STATE OF MICHIGAN

COURT OF APPEALS

DENISE MEAGHER, JEFFREY MEAGHER, and JODIE MEAGHER, also known as JODIE LIFORD,

Plaintiffs-Appellees,

v

MACOMB MEDICAL CLINIC, P.C., a/k/a MACOMB MEDICAL CENTER, P.C.,

Defendant-Appellant.

UNPUBLISHED
July 15, 2004

No. 246738
Macomb Circuit Court
LC No. 2002-003267-CK

Before: Murphy, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the order denying its motion for summary disposition under MCR 2.116(C)(7) and granting summary disposition to plaintiffs under MCR 2.116(I)(2). This case arises out of a medical malpractice claim that resulted in a settlement agreement. Plaintiffs alleged that defendant never paid them the recited consideration under the agreement. We affirm.

Plaintiffs commenced a medical malpractice action against defendant and others in August 1999. Plaintiffs alleged, in part, that Denise Meagher had become addicted to drugs that had been negligently prescribed for her. The defendants in this prior action were eventually granted summary disposition under MCR 2.116(C)(10), and plaintiffs appealed to this Court. However, before the appeal could run its course, the parties reached a settlement agreement. The pertinent portions of the agreement provide as follows:

> FOR AND IN CONSIDERATION of the payment to me at this time, of the sum of FIFTY-THOUSAND DOLLARS ($50,000.00), the receipt of which is hereby acknowledged, we, being of lawful age, do hereby release, acquit and forever discharge MACOMB MEDICAL CENTER, P.C., their employers, employees, agents, independent contractors and/or assigns and all other persons, firms and corporations from any and all actions, administrative actions, causes of action, claims, demands, liens, damages, costs, loss of services and expenses and compensation on account of, or in any way grown out of any and all known or unknown personal injuries including death resulting therefrom and property damage resulting or which will result from any and all contact with the

> released/covenanted parties, including medical treatment, and any and all claims which were or could have been stated in the complaint that was filed in the Macomb County Circuit Court bearing case number 00-0260-NH.

Plaintiffs assert that they never received the $50,000 set forth in the agreement. Plaintiffs filed the instant complaint in July 2002, asserting breach of settlement agreement.

This Court reviews a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) de novo. *Diponio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). Whether the trial court properly determined that release did not bar plaintiffs' action is likewise reviewed de novo. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). MCR 2.116(C)(7) tests, in part, whether a claim is "barred because of release[.]" With respect to a motion brought pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). If a party submits affidavits, depositions, admissions, or other documentary evidence, those materials must be considered. *Id.* The substance or content of the supporting documentation must be admissible into evidence. *Id.* at 82-83. The evidence is viewed in a light most favorable to the plaintiff. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001).

Defendant argues that plaintiffs' cause of action is barred because of release. A release, however, must be supported by the tendering of legally valid consideration. See *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000); *Babcock v Public Bank*, 366 Mich 124, 135; 114 NW2d 159 (1962). Therein lies the crux of this litigation, the payment or nonpayment of $50,000 as consideration for a full release and discharge of liability.

Defendant contends that the trial court improperly allowed plaintiffs to offer parol evidence to rebut their express acknowledgement in the settlement agreement of their receipt of the consideration. Any exception to the parol evidence rule does not apply, defendant argues, because plaintiffs' acknowledgement of the consideration was not a mere recital, but rather was a term of the agreement. We disagree.

The parol evidence rule provides that evidence of contract negotiations, or of prior or contemporaneous agreements that contradict the written contract, is inadmissible to vary the terms of a clear and unambiguous contract. *Vergote v K Mart Corp (After Remand)*, 158 Mich App 96, 108; 404 NW2d 711 (1987). However, "[a] written acknowledgement of receipt of consideration or other form of payment in a contract merely creates a rebuttable presumption that consideration has, in fact, passed. Neither the parol evidence rule nor the doctrine of estoppel bars the presentation of evidence to contradict any such acknowledgement." *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 32; 566 NW2d 4 (1997), citing *Hagan v Moch*, 249 Mich 511, 517; 229 NW 629 (1930), and *Eastern Mich Univ Bd of Control v Burgess*, 45 Mich App 183, 185-186; 206 NW2d 256 (1973). Further, we are not persuaded that plaintiffs' acknowledgement of the consideration was anything more than a statement of fact, as opposed to being an express term of the contract, thereby precluding reliance on the parol

evidence rule. 2 Restatement Contracts, 2d, § 218, p 144.[1] Therefore, we find that the trial court properly determined that the parol evidence rule did not bar plaintiffs from rebutting the presumption that defendant had paid the $50,000 consideration.

Next, defendant argues that even if plaintiffs are allowed to offer parol evidence to rebut the presumption that they were paid the consideration, plaintiffs have nonetheless failed to provide any admissible evidence rebutting the presumption. Again, we disagree.

The complaint specifically alleged that plaintiffs had not received the $50,000 consideration because defendant had failed to pay the money. In the context of defendant's motion for summary disposition, defendant failed to offer adequate admissible evidence in order to controvert plaintiffs' allegations that they were not paid the consideration. Unless contradicted by documentary evidence, a trial court is required to accept all of plaintiffs' well-pleaded allegations as true when determining a motion brought pursuant to MCR 2.116(C)(7). *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994). Defendant argues that the settlement itself provides the contradictory evidence, wherein plaintiffs indicate that the consideration was paid and received. Sole reliance on the underlying contract itself, the release, which is the subject matter of the litigation, is insufficient. If $50,000 had been paid to plaintiffs, it is inconceivable that defendant would not have any other documentary evidence at its disposal or accessible through discovery that reflected the payment. Moreover, plaintiffs presented the affidavit of their attorney, averring that no payment was ever tendered to his law firm. Defendant's reliance on MRPC 3.7(a) is misplaced. It provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . ." The language does not prohibit an attorney from offering evidence, and this case is not at the trial stage, nor shall it proceed to the trial stage. MRPC 3.7(a) may have provided grounds for defendant to seek disqualification of plaintiffs' attorney, which has not been sought, but it does not negate the proffered affidavit of the attorney. Therefore, we find that the trial court correctly determined, as a matter of law, that plaintiffs had rebutted the presumption that they received the acknowledged consideration recited in the release.

Defendant next argues that the language of the release does not set forth an obligation on its part to pay the consideration. Further, defendant asserts that the parties had agreed that defendant's insurers were the obligated party. The scope of a release is governed by its terms and encompasses only those claims intended to be released. *Cordova Chemical Co v Dep't of Natural Resources*, 212 Mich App 144, 150; 536 NW2d 860 (1995). If the terms of the release are unambiguous and unequivocal, the intent of the parties as expressed therein controls the scope of the release. *Burgess v Clark*, 215 Mich App 542, 547-548; 547 NW2d 59 (1996). "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

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[1] Section 218(a) of the Restatement provides that "[a] recital of a fact in an integrated agreement may be shown to be untrue." A recital or acknowledgement of consideration received is no more than a statement of fact, which may be contradicted by parol evidence. *Boy Scouts of America v Responsive Terminal Systems, Inc*, 790 SW2d 738, 744 (Tex App, 1990). See also 3 Corbin, Contracts, § 586, pp 489-490.

reasonably susceptible to more than one interpretation." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

We conclude that the language of the release is clear and unambiguous. Therefore, defendant is barred from offering parol evidence to prove the intent of the parties. *Meager v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).[2] Further, the only logical and reasonable conclusion to be drawn from the release is that the parties intended and agreed that defendant was obligated to pay plaintiffs the recited consideration. This is supported by the fact that there is no indication, either expressed or implied, that the payment of the consideration was the responsibility of defendant's insurers. The agreement indicates that it is between the parties to the lawsuit, and defendant alone is referenced within the context of identifying the amount of the settlement to be paid. Although a contract may be "inartfully worded or clumsily arranged," if it admits of but one interpretation, it is not ambiguous. *Id.* We agree with the language by the United States District Court in *Akahoshi v Southern Waste Services*, 181 F Supp 2d 711, 715 (ED Mich, 2001), wherein it is stated that "[i]f it was defense counsel's intent that the settlement agreement was to be conditioned on the insurance carrier paying the settlement amount, such a provision should have been made an express condition of the settlement proposal – which Plaintiff could have accepted or rejected."

Defendant also argues that, because it was the specific agreement of the parties that defendant's insurers would be obligated to pay the consideration, a novation substituting defendant's insurers for defendant was created, thereby extinguishing the prior debt. We first note that, although a novation does not require a writing to evidence the consent of the parties, the statute of frauds *does* require that every agreement to answer to the debt of another be in writing and signed by the party to be charged. MCL 566.132(1)(b). Regardless, defendant's novation argument lacks merit. A novation requires: (1) parties that are capable of contracting; (2) a valid obligation to be displaced; (3) consent of all the parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. *Macklin v Brown*, 111 Mich App 110, 112; 314 NW2d 538 (1981). Defendant argues that the valid obligation that was displaced arose from the settlement and release, and, that the creation of the new obligation, i.e., insurer's obligation, also arose from the settlement and release because the parties understood that the insurer would be responsible. This argument fails, in that, it reflects an improper attempt to circumvent the rules of construction regarding releases and to circumvent the parol evidence rule. The only obligation that arose from the release, predicated on the clear and unambiguous language of the release, was defendant's obligation to pay the consideration; there is no mention of an insurer. We fully appreciate that an insurance carrier would typically make the actual payment to cover the settlement based on a contract between the insurer and the medical provider; however, this does not absolve the

[2] We note that, as indicated in the trial court's opinion, defendant attempts to rely on an affidavit by defendant's business administrator reflecting that the parties understood the insurers would make the payment. As also noted by the trial court, however, the affidavit of plaintiffs' counsel indicates that all discussions and negotiations were through defendant's attorney and no negotiations were ever conducted with the business administrator.

medical provider from any liability for the settlement consideration unless enunciated in the settlement.

Next, defendant argues that the trial court erred in its determination that plaintiffs' claim for breach of contract was not barred by the equitable doctrine of laches. We disagree. This Court reviews for clear error a trial court's decision that the equitable doctrine of laches did not bar a plaintiff's claim for clear error. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id*. The doctrine reflects "'the exercise of the reserved power of equity to withhold relief otherwise regularly given whether in the particular case the granting of such relief would be unfair and unjust.'" *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982), quoting Walsh, Equity, § 102, p 472.

We conclude that the trial court did not clearly err in its decision that the equitable doctrine of laches did not bar plaintiffs' claim. In determining that laches did not apply, the trial court found that, because the release was silent as to defendant's insurers, plaintiffs could hardly have been expected to file a claim against either insurance company because that was clearly the responsibility of defendant as the liable party under the release. Further, the trial court concluded: (1) that plaintiffs had filed their complaint within the period of limitations pursuant to MCL 600.5807(8), which provides a six-year period to file a contract action; (2) that plaintiffs remedy sought was not purely equitable in nature because they were only seeking specific performance of an award of money; and (3) that it was not persuaded that plaintiffs' failure to pursue their claim in under a year constituted sitting on their rights to the detriment of defendant. We agree with the trial court's well-reasoned analysis. Minimally, there was no clear error.

Finally, defendant argues that the trial court erred by granting summary disposition to plaintiffs pursuant to MCR 2.116(C)(10) because there were genuine issues of material fact. We first note that the trial court did not grant summary disposition to plaintiffs under MCR 2.116(C)(10), but rather, granted summary disposition to plaintiffs pursuant to MCR 2.116(I)(2). "The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). We do recognize that the trial court's analysis is premised on (C)(10) principles.

Contrary to defendant's assertion, the trial court did not conclude that a question of fact was created regarding plaintiffs not having received the $50,000. The language from the court's opinion that defendant relies on is actually the court's citation of, and partial quotation from, *Claire-Ann*; the court here was merely setting forth principles *before* engaging in its analysis of the case at bar. For purposes of plaintiffs' motion for relief under MCR 2.116(I)(2), defendant's failure to satisfactorily meet the affidavit of plaintiffs' attorney, asserting that no payment had been made, means that no genuine issue of fact exists regarding payment of the money. Accordingly, we conclude that the trial court correctly granted summary disposition to plaintiffs

pursuant to MCR 2.116(I)(2), given that the clear and unambiguous language of the release obligated defendant to pay the recited consideration, which defendant failed to do.[3]

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

[3] Defendant makes a brief reference that it did not even sign the release document. There is no signature, but the affidavit of plaintiffs' attorney indicates that the attorney for defendant, with whom negotiations were solely through, prepared the document and forwarded it to plaintiffs' counsel for execution. This is not contradicted. This argument is further reflection of defendant's attempts to distance itself from its obligations under the settlement and release, while still seeking the protections from liability under that same document. We are genuinely disturbed by defendant's position in this matter.