

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH COOK,

Plaintiff-Appellant,

v

KATHERINE WAINWRIGHT SHENSKY and
MILLER AND SHENSKY PLLC,

Defendants-Appellees.

UNPUBLISHED

June 15, 2004

No. 246913

Oakland Circuit Court

LC No. 02-042909-NM

Before: Owens, P.J. and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. Facts

After plaintiff suffered injuries in an automobile accident in May 1998, he hired defendants to represent him in a third-party automobile negligence claim. At some point in the litigation, defendants advised plaintiff to sign a release.

In March 1999, plaintiff underwent surgery on his finger at William Beaumont Hospital (presumably for an injury arising from the automobile accident) during which he sustained a severe burn to his arm. In September 2001, plaintiff filed a medical malpractice claim against Beaumont. Beaumont filed a motion for summary disposition based on the release plaintiff signed in the automobile negligence case claiming that it was broad enough to release them from liability for the alleged medical malpractice. At the hearing on this motion, plaintiff's counsel admitted that he had not filed a response and stated: "[o]ur position is we don't have a legitimate argument against the law in Michigan." The trial court granted the motion and dismissed plaintiff's claim stating:

So I will say that in light that the Defendant [sic] has not responded and has stated that position and based on – which is a very broad language of the release, this Court finds that the claim is barred due to the terms of the release signed by Plaintiff on August 11, 2000. Therefore, summary disposition is granted to the Defendant.

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In August 2002, plaintiff filed this legal malpractice claim alleging that defendants committed legal malpractice in advising plaintiff to sign a release in the automobile negligence case that precluded him from pursuing his medical malpractice claim against Beaumont. Plaintiff moved for partial summary disposition under MCR 2.116(C)(7) on the basis that the trial court had previously ruled that the release operated broadly to release Beaumont. Defendants responded arguing that the release did not release parties beyond the defendants in the automobile negligence case but, if it did, then it also operated to release them from liability for the alleged legal malpractice. Defendants also argued that the only reason the trial court ruled that the release extended to release Beaumont was that plaintiff failed to respond to Beaumont's motion for summary disposition in the medical malpractice case and "tacit[ly]" stipulated to the motion at the hearing. The trial court denied plaintiff's motion and stated on the record:

The Court has reviewed that release. That is an issue that it does not release all parties as Plaintiff contends. The language is clear that it releases only all parties of Mr. Heimsbauch [sic] only.

Thus, the Court finds there was no malpractice based on the release.

On February 5, 2003, the trial court entered an order denying plaintiff's motion for partial summary disposition and granting defendants' counter-motion. The order provided:

- (a) That the release at issue did not release "any and all parties" as alleged by Plaintiff, but rather only release parties "of" Mr. Hengesbach; and
- (b) There was no malpractice by Defendants in regard to the release at issue nor in regard to Mr. Cook executing the release at issue.

On February 12, 2003, the parties stipulated to the dismissal of remaining allegations. Plaintiff appeals the trial court's order of dismissal and its ruling on the release.

II. Analysis

Defendants argue that the trial court erred in granting summary disposition in defendants' favor because (1) the release extended to release Beaumont and, therefore, preclude plaintiff's medical malpractice claim, (2) the trial court erroneously relied on parol evidence, and (3) the trial court already ruled that the release extended to release Beaumont when it dismissed plaintiff's prior medical malpractice case. We conclude that the trial court did not err in granting summary disposition in defendants' favor.

A. Standard of Review

"We review a trial court's grant or denial of summary disposition de novo." *Diehl v Danuloff*, 242 Mich App 120, 122; 618 NW2d 83 (2000). When reviewing a motion under MCR 2.116(C)(7), this Court considers the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether the claim is barred by law. MCR 2.116(G)(5); *Employers Mutual Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). "Summary disposition of a plaintiff's complaint is

proper where there exists a valid release of liability between the parties." *Wyrembelski v City of St. Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996), quoting *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201; 428 NW2d 26 (1988).

B. The Release

1. Plain Language

This Court recently identified the general rules of construction for release agreements:

The scope of a release is governed by the intent of the parties as expressed in the release. *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000). If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Id.* A release is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Close v Ladbroke Racing Michigan, Inc.*, 241 Mich App 1, 13; 614 NW2d 169 (2000). The fact that the parties offer competing interpretations of a release does not, in itself, establish ambiguity. *Id.* at 14. [*Adair v State of Michigan*, 250 Mich App 691, 707; 651 NW2d 393 (2002).]

