684; 388 A2d 842, 845 (1977) regarding the unambiguous meaning of the word “all”.

The Court of Appeals has subsequently applied the *Romska* decision. In the unpublished decision *Samuel v Moran Mitsubishi*, 2002 WL 1065619, Docket No. 229464, *rel’d* (May 24, 2002), the Court once again held that a release agreement that released all other persons prevents a plaintiff from any action against anyone involved in the incident. In *Samuel*, the plaintiff filed suit against the driver of a motor vehicle that struck the

decedent's vehicle, resulting in decedent's death. The plaintiff settled that case, and she executed a settlement-release agreement, which provided that in consideration for the settlement payment, plaintiff released the driver and the insurance company from liability, along with: “all other persons, firms or corporations who are or might be liable, from all claims of any kind or character which she or the estate has or might have against them, and especially because of all damages, losses or injuries to persons or property, or both, whether developed or undeveloped, resulting to or to result from an accident which occurred on December 28, 1997” [emphasis added].

Subsequently, plaintiff filed a wrongful death action against Moran Mitsubishi, alleging negligence in connection with brake work performed on the vehicle which struck the decedent's vehicle. Once again the Court of Appeals held that plaintiff was barred from recovery due to the prior release she had signed. On appeal plaintiff argued that her “testimony at the settlement hearing established an intent to only release the driver and the insurance company, not any third parties. . .” *Id.* The Court rejected that argument stating: “Where the language of a release is clear and unambiguous, the intent of the parties is ascertained from the plain and ordinary meaning of the language.” *Id.*

Next in the progression came *Ruppel v Carlson*, 2002 WL 31928576 (Docket No. 235266 *rel'd* November 8, 2005). There, as in *Romska, Samuel* and here, the plaintiff signed a release that extended to “all other persons.” The Court held, first, that the language of the release was clear and unambiguous and, therefore, the trial court erred by considering parol evidence to determine the intent of the parties and, secondly, that the

release operated to discharge the remaining Defendant from liability. Significantly, for the present purpose, the Court stated:

“The fact that a party regrets the foreseeable results of a document he freely signed is insufficient to throw the release language into doubt, particularly where, as here, the signing party does not claim fraud and is represented by counsel who is presumed to be competent to advise his client regarding the nature and extent of the release.” (Underlining supplied.)

Application of the principle set first in these cases leads inexorably to the conclusion that the Releases in this case constitute a complete release of liability with respect to the Defendants in connection with the incident underlying the Releases. The fact that the plaintiff may not have intended to release anyone besides the defendants with whom he settled is legally irrelevant and immaterial where, as here, he signed two Releases which, by their terms, extend to “all other persons.”

Plaintiff contends, and this is the real core of his position, that the Defendants are not entitled to rely on the two Releases which he signed as the bases for summary disposition because, despite the inclusion of the unambiguous phrase “all other persons,” he did not really intend to release them.¹³ While that contention may have some merit in

¹³ The core of Plaintiff’s position is clearly set forth in the single sentence that appears on p 1 of his Application for leave to Appeal. There, Plaintiff states:

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

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some other states, it assuredly has no merit in Michigan. Michigan applies the rule holding that a general release extending to “all other persons” is unambiguous and, therefore, discharges all potential defendants, both named and unnamed. *See Romska v Opper, supra; Taggart v United States*, 880 F2d 867 (6th Cir 1989) (ruling, based on Michigan law, that a release that discharges “any and all other persons” releases all noted classes from liability notwithstanding the assertion by the Plaintiff and an Affidavit from the settling party that they did not intend to release the Defendant). Simply put, Plaintiff’s unstated asserted intention to not release the Defendants is legally irrelevant and the trial court judge was simply wrong as a matter of law in permitting that asserted fact to enter into his analysis of the summary disposition motion. He simply failed to follow the law.

In an attempt to avoid applying *Romska v Opper*, the trial court Judge relied on the case of *Herrick v Sosnowski*, 2005 WL 12244694 (Docket No. 252299 *rel’d* May 24, 2005), to support his determination that the release involved in this case was ambiguous. Opinion and Order, dated December 6, 2007, p 4. Even a cursory reading of that case shows that it is distinguishable from this case because the ambiguity there resulted from the fact that the Release, itself, at one point, stated that it was restricted to the settling

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That statement certainly begs the question. The question is: how is intent to be determined? The answer is that intent is to be determined from the language that parties utilize in their documents. A court’s obligation is to determine the intent of the parties to a contract by examining the language of the contract itself according to its plain and ordinary meaning. *In Re Smith Trust*, 480 Mich 19; 745 NW2d 754 (2008). Plaintiff is really saying that the parties to the Releases agreed to something entirely different from what is stated clearly and unambiguously.

Defendants only and in another place stated that it extended to “any other person.” On those facts, the Court of Appeals did find an ambiguity stating:

“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 [*Romska* and *Ruppel*].”

In this, the Shay case, the Releases do not include the word “only.” Therefore, there is no ambiguity. Parol evidence was simply inadmissible. Summary disposition was mandated.

Before leaving this argument, two points must be made. Plaintiff criticizes and challenges the Court of Appeals application of *Romska v Opper, supra*, arguing that *Romska* is distinguishable from this case in many respects. Defendants contend that the Court’s treatment of the claimed distinctions between *Romska, supra*, and this case is correct in all regards. With respect to Plaintiff’s argument that the lack of a merger clause in the two Releases in this case renders *Romska, supra*, inapplicable, Defendants emphasize that in *Romska*, the Court of Appeals expressly cited two independent reasons for its conclusion that it was inappropriate to look to parol evidence in determining the scope of the Release. The first reason was that “. . . the language of the Release is unambiguous and thereby precludes resort to allegedly contradictory parole evidence” *Romska, supra* at p. 516. The second reason was that “. . . the release contains an explicit merger clause that independently precludes resort to parole evidence.” *Romska, supra* at p. 516 (underling supplied). Clearly, the Court in *Romska, supra*, held that the unambiguous nature of the language of the Release was in and of itself, and independent of the fact that a merger clause existed, sufficient to mandate the conclusion that the terms of the two

Releases, and those terms only, were all that can be considered in determining the scope of the Releases.

Secondly, Defendants note that Plaintiff argues that the Releases are ambiguous because the first paragraph containing the actual language of the Releases uses language which is different than the third, fourth and fifth paragraphs of the Releases which relate to indemnification. The argument has no merit. It has no merit because the Releases themselves and the indemnity agreements are separate promises by the Plaintiff. They apply to separate and different things. The former apply to claims by the Plaintiff. The latter apply to claims by others against the Allen Park Police Officers. The assumed fact that one may be broader or narrower than another does not make either one ambiguous nor is consistency between them required.

ARGUMENT II

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TWO RELEASES WERE SUPPORTED BY CONSIDERATION.

The trial court judge also based his decision to deny summary disposition on the ground that the sufficiency or adequacy of the consideration paid to Plaintiff in exchange for the release needed to be considered. Opinion and Order dated December 6, 2007, p 5.

He was simply wrong. Consideration is a bargained-for exchange. A court will not inquire into the sufficiency of consideration. *General Motors Corp v Department of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002); *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 596; 669 NW2d 304 (2003). The \$12,500 paid to the Plaintiff by the Allen Park Defendants met the definition of consideration and Judge Edwards had no legal basis to inquire into the adequacy of that consideration. To accept the argument that there was no consideration for the two Releases would lead to the conclusion that the Releases themselves have no legal effect as to anyone - - and Plaintiff admits that he intended them to have operative effect as to someone, the Allen Park Police Officers.

Furthermore, there is no legal requirement that the consideration which is paid for a release come from the party which is an intended third-party beneficiary thereof. *Jachim v Coussens*, 88 Mich App 648; 278 NW2d 708, (1979); MCL 600.1405; *Romska v Opper*,

supra (release discharged American States' insured from liability even though there was no evidence that it had paid any consideration to plaintiff for the release from liability).¹⁴

Moreover, where a release is part of a larger agreement involving multiple promises, the rule is that the consideration paid for all of the promises is also consideration for each one. *Rowady v KMart Corp*, 170 Mich App 54, 59; 428 NW2d 22 (1988). The necessary conclusion is that the two Releases are not invalid for want of consideration.

In his Application/Brief, Plaintiff argues that he received no consideration for the two Releases except what the settling defendants had a pre-existing duty to pay under MCR 2.403(M). He cites cases which stand for the proposition that performance which is already required does not constitute consideration. While that may be an accurate statement of the law in some contexts, it does not apply in this context where consideration for a release is given as part of a unified, contemporaneous transaction.

Even “. . . where there is no specific recitation of separate consideration^[15] for a release, but it is part of a larger contract involving multiple promises, the basic rule is that

¹⁴ In *Theodore v Horenstein*, 2009 WL 1506791 (Docket No. 285153, *rel'd* May 26, 2009), the Court of Appeals acknowledged that:

“This Court has recognized that a release may bar a claim against a defendant who did not provide consideration for its signing. See *Rinke v Automotive Moulding Co*, 226 Mich App 432, 438; 573 NW2d 344 (1997), and *Schofield v Spilker*, 37 Mich App 33, 35; 194 NW2d 549 (1971).”

¹⁵ Here, there was a specific recitation of consideration. The July 12, 2007 letter from counsel for the Allen Park police officers to Plaintiff's counsel, Plaintiff's Brief, Exhibit 5, states “in addition, I enclose for Mr. Shay's signature, Releases of All Claims and Indemnity Agreement for Derivative Claims as it relates to my clients citing the case (Continued on next page.)”

consideration paid for all the provisions in consideration for each promise.” *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741, 743-44 (2005); *Rowady v K Mart Corp*, 170 Mich App 54, 59; 428 NW2d 22, 25 (1988). *See also*, *Stout v Withrow*, 2008 WL 400695 (Docket No. 400195 rel’d February 14, 2008).

Stout v Withrow, supra, clearly sets forth this principle in a setting analogous to the present one. There, the parties signed an agreement to purchase real estate on December 10, 2001 which obligated the plaintiff to purchase and the defendant to sell a house. The closing was held a month later. At that time, the plaintiff signed a Purchaser’s Satisfaction document which contained a release. Subsequently, plaintiff sued the defendant on various theories based on the condition of the house. The defendant sought summary disposition based on the release provision in the Purchaser’s Satisfaction document. On appeal, the plaintiff argued that the release in the purchaser’s Satisfaction document was invalid due to lack of consideration. The Court of Appeals disagreed holding that because there was consideration supporting the contract for the purchase of the home, there was consideration to support the release, which was not a separate and distinct transaction.

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evaluation awards (\$12,500.00) as consideration.” (Underlining supplied.) Furthermore, and more importantly, the two Releases themselves say the Release/Discharge was given “for the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 (\$12,500) DOLLARS. . . .”

Also, Plaintiff conceded that “. . . counsel for the Allen Park officers . . . asked to have the case evaluation settlement accomplished by ‘Release’ . . . with ‘the case evaluation award (\$12,500) as consideration.’” Plaintiff’s Court of Appeals Brief, p 3.

By analogy, the same conclusion obtains here. Because there is, of course, consideration supporting the dismissal based on the acceptance of the case evaluation award, there is consideration to support the two Releases.

ARGUMENT III

THE MELVINDALE POLICE OFFICERS WERE INTENDED THIRD-PARTY BENEFICIARIES OF THE RELEASES.

The Melvindale Police Officers had a statutory right to enforce the Releases in question because they were intended third-party beneficiaries thereof.

MCLA 600.1405; MSA 27A.1405 provides:

“600.1405. Rights of third party beneficiaries

Sec. 1405. Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise made directly to him as the promisee.

The test of whether an entity is a third-party beneficiary of a contract is objective.¹⁶

The subjective intent of the parties to the contract is legally irrelevant.¹⁷ *Alcona*

¹⁶ In determining whether someone is an intended third-party beneficiary of a contract, the contract itself is to be examined using an objective standard. *Schmalfeldt v North Point Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003).

¹⁷ “So long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded him, not as an end in itself, but for the sole purpose of securing to the promisee some consequent benefit or immunity. In short, the motive, purpose, or desire of the parties is a quite different thing from their intention. The former is immaterial; the intention as disclosed by the terms of the contract, governs. It is to be borne in mind that the parties are presumed to intend the consequences of a performance of the contract. That which is contemplated by the terms of the contract is ‘intended’ by the parties’. Annotation: *Right of Third Persons to Enforce Contract Between Others for His Benefit*, 81 A.L.R. 1271, 1287. *Talucci v Archambault*, 20 Mich App 153, 160, 173 NW2d 740, 743 (1969).

See also, Guardian Depositors Corp v Brown, 290 Mich 433, 437-438, 287 NW 798 (1939).” *Jachim v Coussens*, *supra* (underlining supplied).

Community Schools v State of Michigan, 216 Mich App 202, 205; 549 NW2d 356 (1996); *Alden State Bank v Old Kent Bank - Grand Traverse*, 180 Mich App 40, 44; 446 NW2d 599 (1989). “An objective standard is to be used in determining, “from the form and meaning of the contract itself, whether the promissor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status. A court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of 1405.” *Venerian v Charles L. Pugh, Co, Inc*, 279 Mich App 431; 761 NW2d 108 (2008) quoting *Schmalfeldt v Northpointe Ins Co, supra*. Plaintiff’s inclusion of the phrase “all other persons” in the release objectively established the Melvindale Police Officers’ status as third-party beneficiaries. Since they were and are third-party beneficiaries of the “Release of Claims and Indemnity Agreement,” they had a vested right to enforce the release.

ARGUMENT IV

**THE COURT OF APPEALS CORRECTLY
DETERMINED THAT PLAINTIFF LOST ANY RIGHT
OR ABILITY TO SEEK REFORMATION OF THE
RELEASES ON THE DAY THE MELVINDALE POLICE
OFFICERS RELIED ON THEM WHEN THEY FILED
THEIR MOTION FOR SUMMARY DISPOSITION.**

Plaintiff's ability to seek any modification,¹⁸ *i.e., reformation*, of the Releases ended when the Melvindale Police Officers filed their Motion for Summary Disposition. MCL 600.1405(2)(a); 17A, Am Jur2d, §451, p 429; 6A Michigan Law & Practice, *Contracts*, §223. *See also*, Annotation: *Mutual Rescission or Release of Contract as Affecting Rights of Third-Party Beneficiary*, 97 ALR2d 1262 where it is stated:

“. . . where a third-party beneficiary contract has been accepted or acted upon by the third-party, it cannot be rescinded by the principal parties without the third-party's consent.” (Underlining supplied.)

97 ALR2d at 1264.

¹⁸ Plaintiff asserted that this is not “. . . 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.” Plaintiff's Court of Appeals Brief, p 48, underlining in original. Of course, Plaintiff is seeking to modify the two Releases - - to the detriment of the Defendants who relied on them when they filed their motion for summary disposition - - by seeking to include the sentence: “This Release does not operate to release any other party in the Wayne County Circuit Case No. 06-60825-NZ with the exception of the parties herein named.” See Plaintiff's Emergency Motion for Reformation of Releases, dated December 18, 2007, p 5, attached as Exhibit 3 to Plaintiff-Appellee's Motion for Remand of Jurisdiction to the trial court for the limited purpose of a hearing on Plaintiff's pending Motion for Reformation, which was filed in the Court of Appeals on February 8, 2008 and denied on March 14, 2008.

The Restatement 2d, *Contracts*, §311(3) provides that the power of the contracting parties to modify a contract made for the intended benefit of another terminates when the beneficiary brings suit on it. After the third person, here the Melvindale Police Officers, accepts or acts upon a contract entered into for his benefit, the parties thereto cannot rescind or modify it without his consent so as to affect him or deprive him of any right thereunder. *Wolosoff v Gadsden Land and Building Corp*, 245 Ala 628; 18 So2d 568 (1944); *Baldwin v Leach*, 115 Idaho 713; 769 P2d 590 (1989). A situation quite similar to the present one was presented in *Burns v General Motors Corp*, 950 F Supp 137, 139 (D Md 1996). There, a plaintiff executed a release with one defendant which, by its terms, extended to a remaining defendant. The remaining defendant filed its motion for summary judgment based on the release. The plaintiff then entered into an amended release purporting to restrict its scope. The Court held that the defendant was the intended beneficiary of the original release and that the plaintiff's power to modify that release terminated as soon as the defendant filed its motion for summary judgment. *See also, Auer v Kawasaki Motors Corp*, 830 F2d 535 (4th Cir 1987) ("while a releasee may consent to the recreation of a cause of action against it, two parties of a release may not recreate a discharged cause of action against a third party without the third party's consent.")

These principles were applied by the Court of Appeals in *Burkhart Associates, Inc v Nowakowski*, 2008 WL 4367528 (Docket Nos. 277744 and 279402, *rel'd* Sept. 25, 2008); *lv den*, ___ Mich ___; 763 NW2d 914; 2009 WL 1108466 (2009). There, Plaintiff filed a claim for unpaid commissions arising from his employment with Burkhart. After Plaintiff's employment with Burkhart was terminated, he accepted employment with NICA

Sales Group. After he began his litigation against Burkhart, Plaintiff and NICA executed an employment agreement which contained a release provision. The Court of Appeals determined that the Release encompassed the claims against Burkhart.

The plaintiff there, like the Plaintiff here, argued that the trial court should have considered an amended agreement with the other party to the release in order to discern their true intent. The Court of Appeals disagreed stating that “. . . the plain and unambiguous language of the release was required to be enforced, without regard to a party’s affidavit stating that he never intended for the release to apply to the defendant in question.” *Burkhart, supra* at p *4, citing *Meridian Mut’l Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 650; 620 NW2d 310 (2000).

Then, the Court of Appeals rejected the plaintiff’s argument that he and the other contracting party were entitled to revoke the defendant’s third-party beneficiary rights by reforming or modifying the release. The Court stated:

“More importantly, Nowakowski and NICA were not free to revoke any existing third-party beneficiary rights by modifying the contract, and so the trial court did not have the authority to reform the contract to comport with the parties’ true intent.” *Burkhart, supra* at p *4.

The Court emphasized that the Defendant’s third-party rights were vested and could not be rescinded:

“[Burkhart’s] . . . third-party beneficiary rights became vested when the original employment agreement was made, and could not thereafter be rescinded without its consent.

* * *

We also disagree with Nowakowski's argument that his employment agreement with NICA may be reformed to negate Burkhart's third-party rights." *Burkhart, supra* at pp *4-5.

Lastly, the Court of Appeals rejected the Plaintiff's argument that any "mistake" doctrine entitled him to reform the release to the detriment of the Defendant stating:

"Nowakowski argues that the inclusion of Burkhart within the scope of the release was a mutual mistake that the trial court may correct through reformation. However, the use of language with a broader scope than the parties intended constitutes a mistake of law concerning the legal effect of their agreement, not a mistake of fact. *Schmalzriedt, supra* at 120, 9 N.W.2d 24; *Casey, supra* at 398, 729 N.W.2d 277. Further, the cases cited by Nowakowski in which courts reformed releases in accordance with the parties' true intent do not involve restricting the class of persons covered by a release, whose interests are otherwise protected by MCL 600.1405(2)(a)." *Burkhart, supra* at p *6.

Here, the Melvindale Police Officers accepted and adopted the Releases of which they were objectively intended third-party beneficiaries on October 19, 2007 when they filed their Motion for Summary Disposition arguing that by virtue of the Releases they were entitled to a dismissal of Plaintiff's claim with prejudice. Their right to enforce the Releases became vested at that point. Plaintiff's right to reform or modify the Releases in any way ended at that same point.

Furthermore, and in any event as a matter of substantive law, Plaintiff was not entitled to reform the two Releases. A person cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed or that he supposed it was different in its terms. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567, 568; 596 NW2d 915 (1999); *Komraus*

Plumbing & Heating, Inc v Cadillac Sands Motel, Inc, supra. Otherwise stated, it is a basic principle of Michigan law that a party who has not read the contents of a contract before signing it may not claim that his intention was different from that stated in the writing. *Richeson v Wagar*, 287 Mich 79, 84; 282 NW 909 (1938); *Sanborn v Sanborn*, 104 Mich 180, 184; 62 NW 371 (1895). “The stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge. . . . His failure to do so is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents, in the absence of circumstances fairly excusing his failure to inform himself.” *Sponseller v Kimball*, 246 Mich 255; 224 NW 359 (1929) citing, *Warren v Federal Life Ins Co*, 198 Mich 343; 164 NW 449 (1917). In this case, there are, obviously, no circumstances fairly excusing Plaintiff’s failure to inform himself of the contents of the Releases because he had his lawyer for that very purpose. He may not now seek reformation on the ground that his intention in executing the two Releases was different from that stated in the two separate writings.

Defendants contend that a Court, in situations like the present one, should not permit a putative reformation exception to eliminate the general release rule of *Romska v Opper, supra* -- which it certainly would do if reformation was permitted whenever a plaintiff, like Mr. Shay, could simply say, “I did not intend to release the remaining defendants.” In other contexts, courts have noted that they must be cautious in extending the scope of exceptions to general rules to prevent the so-called exceptions, like rodent-consuming anacondas or pythons, from swallowing the general rule. *See* 1 S. Spicer, C.

