STATE OF MICHIGAN

COURT OF APPEALS

BURKHART ASSOCIATES, INC., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED September 25, 2008
v	No. 277744 Oakland Circuit Court
DONALD R. NOWAKOWSKI, Defendant/Counter-Plaintiff-Appellant.	LC No. 2006-074044-CK

DONALD R. NOWAKOWSKI, Plaintiff-Appellant,	
v	No. 279402 Oakland Circuit Court
BURKHART ASSOCIATES, INC., Defendant-Appellee.	LC No. 2006-078176-CK

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

In Docket No. 277744, Donald R. Nowakowski appeals as of right, challenging the trial court's order granting summary disposition in favor of plaintiff Burkhart Associates, Inc., pursuant to MCR 2.116(C)(7) (release of claims). In Docket No 279402, Nowakowski appeals as of right from the trial court's order awarding Burkhart attorney fees and costs of $37,379. We affirm the trial court's order granting Burkhart's motion for summary disposition, vacate the trial court's order awarding attorney fees and costs, and remand for further proceedings in light of *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

This case involves Nowakowski's claims for unpaid commissions arising from his employment with Burkhart, a manufacturers representative firm. One of Burkhart's clients was CNI, Inc., and its related entities. Nowakowski's employment with Burkhart principally involved selling CNI's products to Johnson Controls, Inc. In July 2005, CNI discontinued

Burkhart's exclusive representation status for the Johnson Controls account. Nowakowski terminated his employment with Burkhart and accepted employment with NICA Sales Group, L.L.C., a CNI-related entity that acts as a sales agent for the CNI entities.

After this litigation began, Nowakowski and NICA executed an employment agreement that contained the following provisions:

> **10. Prior Relationship; Release.**
>
> **(a)** Employer and Employee acknowledge that, prior to the Effective Time, Employee provided services to Employer as an employee of Burkhart & Associates, Inc., an outside manufacturer's representative independent contractor ("Employee's Prior Services") and that Employee's Prior Services ceased immediately prior to the Effective Time. Employee acknowledges that Employer does not owe Employee, and will not owe Employee in the future, any compensation, commission, reimbursement, payment, credit, allowance or other remuneration as a result of, in connection with, or related to Employee's Prior Services. Employee releases each Released Party from and with respect to all Damages, whether at law or in equity or otherwise, which against any Released Party Employee ever had, now has or may have, whether presently asserted or not, or may hereafter have, whether known or unknown and whether foreseen or unforeseen, for, upon, by reason of or connected with any matter, cause or thing whatsoever that is in any way, directly or indirectly, a result of, connected with, or related to Employee's Prior Services (the "Released Claims").
>
> **(b)** Employee agrees not to commence any action or suit, prosecute any pending action or suit, or participate or assist in any manner in the commencement or prosecution of any action or suit, at law or in equity, on account of or related to any Released Claims.

The term "released party" is defined in ¶ 1(ff) as

> each of the following: Employer, each Affiliate, and the past, present and future officers, directors, shareholders, members, partners, managers, employees, *agents, representatives*, attorneys, accountants, successors, predecessors, servants, heirs, legal representatives and assigns of Employer or an Affiliate. [Emphasis added.]

The agreement states that it is effective July 13, 2005, but Nowakowski averred in an affidavit that he did not sign it until on or around September 21, 2006, after this litigation began.

Burkhart moved for summary disposition under MCR 2.116(C)(7), arguing that it was within the class of persons designated a "released party" and, therefore, it was released from liability for any unpaid commissions. Nowakowski and NICA subsequently amended their employment agreement to specify that Burkhart

> was not intended to be, and is not, included in the term "Released Party" as defined in the Employment Agreement, (b) was not intended to be, and was not,

> released by the Employment Agreement, and (c) was not intended to be, and is not, a beneficiary (third-party or otherwise) of the Employment Agreement.

The trial court determined that the scope of the release unambiguously applied to any claims Nowakowski might have against Burkhart and granted Burkhart's motion. The court later awarded Burkhart attorney fees pursuant to MCL 600.2961(6).

I. Docket No. 277744

Nowakowski argues that the trial court erred in granting Burkhart's motion for summary disposition on the basis of the release.

We review de novo a trial court's decision to grant summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). Summary disposition may be granted under MCR 2.116(C)(7) if a claim is barred by a release. In reviewing a motion under MCR 2.116(C)(7), this Court considers the documentary evidence submitted by the parties, and accepts the plaintiff's well-pleaded allegations as true, unless contradicted by the documentary evidence. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681-682; 599 NW2d 546 (1999). This issue also involves the construction of a contract, which is a question of law that we also review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

A release is a contract that is to be interpreted according to the rules of contract interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13-14; 614 NW2d 169 (2000). In *Cole*, this Court summarized these rules as follows:

> The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. [*Id.* at 13-14 (citations omitted).]

Although Nowakowski asserts that neither he nor NICA ever intended for the release to apply to Nowakowski's claims against Burkhart, the intent of the contracting parties must be ascertained from the language of the contract, and the plain and unambiguous language broadly releases all claims against a "released party." Further, "released party" is broadly defined to include CNI's agents and representatives, and it is undisputed that Burkhart was a sales agent and representative for CNI. A contract must be construed to give meaning and effect to every word, clause, and phrase. *Klapp, supra* at 468. See also *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 650; 620 NW2d 310 (2000) (holding that "the broad and expansive language" of a release would be enforced, notwithstanding the plaintiff's assertion that he never intended to release the defendant in question).

We disagree with Nowakowski's argument that Burkhart is not an agent or representative within the meaning of ¶ 1(ff), because ¶ 10(a) refers to Burkhart as "an outside manufacturer's representative independent contractor." The phrase "outside manufacturer's" modifies the term "representative," but does not remove Burkhart from the general class of representatives.

Similarly, the phrase "independent contractor" explicates the business relationship between Burkhart and CNI, but does not negate Burkhart's status as either an agent or a representative. Further, ¶ 1(ff) does not restrict the classes of agents and representatives to CNI employees or entities that might be considered CNI "insiders." Consequently, the description of Burkhart as an "outside manufacturer's representative independent contractor" does not remove Burkhart from the class of released parties, nor does it create an ambiguity.

Nowakowski also asserts that Burkhart could not have been intended to be included within the scope of the release because the release was not executed until after the litigation began. However, the agreement had an effective date of July 13, 2005, which was prior to the litigation. And, 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. *Cole, supra* at 13.

Further, it was not necessary for Burkhart to be a party to the release in order to assert its effect. As explained in *Taggart v United States*, 880 F2d 867, 868-870 (CA 6, 1989), a nonparty who is included within the class of persons described in a release is entitled to assert the release as a defense under Michigan's third-party beneficiary statute, MCL 600.1405, which provides that "[a]ny 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 had been made directly to him as the promisee." Nowakowski argues that Burkhart is not entitled to third-party beneficiary status because it is only an incidental beneficiary, not an intended beneficiary, of the release. We disagree.

MCL 600.1405(1) provides:

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

In *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002), our Supreme Court observed:

> [A] third-party beneficiary may be a member of a class, but the class must be sufficiently described. This follows ineluctably from subsection 1405(1)'s requirement that an obligation be undertaken *directly* for a person to confer third-party beneficiary status. . . . The rationale would appear to be that a contracting party can only be held to have knowingly undertaken an obligation *directly* for the benefit of a class of persons if the class is reasonably identified. Further, in undertaking this analysis, an objective standard is to be used to determine from the contract itself whether the promisor undertook to give or to do or to refrain from doing something *directly* to or for the putative third-party beneficiary. [Quoting *Koenig v South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999) (internal quotations and citations omitted) (emphasis in original).]

Although Burkhart is not identified as an intended beneficiary by name, the language of the release clearly delineates the class of persons released, which includes CNI's agents and representatives, and Burkhart is within this class.

Nowakowski argues that the trial court should have considered his amended agreement with NICA to discern their true intent with respect to the employment agreement. In *Meridian Mut Ins, supra* at 650, this Court held that the plain and unambiguous language of a 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. Accordingly, parties to an enforceable and unambiguous release cannot escape the effect of the release by subsequently offering evidence of a contrary intent.

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. The third-party beneficiary statute, MCL 600.1405(2)(a), provides, in pertinent part:

> The rights of a person for whose benefit a promise has been made, as defined in (1), *shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject*, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary. [Emphasis added.]

In construing a statute, this Court must discern and give effect to the Legislature's intent as expressed in the words in the statute. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where the language is unambiguous, it must be presumed that the Legislature intended the meaning clearly expressed, and no further judicial interpretation is permitted. *Id.* Terms that are not defined must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578, 683 NW2d 129 (2004).

Nowakowski argues that there was no vesting of Burkhart's rights because there was no intent to release Burkhart from liability. Relying on the language "subject always to such . . . infirmities of the contract," he argues that the unintentional inclusion of Burkhart within the scope of the release is an infirmity that the parties or the court were free to correct. Conversely, Burkhart argues that its third-party beneficiary rights became vested when the original employment agreement was made, and could not thereafter be rescinded without its consent. Burkhart contends that the phrase "subject always" refers only to the narrow grounds on which parties generally may be released from contractual obligations, such as mutual mistake.

The question whether the release provision in the employment agreement is subject to either modification by the contracting parties or reformation by the court depends on the meanings of the terms "vested" and "infirmities" in the phrase "shall be deemed to have become vested, subject always to such . . . infirmities of the contract to which the rights of the promisee or the promise are subject . . . ." The term "vested" is commonly defined as "[t]hat has become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." Black's Law Dictionary (7th ed, 1999). According to the *Dictionary of Modern Legal Usage* (2d ed, 1995), the term "infirm" "is frequently used in reference to fatal weaknesses, whether constitutional or statutory." In *Bird Finance Corp v Lamerson*, 303 Mich 422; 6 NW2d 732 (1942), our Supreme Court considered whether the plaintiff had notice of an

infirmity in an instrument that would preclude it from claiming status as a holder in due course. As part of its analysis, the Court was required to determine whether usurious terms in the instrument constituted an "infirmity in the instrument." *Id.* at 440. The Court concluded that usury did not constitute an infirmity because "a contract is not void though tainted with usury." *Id.* at 441. The Court thus interpreted the terms "infirmity" and "infirmity in the instrument" to mean "void."

We conclude from the Court's analysis in *Bird Finance* and the dictionary definition of "infirm" that "infirmity" as used in MCL 600.1405(2)(a) refers to a defense to the enforceability of a contract, not an alleged discrepancy between contractual language and the parties' subjective intent. Nowakowski does not argue that there was any infirmity affecting the enforceability of the contract as between him and NICA. Accordingly, there was no infirmity within the meaning of MCL 600.1405(2)(a), and Burkhart's rights became vested when the contract was made, notwithstanding its lack of knowledge of the contract at that time, or lack of consideration.

We also disagree with Nowakowski's argument that his employment agreement with NICA may be reformed to negate Burkhart's third-party rights. A court will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but because of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998). A contractual mistake is a belief that is not in accord with the facts, and must relate to a fact in existence at the time the contract is executed. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982). A mistake of fact must "relate to a basic assumption of the parties upon which the contract is made and which materially affects the agreed performances of the parties." *Shell Oil Co v Estate of Kert*, 161 Mich App 409, 421-422; 411 NW2d 770 (1987). A mistake of fact is distinguished from a mistake of law, which is "a mistake by one side or the other regarding the legal effect of an agreement." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). A mistake of law may also occur when the parties err in the way they reduce the contract to writing, so that what is written does not actually reflect the bargain that was made. *Schmalzriedt v Titsworth*, 305 Mich 109, 109-120; 9 NW2d 24 (1943). A court will not usually reform a party's mistaken belief about the legal effect of an instrument, and a unilateral mistake is insufficient to warrant reformation, *Casey*, *supra* at 397. The trial court also may reform a contract containing a scrivener's error to reflect the parties' true intent. *Capitol Savings & Loan Ass'n v Przybylowicz*, 83 Mich App 404, 408; 268 NW2d 662 (1978).

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; *Casey*, *supra* at 398. 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).

Nowakowski argues that in *Ireland v Lester*, 298 Mich 154; 298 NW 488 (1941), our Supreme Court reformed a contract with the result of revoking third-party beneficiary rights in accordance with the parties' original intent. However, *Ireland* involved a scrivener's error. In contrast, the contracting parties in this case intended for the release to create rights for specific

categories of persons, including CNI's agents and representatives. The alleged error arises from the parties' failure to realize that the intended categories included Burkhart. Thus, *Ireland* is distinguishable.

For these reasons, we conclude that the trial court did not err in granting Burkhart's motion for summary disposition on the basis of the release.

II. Docket No. 279402

Nowakowski also challenges the trial court's order awarding attorney fees to Burkhart as a prevailing party.

In reviewing an award of attorney fees, this Court reviews the trial court's underlying findings of fact for clear error. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). Questions of law are reviewed de novo. *Id.* The trial court's decision whether to award attorney fees, and the reasonableness of the fees, are reviewed for an abuse of discretion. *Id.*

MCL 600.2961(6) provides that if a sales representative brings an action pursuant to this section, "the court shall award to the prevailing party reasonable attorney fees and court costs." MCL 600.2961(1)(c) defines "prevailing party" as "a party who wins on all the allegations of the complaint or on all of the responses to the complaint."

Nowakowski argues that Burkhart was not a prevailing party because it was granted summary disposition on the narrow ground of release, without adjudication of its remaining defenses. We disagree. In *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 560-561; 595 NW2d 176 (1999),[1] the defendant similarly argued that the plaintiff was not a prevailing party within the meaning of § 2961(1)(c), because he pleaded alternative theories of liability, and did not prevail on all of them. This Court rejected that argument, stating:

> In *Van Zanten v H Vander Laan Co, Inc*, 200 Mich App 139, 141; 503 NW2d 713 (1993), the plaintiff pleaded three different damage theories. Because each theory sought to recover for the same injury and recovery under any theory would have allowed recovery of the full measure of her damages, our Court held that it was necessary for the plaintiff to "prevail only on one theory in order to be considered a prevailing party." *Id.* Further, plaintiff was entitled to plead alternative claims pursuant to MCR 2.111(A)(2). See, also, *Abel v Eli Lilly & Co.*, 418 Mich 311, 335; 343 NW2d 164 (1984). Defendant's construction of the

[1] We disagree with Nowakowski's argument that the trial court's application of *H J Tucker, supra*, is contrary to this Court's decision in *Peters v Gunnell, Inc*, 253 Mich App 211; 655 NW2d 582 (2002). We find nothing in *Peters* that undermines the holding in *H J Tucker* that a full victory based on one of several theories satisfies the definition of prevailing party in MCL 600.2961(1)(c).

> statute is too narrow and would defeat the purpose of MCR 2.111(A)(2) to allow inconsistent claims or alternative theories to be pleaded for a single cause of action. [*H J Tucker, supra* at 560-561.]

A defendant who raises alternative theories of defense and entirely avoids liability on one of them is similar to a plaintiff who raises alternative theories of recovery and obtains recovery under one of them. Accordingly, Burkhart, having fully avoided liability on Nowakowski's complaint for damages, is a prevailing party under MCL 600.2961(1)(c).

We also find no merit to Nowakowski's argument that the trial court's award of attorney fees associated with the earlier Macomb County proceedings constitutes an improper collateral attack on the Macomb Circuit Court's order. The proceedings of another court cannot be attacked collaterally unless the court never acquired jurisdiction over the subject matter or persons involved. See *Edwards v Meinberg*, 334 Mich 355, 358; 54 NW2d 684 (1952); *Adams v Adams*, 304 Mich 290, 293; 8 NW2d 70 (1943). Here, however, the Macomb Circuit Court never addressed the issue of attorney fees. Attorney fees were neither awarded, nor denied, because the issue was never raised. Thus, there is no basis for concluding that the trial court's award of attorney fees somehow encroached on the Macomb Circuit Court's order.

We additionally reject Nowakowski's argument that Burkhart was not entitled to attorney fees incurred in pursuing defenses other than the successful defense of release. Nothing in MCL 600.2961(6) limits an award of attorney fees to those incurred only in prosecuting or defending the specific theory of relief that enabled the party to prevail in the entire action. Accordingly, the trial court neither committed an error of law nor abused its discretion in awarding attorney fees and costs. *Temple Marital Trust, supra* at 128.

However, in light of *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), we must remand this matter for further proceedings in regard to the amount of attorney fees that were awarded. After the briefs were filed in this case, our Supreme Court decided *Khouri*. In that case, the Court held that when considering a request for attorney fees, a trial court must first determine the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence, then multiplying the rate by the reasonable number of hours expended before it can make an upward or downward adjustment in light of the *Wood*[2] and Michigan Rules of Professional Conduct 1.5(a)[3] factors, with at least a brief articulation of its views on each factor. *Khouri, supra* at 522.

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[2] *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982) provides that when determining a reasonable attorney fee, a court should consider "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client."

[3] The Michigan Rules of Professional Conduct provide that when determining a reasonable attorney fee, a court should consider:

(continued…)

In light of the procedure set out by the *Khouri* Court, which the trial court naturally did not follow, we must vacate the award of attorney fees and remand to the trial court to apply the procedure outlined in *Khouri*. Affirmed in part, vacated in part, and remanded for the trial court to make specific findings consistent with *Khouri* on each attorney whose fees Burkhart sought to recover in this case. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

(…continued)

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent. [MRPC 1.5(a).]