The release provides in full:

That the undersigned, being of lawful age, for the sole consideration of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS, to the undersigned in hand paid, receipt whereof is hereby acknowledged, do hereby and for his heirs, executors, administrators, successors and assigns releases, acquits and forever discharges ANTHONY JEROME HENGESBACH and his agents, servants, successors, heirs, executors, administrators and all other persons, firms corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and person injuries and property damage and the consequences thereof resulting or to result from the accident, casualty or event which occurred on or about the 10th day of May, 1998 at or near North Rose and Groesbeck Highway, as more fully described in the Complaint filed in the Macomb County Circuit Court, bearing Civil Action No. 98-4259.NI.

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released and that said releases deny liability therefore and intend merely to avoid litigation and buy their peace.

The undersigned hereby declares and represents that the injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this Release it is understood and agreed that the undersigned relies wholly upon the undersigned's judgment, belief and

knowledge of the nature, extent, affect [sic] and duration of said injuries and liability therefore and is made without reliance upon any statement or representation of the party or parties hereby released or their representatives or by any physician or surgeon by them employed.

The undersigned further declares and represents that no promise, inducement or agreement not herein expressed has been made to the undersigned and that this Release contains the entire agreement between the parties hereto and that the terms of this Release are contractual and not a mere recital.

This language is not ambiguous with regard to whom it operates to release. It states that it: “releases, acquits and forever discharges ANTHONY JEROME HENGESBACH and his agents, servants, successors, heirs, executors, administrators and all other persons, firms corporations, associations or partnerships” Although it is clear that the list of entities following Hengesbach’s name are all entities related to Hengesbach, those entities described as “and all other persons firms corporations, associations or partnerships” need not be related to Hengesbach. Indeed, the latter phrase is broad enough to include Beaumont.

But the language describing the nature of claims released unambiguously releases only those claims for injuries related to the automobile accident. The release provides:

. . . all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the accident, casualty or event which occurred on or about the 10th day of May, 1998 .
...

Although the releases in *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999) and *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 649-650; 620 NW2d 310 (2000), differ slightly from the release here, they support our conclusion that the release is unambiguous and does not release Beaumont from plaintiff’s medical malpractice claims. Unlike the defendants in *Romska* and *Meridian*, Beaumont’s alleged negligence was not related to the automobile accident. Certainly, in a broad sense, the alleged medical malpractice “grew out of” or was “a consequence of” plaintiff’s finger injury which resulted from the accident. In that sense, the medical malpractice would not have occurred “but for” the accident. But the alleged medical malpractice injury, the burn to plaintiff’s arm, was proximately caused by the alleged acts of Beaumont, not the automobile accident. Defendants illustrate the absurdity of the conclusion that the release extends to Beaumont by asserting that the instant legal malpractice claim also, in a “but for” sense, arose from the automobile accident and by the same rational, the release would preclude this claim. We conclude that the release is unambiguous and does not extend to release Beaumont for the alleged acts of medical malpractice.

2. Parole Evidence

Plaintiff also argues that the trial court erred in considering parole evidence. We agree, but this error does not require reversal.

This court determined that parole evidence was inappropriate in determining the language of a release if:

(a) the language of the release is unambiguous and thereby precludes resort to allegedly contradictory parole evidence . . .

and (b) the release contains an explicit merger clause that independently precludes resort to parole evidence. [*Romska, supra* at 516.]

Because both circumstances exist in this case, the trial court erred in considering parole evidence. But in light of our conclusion that the release is unambiguous and does not extend to release Beaumont, this error does not require reversal.

3. The Trial Court's Prior Ruling on the Release in the Medical Malpractice Case

Plaintiff also argues that the trial court's ruling in this case must be reversed because it is different from its ruling on the same issue in the prior medical malpractice case. We conclude the trial court's prior ruling has no effect on this case.

Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and (3) "there must be mutuality of estoppel." [*Monat v State Farm Ins Co*, 469 Mich 679, 683-684; ____ NW2d ____ (2004).]

Plaintiff seeks to use collateral estoppel offensively to preclude defendants from relitigating the applicability of the release. But the doctrine does not apply because defendants in this case did not have a "full and fair" opportunity to litigate this issue in the medical malpractice case.

III. Conclusion

Because the release unambiguously released only those claims for injuries related to the automobile accident, it does not release Beaumont for the alleged medical malpractice. Therefore, the trial court did not err in granting summary disposition of plaintiff's legal malpractice claim against defendants.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs