

STATE OF MICHIGAN
IN THE SUPREME COURT

THOMAS JOHN SHAY,
Plaintiff-Appellant,

Docket No. 138908
Court of Appeals docket no. 282550
Wayne Circuit Court No. 06-608275-NZ
Hon. Prentis Edwards

-vs-
JOHN ALDRICH, WILLIAM PLEMONS,
and J. MILLER,

Defendants-Appellees

and

ALLEN PART POLICE OFFICERS
ALBRIGHT and LOCKLEAR

Defendants.

**BRIEF OF AMICUS CURIAE
MICHIGAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF-
APPELLANT'S APPLICATION FOR
LEAVE TO APPEAL**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... iii
INDEX OF AUTHORITIES.....v
STATEMENT OF QUESTIONS PRESENTED..... viii
INTEREST OF AMICUS CURIAEx
STATEMENT OF FACTS1

ARGUMENT I

THIS COURT SHOULD GRANT LEAVE AND CLARIFY THAT AN OPTIONAL
RELEASE AGREEMENT BETWEEN TWO PARTIES WHO HAVE ACCEPTED
CASE EVALUATION DOES NOT “TRUMP” THE CASE EVALUATION RULES.....2
 (a) Under the case evaluation rules, no release of claims is required.2
 i. Mutual acceptance of a case evaluation recommendation is the equivalent
 of a judgment. 2
 ii. Where there are multiple parties, acceptance of the case evaluation as to
 one pair of parties does not affect the progress of the case as to the others. 3
 (b) The Court of Appeals’ decision will undermine the goal of civility between
 opposing counsel.....4

ARGUMENT II

THIS COURT SHOULD OVERRULE *ROMSKA v OPPER* TO THE EXTENT
THAT IT ALLOWS A THIRD PARTY TO BENEFIT FROM A RELEASE
WHERE THE PARTIES TO THE CONTRACT DID NOT INTEND THAT
RESULT.5
 (a) A release of liability applies only to those claims the parties intended to
 release.5
 (b) A release may be interpreted in context.....6
 (c) *Romska* has led to untenable results.....7

ARGUMENT III

A COURT MAY EXERCISE ITS EQUITABLE POWERS TO REFORM A
RELEASE TO REFLECT THE INTENTION OF THE PARTIES.....11
 (a) Michigan circuit courts retain their power to “do equity.”11
 (b) A court may reform a contract to reflect the intent of the parties.....12
 (c) A court acting in equity may reform a release.12
 (d) Allowing reformation of releases where the parties clearly did not intend to
 release a third party will not result in a flood of litigation.....15
 (e) 16The present case is one in which reformation of a release would be
 particularly appropriate.16

RELIEF REQUESTED.....17

INDEX OF AUTHORITIES

Cases

<i>Adair v State</i> , 250 Mich App 691; 651 NW2d 393 (2002).....	6
<i>Auto Club Ins Ass'n v State Farm Ins Cos</i> , 221 Mich App 154; 561 NW2d 445 (1997).....	2
<i>Auto-Owners Ins Co v Elchuk</i> , 103 Mich App 542; 303 NW2d 35 (1981).....	12
<i>Bartrand v Chesapeake & Ohio R Co</i> , 87 Mich App 466; 274 NW2d 822 (1978).....	14
<i>Beck v McKinzie</i> , unpublished opinion per curiam of the Court of Appeals, issued 11/20/01 (Docket No. 223680).....	8
<i>Bush v Mobil Oil Corp</i> , 223 Mich App 222; 565 NW2d 921 (1997).....	2
<i>CAM Constr v Lake Edgewood Condo Ass'n</i> , 465 Mich 549; 640 NW2d 256 (2002).....	2
<i>Casey v Auto Owners Ins Co</i> , 273 Mich App 388; 729 NW2d 277 (2006).....	12
<i>Centala v Navrude</i> , 45 Mich App 282; 206 NW2d 544 (1973).....	14
<i>Chuby v GMC</i> , 69 Mich App 563; 245 NW2d 134 (1976).....	15
<i>Collier v Thomas</i> , unpublished opinion per curiam of the Court of Appeals, issued 4/26/05 (Docket No. 252018).....	9
<i>Denton v Utley</i> , 350 Mich 332; 86 NW2d 537 (1957).....	13
<i>Dilorenzo v Kirkpatrick</i> , unpublished opinion per curiam of the Court of Appeals, issued 2/14/06 (Docket No. 261748).....	8
<i>Doe v Mitchell</i> , 397 Mich 225; 244 NW2d 827 (1976).....	11
<i>Gavins v Detroit</i> , unpublished opinion per curiam of the Court of Appeals, issued 3/6/07 (Docket No. 270162).....	9
<i>Genesee Foods Servs v Meadowbrook, Inc</i> , 279 Mich App 649; 760 NW2d 259 (2008).....	6
<i>Groh-Willis v Great West Casualty Ins Co</i> , unpublished opinion per curiam of the Court of Appeals, issued 11/19/02 (Docket No. 235054).....	9
<i>Harris v Lapeer Public School System</i> , 114 Mich App 107; 114, 318 NW2d 621 (1982) 5, 13, 14	
<i>Hartford Accident & Indem Co v Norris</i> , 363 Mich 279; 109 NW2d 790 (1961).....	14
<i>Heritage Resources, Inc v Caterpillar Financial Services Corp</i> , ___ Mich App ___; ___ NW2d ___ (Docket No. 284036), rel'd 6/30/09.....	7
<i>Hutcherson v Smith</i> , unpublished opinion per curiam of the Court of Appeals, issued 11/4/04 (Docket No. 248143).....	8
<i>Ivinson v Hutton</i> , 98 US 79 (1878).....	15
<i>Jack v Hastings Mutual Ins Co</i> , unpublished opinion per curiam of the Court of Appeals, issued 11/20/08 (Docket No. 278109).....	10
<i>Joan Auto Indus, Inc v Check</i> , 214 Mich App 383; 543 NW2d 15 (1995).....	2

<i>Kent v Klein</i> , 352 Mich 652; 91 NW2d 11 (1958).....	11
<i>Khalil v Reliance Nat'l Ins Co</i> , unpublished opinion per curiam of the Court of Appeals, issued 4/14/05 (Docket No. 251912)	9
<i>Kinyon v Secura Ins Co</i> , unpublished opinion per curiam of the Court of Appeals, issued 12/28/01(Docket No. 226064)	10
<i>Klawiter v Reurink</i> , 196 Mich App 263; 492 NW2d 801 (1992)	2
<i>Malone v SCM Corp</i> , 63 Mich App 11; 233 NW2d 872 (1975)	15
<i>Meridian Mut Ins Co v Mason-Dixon Lines, Inc</i> , 242 Mich App 645; 620 NW2d 310 (2000).....	8
<i>Murray v Arce</i> , unpublished opinion per curiam of the Court of Appeals, issued 5/20/03 (Docket No. 238757)	8
<i>Murray v Black</i> , unpublished opinion per curiam of the Court of Appeals, issued 1/5/06 (Docket No. 264861)	8
<i>Olsen v Porter</i> , 213 Mich App 25; 539 NW2d 523 (1995)	13
<i>Raymond v Auto-Owners' Ins Co</i> , 236 Mich 393; 210 NW 247 (1926).....	12
<i>Reddam v Consumer Mortgage Co</i> , 182 Mich App 754; 452 NW2d 908 (1990).....	2
<i>River Rouge Savings Bank v Fisher</i> , 372 Mich 558; 127 NW2d 426 (1964).....	15
<i>Romska v Opper</i> , 234 Mich App 512; 594 NW2d 853 (1999).....	7, 9, 10, 11
<i>Ross v Damm</i> , 271 Mich 474; 260 NW 750 (1935).....	13
<i>Samuel v Moran Mitsubishi</i> , unpublished opinion per curiam of the Court of Appeals, issued 5/24/02 (Docket No. 229464)	8
<i>Schmalzriedt v Titsworth</i> , 305 Mich 109; 9 NW2d 24 (1943).....	15
<i>Smith v City of Flint Sch Dist</i> , 80 Mich App 630; 264 NW2d 368 (1978).....	15
<i>Solo v Chrysler Corp</i> , 408 Mich 345; 292 NW2d 438 (1980)	12
<i>State Employees Ass'n v Dep't of Mental Health</i> , 421 Mich 152; 365 NW2d 93 (1984).....	11
<i>Stitt v Mahaney</i> , 403 Mich 711; 272 NW2d 526 (1978).....	5
<i>Trongo v Trongo</i> , 124 Mich App 432; 335 NW2d 60 (1983)	5, 13
<i>Warren Tool Co v Stephenson</i> , 11 Mich App 274; 161 NW2d 133 (1968).....	11
<i>Whitmore v Ford Motor Co</i> , unpublished opinion per curiam of the Court of Appeals, issued 6/26/01(Docket No. 216132)	8
<i>Windham v Morris</i> , 379 Mich 188; 121 NW2d 479 (1963)	15
<i>Zahn v Kroger Co of Mich</i> , 483 Mich 34; 764 NW2d 207 (2009).....	7

Statutes

Const 1963, art 6, § 5 11
Const 1963, art 6, §13 11
US Const, art III, §2 11

Rules

MCR 2.403 2
MCR 2.403(L)(3)(a) 4
MCR 2.403(L)(3)(b) 4
MCR 2.403(M) 3
MCR 2.403(M)(2) 3

Treatises

Pomeroy's Equity Jurisprudence, § 1235 11

Other Authorities

66 Am Jur 2d, Reformation of Instruments, § 27 12
Black's Law Dictionary (8th ed) 11, 16
Dickens, *Oliver Twist* 16

STATEMENT OF QUESTIONS PRESENTED

I.

SHOULD THIS COURT GRANT LEAVE AND CLARIFY THAT AN OPTIONAL RELEASE AGREEMENT BETWEEN TWO PARTIES WHO HAVE ACCEPTED CASE EVALUATION DOES NOT "TRUMP" THE CASE EVALUATION RULES?

Plaintiff-Appellant Thomas John Shay answers "YES."

Defendants-Appellees John Aldrich, William Plemons and J. Miller would answer "NO."

Amicus Michigan Association of Justice answers "YES."

This question was not before the lower courts.

II.

SHOULD THIS COURT OVERRULE *ROMSKA v OPPER* TO THE EXTENT THAT IT ALLOWS A THIRD PARTY TO BENEFIT FROM A RELEASE WHERE THE PARTIES TO THE CONTRACT DID NOT INTEND THAT RESULT?

Plaintiff-Appellant Thomas John Shay answers "YES."

Defendants-Appellees John Aldrich, William Plemons and J. Miller would answer "NO."

Amicus Michigan Association of Justice answers "YES."

This question was not before the lower courts.

III.

MAY A COURT EXERCISE ITS EQUITABLE POWERS TO REFORM A RELEASE TO REFLECT THE INTENTION OF THE PARTIES?

Plaintiff-Appellant Thomas John Shay answers "YES."

Defendants-Appellees John Aldrich, William Plemons and J. Miller would answer "NO."

Amicus Michigan Association of Justice answers "YES."

The trial court answered "YES."

The Court of Appeals answered "NO."

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

STATEMENT OF FACTS

Amicus curiae adopts the statement of facts set out in plaintiff-appellant's application for leave to appeal.

ARGUMENT I

THIS COURT SHOULD GRANT LEAVE AND CLARIFY THAT AN OPTIONAL RELEASE AGREEMENT BETWEEN TWO PARTIES WHO HAVE ACCEPTED CASE EVALUATION DOES NOT “TRUMP” THE CASE EVALUATION RULES.

(a)

Under the case evaluation rules, no release of claims is required.

- i. *Mutual acceptance of a case evaluation recommendation is the equivalent of a judgment.*

A judgment resulting from mutual acceptance of the case evaluation is equivalent to a consent judgment. *Klawiter v Reurink*, 196 Mich App 263; 492 NW2d 801 (1992). The judgment disposes of all claims in the action and includes all fees, costs, and interest to the date it is entered. MCR 2.403(M)(1).

In *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002), this Court held a party may not subsequently appeal an adverse summary disposition of one of the counts in the action after a mutual acceptance of a case evaluation. 465 Mich 550. *CAM* also overruled *Reddam v Consumer Mortgage Co*, 182 Mich App 754; 452 NW2d 908 (1990), and other cases¹ that “have been read to suggest that parties may except claims from case evaluation under the current rule.” 465 Mich 557.

MCR 2.403 provides for entry of judgment when the case is resolved through case evaluation. As a practical matter, most litigants treat mutual acceptance of the case evaluation as a settlement agreement and execute a release and dismissal in exchange for the payment of the case evaluation amount. If, however, there is no agreement between the litigants to resolve the

¹ *Joan Auto Indus, Inc v Check*, 214 Mich App 383; 543 NW2d 15 (1995); *Bush v Mobil Oil Corp*, 223 Mich App 222; 565 NW2d 921 (1997); *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154; 561 NW2d 445 (1997).

case by stipulated dismissal and release, a judgment is entered to bring the case to a close. MCR 2.403(M). That is, no court rule allows for an acceptance of the case evaluation to be contingent on execution of a settlement agreement.

- ii. Where there are multiple parties, acceptance of the case evaluation as to one pair of parties does not affect the progress of the case as to the others.*

MCR 2.403(L)(3) provides:

In case evaluations involving multiple parties . . .

- (a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.
- (b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if
 - (i) all opposing parties accept, and/or
 - (ii) the opposing parties accept as to specified coparties.

As to awards that were mutually accepted, MCR 2.403(M)(1) provides that a judgment is to be entered in accordance with the evaluation “unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the Court shall dismiss the action with prejudice.” If there are multiple parties, “judgment or dismissal as provided in subrule (1) shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.” MCR 2.403(M)(2).

The signing of a release should not otherwise impair the mandatory effect of MCR 2.403(M)(2), which limits the entry of a dismissal with prejudice to only those parties who have accepted case evaluation. Any ruling that a release, signed in the context of a mutual acceptance of case evaluation, trumps the express limitations of MCR 2.403(M)(2) has the potential to interfere with the significant judicial benefits of the case evaluation process.

The interrelationship between the rules governing case evaluation and the release at issue has a significant bearing on the analysis of the legal issues in this matter. The settlements reached in the present case were the result of a mutual acceptance of case evaluation by some but not all of the parties. Plaintiff had the right to select which case evaluation awards to accept, if any. MCR 2.403(L)(3)(a) and MCR 2.403(L)(3)(b). The optional release he provided should not override the clear language of the case evaluation rules.

(b)

The Court of Appeals' decision will undermine the goal of civility between opposing counsel.

As a matter of custom and practice, parties who have mutually accepted case evaluation sometimes agree to sign a release in exchange for payment. This is so because many insurance carriers desire a release in lieu of a judgment. Many times, as a matter of civility and professionalism, claimants agree to provide the release while under no obligation to do so, as occurred in this case.

To hold that the release in this case releases more than the parties that accepted case evaluation will frustrate the civility principles the State Bar of Michigan and this Court wish to encourage between lawyers. Every lawyer will be compelled to refuse to agree to the releases requested by insurers, because of the potential for uncorrectable error. If the Court of Appeals' ruling in this case is allowed to stand, the lesson to all lawyers will be to reject accommodation and practicality; refuse civility; and maximize protection, because if one does not do so, and a mistake is made, the courts will turn a blind eye to reality and refuse to correct it.

In essence, the courts will be telling the legal profession that civility is not truly a desirable aspect of the practice of law and that "no good deed will go unpunished."

ARGUMENT II

THIS COURT SHOULD OVERRULE *ROMSKA v OPPER* TO THE EXTENT THAT IT ALLOWS A THIRD PARTY TO BENEFIT FROM A RELEASE WHERE THE PARTIES TO THE CONTRACT DID NOT INTEND THAT RESULT.

(a)

A release of liability applies only to those claims the parties intended to release.

It is well-settled in Michigan law that A release of liability covers only those claims intended by the parties. *Harris v Lapeer Pub School System*, 114 Mich App 107, 114; 318 NW2d 621 (1982); *Trongo v Trongo*, 124 Mich App 432, 435; 335 NW2d 60 (1983); *Petrove v Grand Trunk W RR Co*, 174 Mich App 705, 716; 436 NW2d 733 (1989), *vacated on other grounds*, 437 Mich 31; 464 NW2d 711, *aff'd on remand*, 189 Mich App 284; 471 NW2d 656 (1991).

Michigan law historically recognized that courts may sometimes go beyond the broad language of a release to determine the intent of the parties in executing it or even the fundamental "fairness" of the contract.

In *Stitt v Mahaney*, 403 Mich 711; 272 NW2d 526 (1978), for example, the plaintiff was injured in an motorcycle accident. He was treated for his injuries after the accident. He signed a release form that included "all consequential damage" resulting from the accident or occurrence described in the release. 403 Mich 718. When he later sued the hospital and several physicians, they sought to rely on the release. This Court held that there was an issue of fact as to the scope of the release. "The determination of the intention of the parties to a release is properly left to the jury, with appropriate instructions, when the language of the release is susceptible to conflicting interpretations, one of which would plausibly extend its terms to defendants who were not parties to the release." 403 Mich 718.

There is, then, precedent from this Court that a release applies only to parties the releasor intended to benefit from it.

(b)

A release may be interpreted in context.

Meanings of the terms used in a release may be framed by the business practices of the activities involved and the surrounding common law. In *Genesee Foods Servs v Meadowbrook, Inc*, 279 Mich App 649; 760 NW2d 259 (2008), for example, the Court of Appeals held that the defendants, who admitted to being “independent” insurance agents, were not released from liability by an agreement releasing Citizens Insurance Company of America and “Citizens Releasees” (referring to its in-house agents) from liability for loss of the plaintiff’s business in a fire. The court pointed out:

[O]therwise, we would have to conclude that plaintiffs, in signing the release of Citizens and its agents, intentionally released their own agents (defendants) regarding the very transaction for which defendants owed plaintiffs the primary duty of loyalty and expertise. *Such a conclusion would violate reason and common sense.* [279 Mich App 657. Emphasis supplied.]

The meaning of a term may be “supplied by its setting and context,” rather than solely by dictionary definitions. In *Adair v State*, 250 Mich App 691, 708-709, 651 NW2d 393 (2002), *aff’d in part, rev’d in part on other grounds*, 470 Mich 105; 680 NW2d 386 (2004), for example, the Court of Appeals construed a statutory release of Headlee Amendment claims. Considering the releasing language in its “constitutional and statutory context,” the court decided that “similar” claims was intended to mean claims having “a general resemblance to” the specifically described claims, “although possessing occasional points of difference.” 250 Mich App 709.

A release, then, should be viewed in the context of the transaction it was drafted to memorialize.

(c)

Romska has led to untenable results.

In *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999), the majority (then-Judge Markman, with Judge Saad concurring) allowed a stranger to a contract to benefit from the exchange of consideration between two other parties.

As Judge Hoekstra said in dissent, “fundamental fairness” should lead the court to reject the “flat-bar rule”² that allows a non-settling defendant to rely on the plaintiff’s release of another joint tortfeasor. “[T]he flat-bar rule of interpretation, which holds that a general release is unambiguous as a matter of law, is inconsistent with Michigan’s enactment of a release-contribution statute and contrary to fundamental fairness.” 234 Mich App 528-529 (Hoekstra, J., dissenting). See also, *Heritage Resources, Inc v Caterpillar Financial Services Corp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 284036), rel’d 6/30/09 (Hoekstra, J., concurring) (release of selling agent held to release implied warranty claims against manufacturer).

The line of Court of Appeals’ decisions following *Romska* illustrates how “fundamentally unfair” the “flat-bar” rule has become.³ Cases have construed “form” or boilerplate releases as if only the intention stated by the drafting party - generally an insurance company or its attorneys - controlled the meaning of the released claims. Even though it was understood among the releasing parties that the third party would be sued after the initial settlement, the language of the release was held to release a third party unintentionally.

² See plaintiff-appellant’s brief, Argument I(C).

³ Defendants’ reliance on *Zahn v Kroger Co of Mich*, 483 Mich 34; 764 NW2d 207 (2009) (defendants’ brief in opposition to plaintiff’s application for leave to appeal) is misplaced. In *Zahn*, this Court approved a contract between “[two] business entities with equal bargaining power.” 483 Mich 40. Cases like those reviewed *infra*, by contrast, do not involve entities with “equal bargaining power.”

In a series of cases, the Court of Appeals has found or agreed that a release from a prior action operated to bar claims against a different defendant in a later suit. In *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645; 620 NW2d 310 (2000), the Court of Appeals held that the release language was sufficient to encompass a third party. See also, *Murray v Arce*, unpublished opinion per curiam of the Court of Appeals, issued 5/20/03 (Docket No. 238757) (plaintiff in a motorcycle accident released the driver; later suit against driver and owner of a tractor with which the motorcycle had collided barred⁴); *Whitmore v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued 6/26/01 (Docket No. 216132) (release of driver barred products liability action); *Samuel v Moran Mitsubishi*, unpublished opinion per curiam of the Court of Appeals, issued 5/24/02 (Docket No. 229464) (release of driver barred action against dealer who had repaired the vehicle); *Dilorenzo v Kirkpatrick*, unpublished opinion per curiam of the Court of Appeals, issued 2/14/06 (Docket No. 261748) (release of bank officers barred later claim against accounting firm); *Beck v McKinzie*, unpublished opinion per curiam of the Court of Appeals, issued 11/20/01 (Docket No. 223680) (release of truck driver barred later claim against individuals who negligently attached trailer to truck); *Hutcherson v Smith*, unpublished opinion per curiam of the Court of Appeals, issued 11/4/04 (Docket No. 248143) (passengers' suit against estate of driver barred by res judicata; release provided alternative basis for summary disposition).

In another line of cases, the Court of Appeals has allowed an insurer to rely on a third party's release to avoid a clear statutory or contractual obligation.

⁴ The plaintiff later sued the lawyers who had represented her. *Murray v Black*, unpublished opinion per curiam of the Court of Appeals, issued 1/5/06 (Docket No. 264861). The defendants argued that the release was not enforceable against a third party at the time it was signed. The Court of Appeals held that the plaintiff failed to present expert testimony to counter the defendants' argument.

No-fault benefits. In *Khalil v Reliance Nat'l Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued 4/14/05 (Docket No. 251912), the plaintiff was involved in an auto accident and settled with the insurer of the other driver. The release referred to “any other person, firm or corporation charged or chargeable with responsibility or liability” for the accident. She later sued for personal protection insurance benefits from the owner of the car she was driving. The Court of Appeals, relying on *Romska*, held that “settling parties . . . may waiv[e] whatever rights they choose.”

In *Gavins v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued 3/6/07 (Docket No. 270162), the plaintiff was a city bus driver who was injured on the job. He redeemed his worker’s compensation claim and signed a release of “any and all liabilities, claims, causes of actions . . . arising out of and in the course of employment.” He later sued for no-fault benefits but the claim was dismissed. The Court of Appeals affirmed. “[P]laintiff’s no-fault claim . . . arose out of and in the course of his employment and was covered by the release.”

Uninsured/underinsured motorist benefits. In *Groh-Willis v Great West Casualty Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued 11/19/02 (Docket No. 235054), the plaintiff, without an attorney, released her claim for PIP benefits in an accident with an uninsured driver. When her attorney later sued for uninsured motorist benefits under her insurance policy, the insurer denied the claim. The Court of Appeals held that “the document indicates that the parties intended the scope of the release to cover all possible claims related to the accident.”

The plaintiff in *Collier v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued 4/26/05 (Docket No. 252018) sued several tortfeasors and settled with some of them. He then claimed uninsured motorist benefits from his insurance company. The insurer

relied on the release, arguing it was a third-party beneficiary. The Court of Appeals agreed, holding that “Auto-Owners reasonably relied on, and asserted its reliance on, the release before plaintiff made an attempt to void the release.”

In *Kinyon v Secura Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued 12/28/01(Docket No. 226064), the plaintiff's underinsured motorist insurer refused to waive its right of subrogation against the tortfeasor. The plaintiff settled her claim, releasing the driver “and all other persons, firms, and corporations . . .” The underinsured motorist insurer argued that the release applied to it as well. The Court of Appeals affirmed summary disposition for the insurer.

Property insurance. In *Jack v Hastings Mutual Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued 11/20/08 (Docket No. 278109), the plaintiffs' condo was damaged by a frozen pipe and they received a settlement from their insurance company for the damage to the unit. They later sued several other defendants for damage to their personal property and loss of use. Hastings moved to intervene, to protect its subrogation rights, but withdrew its motion after mediation (case evaluation). The plaintiffs submitted additional claims, which were denied. The trial court ordered the plaintiffs to settle with the defendants in the second lawsuit, “stat[ing] that, because defendant was not a party to the [other] litigation, the effect of the settlement agreement as between plaintiffs and defendant could be litigated in another lawsuit.” They then filed suit against Hastings. The trial court dismissed the suit, on the basis of the release in the prior action. The Court of Appeals affirmed.

The broad application of the *Romska* rule, then, has allowed negligent individuals; employers; and insurance companies to benefit from the actions of others at no cost to

themselves. This is not the purpose of the tort system, the worker's compensation act or the insurance code.

This Court should take the opportunity to examine *Romska* and its progeny and provide a platform for examining whether Michigan should continue to apply its rule.

ARGUMENT III

A COURT MAY EXERCISE ITS EQUITABLE POWERS TO REFORM A RELEASE TO REFLECT THE INTENTION OF THE PARTIES.

(a)

Michigan circuit courts retain their power to “do equity.”

Black defines “equity” as “[t]he body of principles constituting what is fair and right . . .” or “[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances.” Black's Law Dictionary (8th ed).

“Equity, to paraphrase, regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done.” *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958) (citation omitted). See also, *Warren Tool Co v Stephenson*, 11 Mich App 274, 296, n 14; 161 NW2d 133 (1968), citing 4 Pomeroy's Equity Jurisprudence, § 1235, p 697.

US Const, art III, §2 grants courts “[the] power [to decide] Cases, in Law and Equity.” Michigan has abolished “distinctions between law and equity proceedings . . . as far as practicable . . .” Const 1963, art 6, § 5. Circuit courts, however, retain “original jurisdiction in all matters not prohibited by law . . .” Const 1963, art 6, §13.

“Traditional equitable jurisdiction” is included in the powers of the circuit courts. See, e.g., *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 166; 365 NW2d 93 (1984); *Doe v Mitchell*, 397 Mich 225, 331; 244 NW2d 827 (1976), *overruled on other grounds*, 441 Mich 23; 490 NW2d 568 (1992).

Michigan's circuit courts, then, have the power to "do that which ought to be done."

(b)

A court may reform a contract to reflect the intent of the parties.

"A court of equity has power to reform the contract to make it conform to the agreement actually made." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006), quoting *Raymond v Auto-Owners' Ins Co*, 236 Mich 393, 396; 210 NW 247 (1926).

As one authority explains:

A written instrument may be reformed where there is ignorance or a mistake on one side and fraud or inequitable conduct on the other. The reformation of an agreement can be awarded if one party has knowledge that the other party suffers from a unilateral mistake. Thus, unilateral mistake may be the basis for relief when it is accompanied by the fraud of, or is known to, the other party. [66 Am Jur 2d, Reformation of Instruments, § 27.]

In *Solo v Chrysler Corp*, 408 Mich 345; 292 NW2d 438 (1980), this Court held that the court's equity jurisdiction extended to rescission of a worker's compensation redemption agreement. 408 Mich 352-355. "Equity has exclusive jurisdiction to rescind an agreement on the ground of mutual mistake." *Id.* at 353.

The Court of Appeals extended *Solo* to a situation where the dispute involved reformation in *Auto-Owners Ins Co v Elchuk*, 103 Mich App 542; 303 NW2d 35 (1981). "[T]he plaintiff properly sought redress in the [circuit court] for reformation of the insurance policy so as to reflect the agreement of the parties and that the circuit court had subject matter jurisdiction." 103 Mich App 547.

(c)

A court acting in equity may reform a release.

"Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake

on one side and fraud on the other, the instrument does not express the true intent of the parties.”
Olsen v Porter, 213 Mich App 25, 29; 539 NW2d 523 (1995), citing *Ross v Damm*, 271 Mich 474, 480-481; 260 NW 750 (1935).

The leading case on rescission of releases is *Denton v Utley*, 350 Mich 332; 86 NW2d 537 (1957). In stirring language, the late justice Talbot Smith affirmed a circuit court’s decision, setting aside a release where the plaintiff accepted \$50 from an auto insurance company in return for “complete absolution of liability for any and all personal injuries”:

In the particular case before us, involving a release, we confront merely a specialized application of the overriding principle that *in its accomplishment of its mission, equity will strike down without hesitation any agreement resulting from oppression, fraud, mutual mistake of the contracting parties, or other evil*. The cases rest upon this great principle, not upon the minutiae urged. It matters not how sweeping are the words involved. When their content cloaks iniquity they shall be vacated and held for naught. [350 Mich 342. Emphasis supplied.]

“We will, in each case where fraud or mistake is alleged, look to the intent of the parties.”
350 Mich 345.

In *Trongo v Trongo*, *supra*, the plaintiff was injured in a motorcycle accident and received treatment paid for by Medicaid. Her caseworker essentially ordered her to sign a release of the driver who had injured her in return for payment by the driver’s insurer of the exact amount of the Medicaid payment. The Court of Appeals allowed her to challenge the release. “[T]his Court will look beyond the language of the release to determine the fairness of the release and the intent of the parties on executing it.” 124 Mich App 435.

The plaintiff in *Harris v Lapeer Public School System*, *supra*, was a passenger in a car that collided with a school bus. The bus driver claimed that her view of the intersection was blocked by a sign. The plaintiff signed a release of the car’s driver and “all other persons, firms or corporations liable or who might be claimed to be liable . . .” She later sued the bus driver, the school, the county road commission and the owner of the sign. The school added the car’s

driver as a defendant, and she cited the release. The other defendants then moved to add the release as an affirmative defense. The trial court granted the motions and dismissed the case. The Court of Appeals reversed, finding an issue of fact. 114 Mich App 115.

A similar result was reached in *Hartford Accident & Indem Co v Norris*, 363 Mich 279; 109 NW2d 790 (1961), in which a general release executed after a vehicle collision was reformed to allow a third-party action in subrogation for worker's compensation benefits. This Court concluded that the release only affected property loss, not compensation liability.

Bartrand v Chesapeake & Ohio R Co, 87 Mich App 466; 274 NW2d 822 (1978), is another example. The Court of Appeals held that a release of a wrongful death claim arising from a motor vehicle collision for the \$25,000 automobile policy limit was properly reformed as a covenant not to sue, subjecting the tortfeasor's employer to liability. The court considered that the decedent's widow testified it was her intent to release only the employee, that the decedent earned over \$1,000 per week, and that the widow had trusted her attorney, who had subsequently altered the release and embezzled the settlement check.

The court also reformed a release in *Cental v Navrude*, 45 Mich App 282; 206 NW2d 544 (1973), where the plaintiff's daughter was seriously injured in an automobile collision. The Court of Appeals considered the extent of the injuries resulting from the collision, including the daughter's loss of competency and ability to walk, talk, or take care of herself. The mother and her attorney had "inadvertently" discharged the driver's employer without requiring it to contribute any funds to the settlement. The court concluded that, although it was in the daughter's best interests to release the driver, who was otherwise uncollectible, it was not in her best interests to release his employer. The court therefore reformed the release to become a covenant not to sue the driver or his heirs, executors, or assigns.

See also, *Chuby v GMC*, 69 Mich App 563; 245 NW2d 134 (1976) (trial court should have held hearing to determine whether release was fairly and knowingly made). But see, *Smith v City of Flint Sch Dist*, 80 Mich App 630; 264 NW2d 368 (1978)⁵.

(d)

Allowing reformation of releases where the parties clearly did not intend to release a third party will not result in a flood of litigation.

In *Ivinson v Hutton*, 98 US 79 (1878), the United States Supreme Court reviewed the courts' equitable powers of reformation, "to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain and which are the subjects of special agreement." 98 US 82. The court emphasized, however, that "the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory." *Id.*

The burden of proof is on the party seeking reformation. *River Rouge Savings Bank v Fisher*, 372 Mich 558, 562; 127 NW2d 426 (1964). The court generally does not rewrite documents unless there is a mutual mistake or a unilateral mistake coupled with fraud, shown by clear and convincing evidence. *Windham v Morris*, 379 Mich 188, 192, 121 NW2d 479 (1963). One party's misunderstanding of the legal effect of a written document is not sufficient reason for the court to reform it. *Schmalzriedt v Titsworth*, 305 Mich 109, 118–120, 9 NW2d 24 (1943) (deed); *Malone v SCM Corp*, 63 Mich App 11, 14; 233 NW2d 872 (1975). Thus, the court may only rewrite when it is shown that the release was not what the parties intended. *Denton*. Under those guidelines, it is not reasonable to claim that there will be an avalanche of releases overturned by the reviewing courts.

⁵ The plaintiff's incapacity in *Centala* may have contributed to the difference in result in that case.

It should be apparent, then, that allowing reformation of a release where there is no doubt that both the parties intended one result – that only one party and not “all persons” should be released – to reflect the parties’ own intentions will not open a “floodgate” to litigation seeking to change the terms of contracts that are otherwise clear.

(e)

The present case is one in which reformation of a release would be particularly appropriate.

“If the law supposes that,’ said Mr. Bumble, ‘the law is a ass, a idiot.’” Charles Dickens, *Oliver Twist*.⁶

Black’s defines equity as “[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances.” Black’s Law Dictionary (8th ed). The case at hand is one especially suited to the “correction or supplementation” of the law.

The present case offers exactly the sort of scenario that provokes comments like Mr. Bumble’s. Both parties to a contract – plaintiff and the Allen Park officers – agree about what was intended by the release, yet “the law” will not allow them to repair a mistake in order to enforce their own agreement. Instead, it will penalize plaintiff and allow third-party strangers to the contract to enjoy its benefits with no contribution to its burden.

This bizarre and inequitable result is precisely what a court of equity is empowered to correct. The Court of Appeals should not have prevented the trial court from allowing plaintiff to amend the releases.

⁶ Mr. Bumble’s reaction to being informed that, in the eyes of the nineteenth-century British legal system, he was presumed to control his domineering wife.

RELIEF REQUESTED

Amicus curiae Michigan Association for Justice respectfully asks that this honorable court GRANT plaintiff-appellant Thomas John Shay's application for leave to appeal.

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