STATE OF MICHIGAN

COURT OF APPEALS

THOMAS JOHN SHAY,

Plaintiff-Appellee,

v

JOHN ALDRICH, WILLIAM PLEMONS, and J. MILLER,

Defendants-Appellants,

and

OFFICER ALLBRIGHT and OFFICER LOCKLEAR,

Defendants.

UNPUBLISHED
March 5, 2009

No. 282550
Wayne Circuit Court
LC No. 06-608275-NZ

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendants John Aldrich, William Plemons, and J. Miller ("defendants"), appeal by leave granted from an order denying their motion for summary disposition. We reverse.

Defendants are Melvindale police officers, and this case arises out of plaintiff's September 8, 2004, arrest for disorderly conduct, resisting arrest, and obstructing justice. Plaintiff filed the instant lawsuit in March 2006, against defendants as well as against Allen Park police officers Wayne Allbright and Kevin Locklear. The claim against defendants pertained to gross negligence as a result of an alleged assault and battery, while the claim against the Allen Park officers pertained to gross negligence as a result of inaction.

The case proceeded to case evaluation in June 2007. The evaluation panel issued awards of $500,000 against Aldrich, $500,000 against Plemons, $450,000 against Miller, and $12,500 against each of the Allen Park officers. Plaintiff accepted the awards against Miller and the Allen Park officers. Defendants rejected the awards, and the Allen Park officers accepted the awards.

On July 23, 2007, a settlement conference was conducted. As a result of the mutual acceptance of the case evaluation awards, the Allen Park officers were dismissed from the case.

On July 24, 2007, plaintiff executed releases. A separate release was executed for each Allen Park officer, but, other than the name of the particular officer, the releases contain identical language. The releases provide, in part:

> For the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($12,500.00) DOLLARS to me in hand paid by **Michigan Municipal Liability and Property Pool** do for ourselves, executors, administrators, successors, and assigns, discharge, **ALLEN PARK POLICE OFFICER** [Locklear/Allbright] **and Michigan Municipal Liability and Property Pool, insurer,** together with all other persons, firms and corporations, from any and all claims, demands and actions which I have now or may have arising out of any and all damages, expenses, and any loss or damage resulting from an incident occurring on September 8, 2004. [Emphasis in original.]

On October 19, 2007, defendants moved for summary disposition under MCR 2.116(C)(7). Defendants argued that because the plain language of the releases reference not only the Allen Park officers, but "all other persons," defendants are in the class of persons released from liability to plaintiff in connection with the September 8, 2004, incident. Plaintiff responded to the motion by arguing that summary disposition under MCR 2.116(C)(7) on the basis of a release is only appropriate if, in contrast to the instant case, the release was executed "before commencement of the action."

At a hearing on November 9, 2007, the trial court ruled:

> The motion here is brought pursuant to MCR 2.116(C)(7) alleging that the claim of the Plaintiff should be barred because of a release.
>
> * * *
>
> Now, the Defense is relying on a provision in the Court Rule to bar the, or really to dismiss the claim of the Plaintiff. I think in those circumstances it's very important that we look at the exact language of the, of the Court Rule so that we could, we can make a determination as to whether or not the requirements of the Court Rule are being satisfied. And in this case there are two sections that really give us some guidance here. 2.116(C)(7) and 2.116(D), (D)(2), as a matter of fact.
>
> And just to kind of highlight from (C)(7), it says the claim is barred because of release, payment, prior judgment, and it lists some other factors, or other disability of the moving party or assignment or other disposition of the claim before commencement of the action. And I think that last few words, "before commencing, commencement of the action" is a requirement. It's important that we look at that.
>
> And that is, is further amplified or explained in (D)(2) where it says that the grounds listed in Subrules, Subrule (C)(5), (6) and (7), and (7) is the one that we're concerned about, must be raised in a party's responsive pleading unless the

> grounds are stated in a motion filed under this rule prior to the party's First Responsive Pleadings. Those requirements have to be satisfied . . . .
>
> In this case the rules have not been satisfied. There's no basis for the motion to dismiss the case or grant the relief that Defendant is requesting, so that the motion here is denied.

Also on November 9, 2007, the trial court issued a written order that denied defendants' motion for summary disposition "for the reasons stated on the record."

Subsequently, defendants moved to amend their affirmative defenses to include a defense based on the releases. In an opinion and order dated December 6, 2007, the trial court denied the motion. The trial court opined that the releases were ambiguous because the bolded portion of the releases indicated an intent to limit the releases to those parties, and, under the circumstances of this case, it was clear that plaintiff only intended to release the Allen Park officers. The trial court also noted that the Allen Park officers had no authority to enter into an agreement that would release defendants. The trial court then concluded:

> MCR 2.118(A)(2) provides that a party may amend a pleading by leave of the court and leave shall be freely given when justice so requires. The question here is whether justice would require leave to amend be granted under these circumstances. The aim of the defense is to amend their pleading so that they may again file a motion for summary disposition based on the affirmative defense of release. In this case, justice requires that the Plaintiffs case go forward in conformity with the intentions of the parties.