Kraus and A. Gands, *The American Law of Torts*, §: 23, p 676 (1983) (cited in *Haufle v Sboboda*, 416 NW2d 879, 890 (SD 1987). There would have been no point for the Courts in the foregoing cases to have decided that the general release entitled the defendant to summary disposition if the plaintiff could have easily avoided that result by simply claiming that he did not intend to release the remaining defendant and that the release should have been reformed to reflect that intent. The fact that the courts did decide that the defendants were entitled to summary disposition, demonstrates that reformation is not available in this situation.

ARGUMENT V

THE COURT OF APPEALS CORRECTLY DETERMINED THAT JUDGE THOMAS WAS WRONG AS A MATTER OF LAW IN HIS INITIAL DETERMINATION THAT A DEFENDANT MAY ONLY RELY ON RELEASES WHICH ARE ENTERED INTO PRIOR TO THE FILING OF THE PLAINTIFF'S COMPLAINT -- AND, CONVERSELY, MAY NOT RELY ON RELEASES WHICH ARE EXECUTED BY THE PLAINTIFF DURING THE COURSE OF THE LITIGATION -- BECAUSE RELEASES WHICH DO NOT EXIST AT THE TIME THE PLAINTIFF FILES HIS COMPLAINT OBVIOUSLY CANNOT BE RAISED IN THE DEFENDANT'S ANSWER.

A. Introduction.

Before engaging in an analysis of this issue, Defendants note that Plaintiff has not briefed this issue in his Application for Leave to Appeal. He has said that he “does not waive his objection to the procedural rulings” Application for Leave to Appeal, p 11 fn, 1. However, “not waiving” an issue is not sufficient to present it to this Court or to preserve it in any manner. The issue has been waived. In the unlikely event that this Court has any inclination to consider this issue, the following discussion will demonstrate that it has no merit.

B. A Remaining Defendant is Entitled to Rely on a Release Given to a Prior Defendant Subsequent to the Commencement of the Action.

Having addressed the clear, substantive error, in the lower court's denial of summary disposition, Defendants need to spend only little time demonstrating that the original basis for the denial of summary disposition was simply wrong. Judge Edwards

initially denied the Motion for Summary Disposition on the ground that the only releases that a Defendant may rely on under MCR 2.116(C)(7) are those which have been executed prior to the commencement of the action. Of course, that is wrong since a Defendant cannot be penalized for failing to include in its answer, a defense which does not even exist at the time the answer is filed.

In *Ruppel v Carlson, supra*, the trial judge made the same mistake which Judge Edwards made in this case. There, the Plaintiff settled with one Defendant and executed a release extending to “all other persons.” The remaining Defendants then sought summary disposition. The trial court denied the Defendants’ Motion to Amend the Affirmative Defenses to include the defense of release and denied summary disposition. The Court of Appeals reversed. The Court squarely rejected the argument that the affirmative defense of release is only available when a release is executed before commencement of the action. The Court held that the release in that case applied to the pending litigation with the Defendant. The same conclusion necessarily obtains here.

The timing of the execution of a release has no legal relevance whatsoever to the issue of the effect which must be given to it. It is, of course, impossible for a defendant to plead a non-existing-at-that-time release when he files his Answer in order to avail himself of that defense. Where, as here, a release is executed during the course of litigation, a trial court abuses its discretion in refusing to permit the remaining defendants to amend their answer to include the newly-created defense of release. *Moorehouse v Ambassador Ins Co, Inc*, 147 Mich App 412; 383 NW2d 219 (1986) (it makes sense to allow affirmative

defenses to be raised when they become legally available). There exists no time or procedural bar to the Defendants' right to summary disposition.

In *Burkhart Associates, Inc v Donald R. Nowakowski, supra*, the Plaintiff stated in an affidavit that he did not sign the agreement containing the release until September 21, 2006, after the litigation against his prior employer began. The Court of Appeals held that even though the release may have been executed after Plaintiff sued Burkhart, it was nonetheless effective. The Court of Appeals stated:

“Regardless of when the release was executed, the unambiguous language of the release encompasses Nowakowski’s claims against Burkhart, thus precluding this Court from looking beyond the language of the agreement to ascertain the parties’ intent.”

Burkhart Associates, supra, at p *3.

Defendants contend that the *Burkhart* case further supports their contention that a defendant may rely on a release which is entered into during the course of litigation.

Plaintiff has contended that Defendants' positions with respect to the interpretation MCR 2.116(C)(7) and the two July 24, 2007 Releases are inconsistent. Plaintiff has argued that Defendants want to apply a strict interpretation of the July 24, 2007 Releases but an interpretation of MCR 2.116(C)(7) that is not a strict one. Defendants' positions are not inconsistent. They are not inconsistent because the July 24, 2007 Releases are not ambiguous¹⁹ while MCR 2.116(C)(7) is ambiguous, thereby necessitating the application of different principles.

¹⁹ Again, it cannot be emphasized too strongly that Plaintiff conceded that:
(Continued on next page.)

MCR 2.116 (C)(7) provides:

“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.”

Plaintiff contends that this Court Rule entitles a defendant to summary disposition only when a release predates the commencement of the action. Plaintiff is wrong.

Any other conclusion would be absurd because it would, in effect, change the substantive law concerning the effect of a release, making it dependent on the timing of the execution of the release, *i.e.*, pre or post-suit, and constitute a denial of equal protection since there is no rational basis for such a distinction. In other words, the position advocated by Plaintiff with respect to MCR 2.116(C)(7) is absurd.

The interpretation of a court rule follows the general rules of statutory construction and both “must be construed to prevent absurd results, injustice, or prejudice to the public interest.” *Hill v City of Warren*, 276 Mich App 299, 305; 740 NW2d 706 (2007) (citing *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367(1999)). While this Court has disapproved of the absurd-results rule as an improper invitation to judicial lawmaking in circumstances in which a statute is unambiguous, see *People v McIntire*, 461 Mich 147,

(Continued from previous page.)

“The Release, by itself, is unambiguous, and the intention of the parties thereto is clear.” Plaintiff’s Response to Melvindale Defendants’ Motion for Summary Disposition dated November 2, 2007 at p 19.

155, fn 2; 599 NW2d 102 (1999), MCR 2.116(C)(7) is, at a minimum, ambiguous with respect to the scope of application of the phrase “before commencement of the action.”

It is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation.” *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004), citing *Haveman v Kent County Road Comm’n*, 356 Mich 11, 18; 96 NW2d 153 (1959). *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). “Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.” 2 A Sutherland, *Statutes and Statutory Construction*, §47.33; *Cameron v Auto Ins Ass’n*, 476 Mich 55; 718 NW2d 784 (2006). Under this rule, the phrase “before commencement of the action” modifies only the phrase “other disposition of the claim” which is the last phrase preceding the phrase in question. There is no comma separating the clause “before commencement of the action” from the last antecedent, “other disposition of the claim.” As such, the necessary and “non-absurd,” interpretation of MCR 2.116(C)(7) is that a plaintiff’s claim may be barred by all releases and not just those executed before commencement of the action. The Court of Appeals correctly reached this result.

ARGUMENT VI

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE LOWER COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO AMEND TO SET FORTH THE DEFENSE OF RELEASE.

An understanding of the timing of what occurred in the lower court is essential to an understanding of this issue. As set forth above, the two Releases were not provided to counsel for Defendants until October 2007. On October 19, 2007, Defendants filed their Motion for Summary Disposition based on the Releases. It was not until Judge Edwards denied that Motion on the ground that a defendant may only rely on releases which are entered prior to the filing of the plaintiff's complaint and, conversely, may not rely on releases which are executed by plaintiffs during the course of litigation, see the discussion in this regard *supra*, that there was any need for Defendants to seek to amend their Answer. They did so within 12 days of Judge Edwards' ruling. Under these circumstances, Defendants contend that the necessary and only conclusion is that they did not unduly delay in seeking leave to amend.

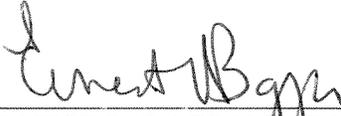
Moreover, and more importantly, delay alone does not warrant denial of a motion to amend. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997). In addition, there must be prejudice which "... does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits." *Weymers v Khera, supra*. The only prejudice that Plaintiff will suffer in this case is the grant of summary disposition in

favor of the Defendants based on the two Releases. This is not the requisite type of “prejudice” that will support the denial of leave to amend.

CONCLUSION

Based on the foregoing analyses and citations to authority, Melvindale Police Officers, John Aldrich, William Plemons and J. Miller, contend that this Court should deny Plaintiff's Application for Leave to Appeal.

PLUNKETT COONEY

BY: 
ERNEST R. BAZZANA (P28442)
PETER W. PEACOCK (P37201)
Attorney for Melvindale Defendants
535 Griswold - Suite 2400
Detroit, MI 48043
(313) 983-4798

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