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IN THE
COURT OF APPEALS OF INDIANA

John Levi Bird,

Appellant-Plaintiff,

v.

Valley Acre Farms, Inc., David Bagshaw,

Appellees-Defendants.

September 21, 2021

Court of Appeals Case No. 21A-CT-589

Appeal from the Washington Circuit Court

The Honorable Larry W. Medlock, Judge

Trial Court Cause No. 88C01-1807-CT-424

Bailey, Judge.

Case Summary

[1] John Levi Bird ("Bird") appeals a grant of summary judgment that disposed of his negligence claims against Valley Acre Farms, Inc. and other co-defendants (at times, collectively referred to as "Valley Acre") upon the trial court's determination that a general release of all defendants, drafted by the insurer of two defendants and signed by Bird, was a valid contract; a Covenant Not to Execute of the same date in contemplation of ongoing litigation was parol evidence irrelevant to party intent; and a subsequently executed limited release failed for lack of consideration. We reverse and remand for trial.

Issues

[2] Bird presents two issues for review:

I. Whether the trial court properly granted a motion from Valley Acre to strike an attorney e-mail and attorney affidavit designated in opposition to the motion for summary judgment; and

II. Whether the trial court erroneously granted summary judgment.

Facts and Procedural History

[3] The uncontested facts are as follows. On May 9, 2017, then sixteen-year-old Bird and another minor, D.G., were working at Valley Acre, and were directed to clean out a chicken coop. Inside the chicken coop, D.G. discovered a loaded

rifle, with which he shot Bird in the abdomen. Bird was taken to a local hospital and ultimately airlifted to University of Louisville Hospital with life threatening injuries.

[4] On July 23, 2018, Bird filed his complaint against D.G., D.G.'s parents Mother G. and Father G., Valley Acre, Valley Acre's shareholder[1] David Bagshaw ("Bagshaw"), and premises owner Geneva Bagshaw ("Geneva"). After the filing of the complaint, three documents were executed having a connection to the shooting incident: a May 19, 2020 document entitled "Release of All Claims against Dennis and Angelina Gresham and Indemnity Agreement" ("the May Release"), a May 19, 2020 "Covenant not to Execute on any Judgment in Excess of Available Insurance Proceeds" (with Bird and an authorized representative of State Farm Insurance[2] as signatories) ("the Covenant"), and a December 11, 2020 "Release of All Claims against Dennis and Angelina Gresham and Indemnity Agreement" ("the December Release"). (App. Vol. II, pgs. 55, 58, 61.) The language of the May Release, in relevant part, addressed "full settlement of all claims resulting from said accident." *Id.* at 55. The Covenant contemplated ongoing litigation, but Bird agreed not to execute upon any judgment obtained against D.G. The December Release deleted the "all claims" language and included the term: "Nothing herein does

[1] The parties have simply referred to David Bagshaw as an owner. It is unclear whether he is the sole, majority, or minority shareholder of the incorporated farming operation.

[2] D.G.'s parents were insured by State Farm Insurance, under a policy having limits of $100,000.00.

or is intended to release any claims against Valley Acre Farms, Inc., David Bagshaw, or Geneva Bagshaw." *Id.* at 58. Each of the releases stated that a $5,000.00 payment was the consideration for the release.

[5] On December 17, 2020, Valley Acre filed a motion for summary judgment, contending that all defendants had been released from liability upon execution of the May Release. Bird responded, contending that the "defunct [July] Release was never fully executed." (*Id.* at 57.) On February 22, 2021, the trial court conducted a hearing on the summary judgment motion and Valley Acre's motion to strike some materials designated in opposition to summary judgment. Valley Acre argued that the May Release was a valid contract supported by $5,000.00 in consideration, the December Release failed for lack of new consideration, and the Covenant was not to be considered in conjunction with the May Release because D.G., and not his parents, was the signatory. Bird's counsel advised the trial court that two separate $5,000.00 checks had been issued in connection with the releases and the first had been returned.[3]

[6] On March 24, 2021, the trial court issued its order on the motion to strike, striking from Bird's designation of evidence: proposed stipulations of dismissal as to Father G. and Mother G., a December 9, 2020 e-mail from an attorney representing D.G.'s parents, and affidavits from two attorneys who had represented Bird. Also on March 24, 2021, the trial court entered its order

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[3] Bird's counsel stated: "We've had a check cut. We've had two checks cut. One was sent back while the terms were being finalized within the time with the contract with (inaudible)." (Tr. Vol. II, pg. 19.)

granting the summary judgment motion of Valley Acre and declaring the order to be final and appealable pursuant to Indiana Trial Rule 54(B).[4] The trial court concluded that: the May Release terms were clear and unambiguous so as to release all defendants from liability; the court could not consider parol evidence; the Covenant was not a document to be considered as one executed contemporaneously with the May Release transaction because D.G.'s parents were not parties to the Covenant; the December Release represented an attempted modification of the May Release without new consideration; and Bird was not entitled to equitable reformation of the May Release because a mistake of law, as opposed to a mistake of fact, had been made.[5]

[7] On May 7, 2021, the parties filed a Stipulation of Dismissal as to Father G. and Mother G. only. Bird now appeals.

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[4] The Notice of Appeal in a separate appeal brought by Bird in 21A-CT-225 discloses that Geneva Bagshaw and David Bagshaw were individually granted summary judgment on September 1, 2020, and December 23, 2020, respectively, something not clearly reflected in the Chronological Case Summary herein. On June 25, 2021, this Court involuntarily dismissed the prior attempted appeal.

[5] In Indiana, a court may reform a written contract only if (1) there has been a mutual mistake, or (2) one party makes a mistake while the other party commits fraud or inequitable conduct. *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1275 (Ind. Ct. App. 2001). Reformation for a mistake is only available to address a mistake of fact, not a mistake of law. *Id.* Additionally, equity does not intervene if the complaining party failed to read the instrument or heed its plain terms. *Id.*

Discussion and Decision

Motion to Strike

[8] Without record citation or citation to legal authority, Bird makes the following concise argument regarding the trial court's grant of the motion to strike:

> The trial court abused its discretion in granting the Appellees' Motion to Strike with regard to the December 9, 2020 Email from Natalie Short, and Affidavit of Kungu Njuguna. The latter affidavit was timely filed with regard to the subject matter of the Appellees' Second Motion for Summary Judgment. The affidavit properly authenticated and verified the December 9, 2020 Email from Natalie Short, thereby making said designated evidence admissible. Accordingly, the trial court abused its discretion at least in part by granting the Appellees' Motion to Strike.

Appellant's Brief at 23-24. When an appellant presents only argument, unaccompanied by citation to authority or record citation, the issue is waived for appellate review. *Bixler v. State*, 537 N.E.2d 21, 23 (Ind. 1989).

[9] Waiver notwithstanding, we find no abuse of discretion. "[I]n ruling on a motion for summary judgment, the trial court will consider only properly designated evidence which would be admissible at trial." *Zelman v. Capital One Bank (USA) N.A.*, 133 N.E.3d 244, 248 (Ind. Ct. App. 2019). The email in question was proffered without authentication, that is, "evidence sufficient to support a finding that the item is what the proponent claims it is." Ind. Evidence Rule 901. It was properly stricken.

[10] Subsequently, Bird proffered an attorney affidavit in an attempt to authenticate the e-mail. However, the affidavit was not timely designated. Trial Rule 56(C) provides that "[a]n adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits." If the non-moving party does not respond to a motion for summary judgment "within 30 days by either filing a response, requesting a continuance under Trial Rule 56(1), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period." *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008). Here, Bird proffered the attorney affidavit sixty-two days after Valley Acre's motion for summary judgment, without an order granting an extension of time to designate materials in opposition to the motion. The affidavit was properly stricken as untimely.

Grant of Summary Judgment

Summary Judgment Standard of Review

[11] We review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). We construe the evidence in favor of the nonmovant and resolve all doubts against the moving party. *Pfenning v. Lineman*, 947 N.E.2d 392, 397 (Ind. 2011) (quotation omitted). The party moving for summary judgment bears the initial burden to establish its

entitlement to summary judgment. *Id.* at 396–97. Only then does the burden fall upon the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. *Id.* at 397 (quotation omitted).

[12] A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. *Huntington v. Riggs*, 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007), *trans. denied*. The summary judgment process is not a summary trial. *Hughley*, 15 N.E.3d at 1003-04. Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. *Id.* at 1004. Nevertheless, a grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the trial court erred. *Kramer v. Catholic Charities of Diocese of Fort Wayne – South Bend, Inc.*, 32 N.E.3d 227, 231 (Ind. 2015).

[13] "When no genuine issues of material fact divide the parties, we need only determine whether the trial court correctly applied the law to the undisputed facts." *GEICO Ins. Co. v. Rowell*, 705 N.E.2d 476, 480 (Ind. Ct. App. 1999). The construction of an unambiguous contract is generally a question of law, which may be particularly appropriate for summary judgment. *Id.*

Contract Standard of Review

[14] The intent of the contracting parties to bestow rights upon a third party must affirmatively appear from the language of the instrument when properly

interpreted and construed. *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312, 1315 (Ind. 1996). A release is interpreted like any other contract:

> A release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well. A release, as with any contract, should be interpreted according to the standard rules of contract law. Therefore, from this point forward, release documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing.

Huffman v. Monroe Cnty. Comm. Sch. Corp., 588 N.E.2d 1264, 1267 (Ind. 1992).

[15] When interpreting a contract, a court is to determine and give effect to the parties' intent through the language they use to express their rights and duties under the contract. *Gold v. Cedarview Mgmt. Corp.*, 950 N.E.2d 739, 742-43 (Ind. Ct. App. 2011). Absent ambiguity, the terms of a contract are given their plain and ordinary meaning. *Id.* at 743. There is ambiguity when "reasonable people could come to different conclusions about the contract's meaning." *Id.* When the terms of an agreement are clear and unambiguous, extrinsic evidence, i.e., that which relates to a contract but not appearing on the face because it comes from other sources, is not admissible. *Id.*

> In general, "[t]he parol evidence rule provides that extrinsic evidence is inadmissible to add to, vary, or explain the terms of a written instrument if the terms of the instrument are clear and unambiguous." *Cooper v. Cooper*, 730 N.E.2d 212, 215 (Ind. Ct. App. 2000). However, under the stranger to the contract rule, "the inadmissibility of parol evidence to vary the terms of a

> written instrument does not apply to a controversy between a third party and one of the parties to the instrument." *Id.* at 216 (relying on White v. Woods, 183 Ind. 500, 109 N.E. 761, 763 (1915)). *See also State Highway Comm'n v. Wilhite*, 218 Ind. 177, 180–181, 31 N.E.2d 281, 282 (1941) (holding that "the general rule that resort may not be had to parol evidence to vary or contradict a written contract complete on its face does not apply to others than the parties to the instrument"); *Kentucky & Indiana Bridge Co. v. Hall*, 125 Ind. 220, 224, 25 N.E. 219, 220 (1890) ("We recognize the rule that parol evidence may not be introduced to impeach the contents of a writing, or to control its legal effect; but the circumstances under which a writing is executed, or the consideration upon which it rests, may always be shown by parol."); *Burns v. Thompson*, 91 Ind. 146, 150 (1883) ("[A]side from the question of fraud, while a dispositive instrument can not be varied by parol, so far as the parties to it are concerned, yet, in respect to strangers, written instruments, usually have no binding force, and the familiar rule against the variation of such instruments by parol evidence applies only to parties and privies, and does not forbid their being attacked and contradicted by parol by strangers to them.").

Evan v. Poe & Assoc., Inc., 873 N.E.2d 92, 101-02 (Ind. Ct. App. 2007). But extrinsic evidence allowed under the "stranger to the contract" exception cannot be considered when the release is unambiguous. *Id.* at 104. "We conclude that, in the context of a controversy that exists between a third party and one of the parties to the instrument, when a release is unambiguous we need not look at any other evidence to determine the parties' intent." *Id.*

[16] Also, the contemporaneous document doctrine may permit determination of intent by examination of related writings. The doctrine provides, "[i]n the absence of anything to indicate a contrary intention, writings executed at the

same time and relating to the same transaction will be construed together in determining the contract." *Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998). However, even if documents are executed at different times, they may still be construed together as long as they are a part of the same transaction. *McCae Mgmt. Corp. v. Merchants Nat. Bank and Trust Co. of Indianapolis*, 553 N.E.2d 884, 887 (Ind. Ct. App. 1990), *trans. denied*.

Analysis

[17] Valley Acre described the May Release as a clear and unambiguous statement of intention to release all claims against all defendants, in exchange for consideration of $5,000.00. On the other hand, Valley Acre described the December Release as a failed contract, due to lack of consideration. Valley Acre argued to the trial court that the May Release is the only one of the three documents executed in connection with the shooting incident that is germane to the summary judgment decision. Valley Acre prevailed in that argument, and the grant of summary judgment to Valley Acre is premised solely upon the May Release, with its broad release language.

[18] Bird contends that the May Release was "rescinded" and it is now "moot." Appellant's Brief at 12. He directs our attention to the multiplicity of documents and argues that the trial court should have determined party intent through a broader examination. More particularly, he contends that the contemporaneous writing rule permits consideration of the Covenant, executed

the same day as the May Release.[6] According to Bird, if the parties to the May Release actually intended a broad release, the agreement not to execute a judgment obtained against D.G. would have been superfluous, as D.G. would have been released in the first instrument.

[19] Moreover, Bird contends that the trial court should have concluded that the December Release – as opposed to the May Release – is the valid contract, as it is supported by consideration and expresses the intent of the parties. The essence of Bird's argument is that a novation occurred. This was the threshold question for the trial court because, if the December Release extinguished the May Release, there is no need to examine the May Release for alleged ambiguity.

[20] In 1893, a panel of this Court described a novation and set forth its elements:

> Novation is the act of making something new. It is the substitution of a new obligation for an existing one. It takes place when a new debtor is substituted for an old one, or when a new obligation takes the place of an old one. In every case of a novation there are four requisites: A previous valid obligation, agreement of all the parties to the new contract, extinguishment of the old contract, and a valid new contract. It may take place in three ways: When the debtor and creditor remain the same, but a new debt takes the place of an old one; when the debt remains the same, but a new debtor is substituted for the old debtor; and where the debt and debtor remain the same, but a

[6] The Covenant recited that D.G. agreed to pay Bird $95,000.00, representing the remaining proceeds available under an insurance policy, and Bird agreed not to execute upon any judgment obtained against D.G.

> new creditor is substituted for the old one. The contract of novation, like any other contract, must have a consideration to support it. The extinguishment of the old debt is the consideration for the new contract. Hence it follows that the original obligation or debt of which novation is sought must be absolutely extinguished. Unless it is extinguished, the new agreement is wanting in an essential element, and the novation fails. It is also essential in such contract that the discharge or extinguishment of the old obligation take place simultaneously with, and result from, the creation of the new obligation.

Morrison v. Kendall, 6 Ind. App. 212, 215, 33 N.E. 370, 370 (1893).

[21] The trial court considered the May Release as a standalone contract, the terms of which could not be varied because of lack of ambiguity. To the extent that the trial court considered whether the December Release may have extinguished the May Release, the trial court focused only upon whether the latter was not a valid contract due to a lack of consideration. A novation requires a valid new contract. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1234 (Ind. 1994). In order to be valid, a release must be supported by consideration. *Peters v. Kendall*, 999 N.E.2d 1030, 1034 (Ind. Ct. App. 2013), *trans. denied.* But the trial court could not conclude that the December Release lacked consideration by reference to undisputed facts. Notwithstanding the recitations in each release that $5,000.00 was the consideration therefor, the trial court simply accepted Valley Acre's claim that consideration supported the May Release but not the December Release. Valley Acre points out that Bird did not designate evidence regarding tender or acceptance of remittance. True, but Bird is the non-movant.

[22] In Indiana, in summary judgment proceedings, the initial burden is on the movant to "designate sufficient evidence to foreclose the nonmovant's reasonable inferences and eliminate any genuine factual issues." *Butler v. City of Peru*, 733 N.E.2d 912, 915 (Ind. 2000). It is only after the movant has met this burden that "the burden shifts to the nonmovant to make a showing sufficient to establish the existence of a genuine issue for trial on each challenged element of the cause of action." *Id.* This aspect of summary judgment procedure in Indiana differs significantly from the federal procedure. Any doubt as to the existence of a factual issue should be resolved against the party moving for summary judgment, and where designated evidentiary materials may give rise to reasonable conflicting inferences, such inferences shall be drawn in favor of the non-movant. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1289 (Ind. 2006). "The court must accept as true those facts alleged by the nonmoving party and resolve all doubts against the moving party." *Id.* (citations and quotations omitted).

[23] We cannot say as a matter of law, without factual development, that the May Release was "a release executed in exchange for proper consideration" and that the December Release was not. *See Stemm v. Estate of Dunlap*, 717 N.E.2d 971, 975 (Ind. Ct. App. 1999). Accordingly, summary judgment was improvidently granted.

Contemporaneous Writing Rule

[24] Moreover, if the December Release fails for lack of consideration, the question remains as to whether intent must be found solely within the four corners of the May Release or another document is admissible. Valley Farms focuses upon the four corners rule of *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269 (Ind. Ct. App. 2001). There, a panel of this Court considered the propriety of a grant of summary judgment to all defendants based upon a release where it was claimed that the intention of the Estate and one defendant's insurer was to release only that insured and insurer. We observed that: "[o]ne standard rule of contract interpretation is that if the language of an instrument is unambiguous, the intent of the parties is to be determined by reviewing the language contained between the four corners of that instrument." *Id.* at 1273. The release broadly provided that the Estate released the insured "and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs, representatives and assigns, from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action." *Id.* Finding no contradictory language in the release document, the Court held that summary judgment was proper because the instrument had unambiguously released all defendants. *Id.*

[25] However, the Court acknowledged that, in some circumstances, "[t]he contemporaneous writing rule allows a court to determine the intent of the parties to an agreement by examining documents that were drafted contemporaneously. … In addition to being executed at the same time, the

writings must relate to the same transaction or subject-matter to be construed together as a contract." *Id.* at 1273-74 (citations omitted). The *Spry* Court found that the trial court had not erred in refusing to interpret together under the contemporaneous writing rule a release, a petition, and a court order executed on different dates and involving different parties. *Id.* at 1275.

[26] But Bird refers this court to our decision in *Rowell*, where the Court had determined that it was not bound by the four corners of a release agreement because the stipulation was a contemporaneous document; both were construed together. 705 N.E.2d at 482. The *Spry* Court explained and distinguished *Rowell*:

> In *Rowell*, a plaintiff, who intended to release only two of the four defendants she was suing, signed a general release. *Id*. at 478. Before filing the release with the trial court, the plaintiff's attorney realized that the general release released all four defendants, including GEICO, so the attorney drafted a stipulation providing that only two of the defendants were released. *Id.* The attorney then had all of the parties, including GEICO, sign the stipulation. *Id.* After the stipulation and release were filed with the trial court, GEICO asserted that they were released by the general release that the plaintiff had signed. *Id*. at 479. The trial court denied GEICO's motion for summary judgment. *Id*. After holding that GEICO was judicially estopped from asserting the general liability release because their representative had signed a stipulation agreeing that the release applied only to two other defendants, we noted that the contemporaneous document rule required us to interpret the release in conjunction with the stipulation. *Id*. at 481–482.

> Distinctions between the document in *Rowell* and the documents here prohibit us from following *Rowell*. The stipulation in *Rowell* was created and executed by all of the parties to the agreement in order to modify the release. *Id*. at 478. The signature of the GEICO representative on the stipulation was his acknowledgment that the stipulation modified the release. *See id*. Consequently, the release and the stipulation were part of the same transaction: a contract agreeing that some defendants would be released from liability in exchange for money.

Estate of Spry, 749 N.E.2d at 1274.

[27] Here, the parties to the releases were Bird and D.G.'s parents while D.G. was a party to the Covenant. The contemporaneous writing rule does not absolutely require that the parties be the same; however, the doctrine "should be applied cautiously when the documents involve different parties." *Murat v. South Bend Lodge No. 235 of the Benev. & Protective Order of Elks of the USA and Burkhart Advertising, Inc.*, 893 N.E.2d 753, 757 (Ind. Ct. App. 2008), *trans. denied*. Instruments pertaining to the same subject matter and executed at the same time are construed together, "absent contractual language indicating that the documents are unrelated." *PNC Bank, Nat. Ass'n. v. LA Development, Inc.*, 973 N.E.2d 1131, 1136 (Ind. Ct. App. 2012), *trans. denied*.

[28] Bird contends that (1) the circumstances surrounding the execution of the releases are more akin to those in *Rowell* than in *Spry*, (2) an expression of party intent to release only D.G.'s parents may be found in the contemporaneously executed Covenant, and (3) the latter release was drafted by the same parties to the earlier release, as was the case in *Rowell*.

[29] The May Release purports to release all parties and claims and contains no contradictory language within the body of the document. However, the title is inconsistent[7] and there is no merger clause; the Covenant was executed the same day and specifically contemplates ongoing litigation. It pertains to the same subject matter – Bird's surrender of rights to pursue and hold liable those allegedly responsible for his injuries. Any liability on the part of D.G.'s parents is not due to their independent conduct but is derivative of D.G.'s liability

[30] The Covenant contemplated ongoing litigation:

> Bird believes that it would be detrimental to his case against co-Defendants—specifically, his causes of action against David Bagshaw, Valley Acre Farms LLC, and Geneva Bagshaw—if Bird dismissed his cause of action against D.G. before trial or final resolution of all claims against co-Defendants.
>
> To avoid potential detriment to Bird's trial and settlement strategies and to avoid delay in the resolution of Bird's claims against D.G., Bird and D.G. are entering into this Covenant. …
>
> To avoid delay in the resolution of Bird's claims against D.G., which would otherwise occur while Bird's claims against co-Defendants are being litigated and to obtain certainty in the resolution of Bird's claims against D.G., Bird does hereby now and forever COVENANT AND AGREE not to execute on any judgment against D.G. in excess of the Policy's remaining

[7] We acknowledge that a title is not a substantive term of a contract; however, our Indiana Supreme Court has included the title of a release document in its consideration of "contradictory references" found to "cloud the intent of the document." *Huffman v. Monroe Cnty. Comm. Sch.*, 588 N.E.2d 1264, 1267 (Ind. 1992). In that case, the Court concluded that "parol evidence may be utilized to determine the parties' true intentions respecting the document's application." *Id.*

> applicable insurance proceeds after the resolution of Bird's claims against D.G.'s Parents[.] …
>
> D.G. will remain a party to the lawsuit until Bird has resolved all claims against the remaining co-Defendants or Bird otherwise voluntarily dismisses D.G.[.] …
>
> This Covenant does not limit Bird's ability to pursue his claims against David Bagshaw, Valley Acre Farms LLC, or Geneva Bagshaw but is full, final and complete with respect to any and all claims against D.G.

(App. Vol. II, pgs. 76-78.) Additionally, the December Release expresses intent to release only D.G.'s parents. We conclude that the criteria for consideration of a document under the contemporaneous writing rule is satisfied. Construing the language of the May Release together with the language of the other documents, it is clear that a limited release was intended.

Conclusion

[31] The trial court did not abuse its discretion in its evidentiary rulings. However, our examination of the designated materials, including documents appropriate for examination under the contemporaneous writing rule, leads us to conclude that Valley Acre did not meet its burden of showing the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. We therefore reverse the grant of summary judgment.

[32] Reversed and remanded.

Crone, J., and Pyle, J., concur.