On appeal, defendants contend that the trial court erred in denying their motion for summary disposition. We review de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

> When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff. . . . A motion under this subrule should be granted only if no factual development could provide a basis for recovery. [*Romska v Opper*, 234 Mich App 512, 515; 594 NW2d 853 (1999).]

We find the *Romska* case particularly instructive here. In *Romska*, *supra* at 513, the plaintiff's vehicle was struck by a vehicle owned by Boyan Daskal and driven by Veliko Velikov. David Opper allegedly caused Velikov to swerve into oncoming traffic and strike plaintiff's vehicle. *Id*. The plaintiff executed a release in connection with proceedings against Daskal and Velikov. *Id*. at 513-514. The release stated, in part:

> I/we hereby release and discharge Boyan Daskal and Veliko Velikov, his or her successors and assigns, and *all other parties, firms, or corporations who are or might be liable*, from all claims of any kind or character which I/we have or might have against him/her or them. [*Id*. at 514 (emphasis supplied by *Romska*).]

The plaintiff subsequently sued Opper; Opper did not raise the affirmative defense of release initially, but the trial court permitted an amendment to the affirmative defenses and then concluded that the release barred plaintiff's lawsuit. *Id*. at 514-515.

This Court concluded that Opper clearly fit within the "all other parties, firms, or corporations who are or might be liable" language from the release. *Id*. at 515. It stated that it need not "look beyond the plain, explicit, and unambiguous language of the release in order to conclude that [Opper] has been released from liability." *Id*. at 515. The Court emphasized that the word "all" had been used in the release. *Id*. at 515-516.

The releases at issue in the present case use the same broad language as the release at issue in *Romska*, and they also employ the word "all." Contrary to plaintiff's arguments on appeal, the language is unambiguous and thus must be applied as written. *Id*. at 515. The releases indicate that "all other persons" are discharged "from any and all claims . . . which I have now or may have . . . ." Accordingly, the releases encompassed the pending litigation and served to bar plaintiff's claims against defendants.

We reject plaintiff's argument that summary disposition was inappropriate because MCR 2.116(C)(7) applies only if a release is entered into before commencement of the action. MCR 2.116(C)(7) states that summary disposition is appropriate if

> [t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

As noted in *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004), "a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation" (internal citations and quotation marks omitted). Here, the subject matter or dominant purpose of the rule does not compel us to conclude that the phrase "before commencement of the action" must apply to all the antecedents as opposed to applying simply to the phrase "other disposition of the claim." Additionally, as stated in *Cameron v Auto Ins Ass'n*, 476 Mich 55, 71; 718 NW2d 784 (2006), "the last antecedent rule does not apply where the modifying clause is set off by a punctuation mark, such as a comma or, in this case, a period." We note that the modifying clause "before commencement of the action" is not set off by a comma or period. We find that MCR 2.116(C)(7) did in fact apply in this case.

Moreover, given the applicability of the releases and the applicability of MCR 2.116(C)(7), we find that the court abused its discretion in failing to allow defendants to amend their affirmative defenses. See *Moorehouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 419; 383 NW2d 219 (1986) (it makes sense to allow affirmative defenses to be raised when they become available). Any delay did not cause the type of "prejudice" that mandates the denial of leave to amend. See, generally, *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997).

Plaintiff contends that the releases are unenforceable against defendants because plaintiff received inadequate consideration. Plaintiff contends that the Allen Park officers paid nothing more than that which they were already obligated to pay. We reject this argument. As noted by plaintiff himself in his appellate brief, counsel for the Allen Park officers "asked to have the case

evaluation settlement accomplished by 'Release' and Stipulation and Order of Dismissal, with 'the case evaluation award ($12,500.00) as consideration.'" Plaintiff also stated in his brief that "[t]he settlement amount was paid by the insurer of Allen Park and forwarded with a letter by their counsel . . . ." Under these circumstances, we conclude that the Allen Park officers paid consideration for the releases.

Plaintiff additionally contends that there was no consideration for the promise to release persons other than the Allen Park officers from liability. We also reject this argument. As noted in *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005), "the basic rule of contract law is that whatever consideration is paid for all of the promises is consideration for each one . . ." (internal citation and quotation marks omitted).

Plaintiff contends that, if we find the releases applicable to defendants, the proper remedy is to allow a reformation of the releases. We disagree. The releases must be applied as written. *Romska*, *supra* at 515. "This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999) (internal citation and quotation marks omitted).

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood