24-128438-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL SZERWINSKI,

Plaintiff / Appellant,

vs.

THE MAIN STREET ASSOCIATES , INC., d/b/a MINSKY'S PIZZA,

Defendant / Appellee.

On Appeal from the District Court of Johnson County
Honorable David W. Hauber, District Court Judge
District Court Case No. 24CV00198

REPLY BRIEF OF THE APPELLANT

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Table of Contents

Reply Argument and Authorities

Rule 6.05 Statement

This reply brief is made necessary by new material in the appellee's brief. Specifically, that new material is the appellee's arguments that:

- Mr. Szerwinski abandoned his *respondeat superior* claim (Brief of the Appellee ["Aple.Br."] 7-8);
- The language in Mr. Szerwinski's general release was broad enough to sufficiently identify Minsky's and extinguish its liability (Aple.Br. 9-13);
- Unpublished opinions that contradict a later holding of the Kansas Supreme Court should still be persuasive authority (Aple.Br. 12-13);
- Mr. Szerwinski was not the plaintiff who the Kansas Supreme Court sought to protect from the "flat bar rule" because he was represented by counsel (Aple.Br. 13);
- Mr. Szerwinski was tricked into releasing claims against Minsky's by any "unsavory bait and switch tactics" (Aple.Br. 14);
- Had Mr. Szerwinski and his counsel "intended to specifically reserve any claims against Minsky's they could have explicitly done so in the Release of All Claims" (Aple.Br. 14-16); and
- If this Court adopts the "intent rule," it should reject any request to consider parol evidence and ascertain the intent of the parties from the instrument itself (Aple.Br. 14-16).

A. Summary of Mr. Szerwinski's opening brief

Michael Szerwinski appeals from a judgment on the pleadings under K.S.A. § 60-212(c) dismissing his personal injury claims against The Main Street Associates, Inc., d/b/a Minsky's Pizza ("Minsky's"). He had brought an action for damages against Minsky's after he was injured in an automobile accident he alleged a Minsky's employee caused (R1 at 1-7). He brought one claim against Minsky's under the doctrine of *respondeat superior* (agency liability) and another claim for Minsky's independent negligence (R1 at 2-6).

Minsky's moved the district court to enter a judgment on the pleadings dismissing both claims (R3 at 1-9). It relied entirely on a general release Mr. Szerwinski had executed in a settlement with the Minsky's employee (R3 at 1-9). It argued the release was broad enough to extinguish its liability for *both* agency liability *and* any independent torts (R3 at 1-9).

After hearing arguments, the district court granted Minsky's judgment on the pleadings on both of Mr. Szerwinski's claims (R1 at 17-26).

In his opening brief, Mr. Szerwinski explained that the district court erred in granting Minsky's judgment on the pleadings for his *independent negligence* claim (Aple.Br. 11-22). This is because the law of Kansas follows a "specific identity rule" requiring a party to be identified by name or specific terminology in a release to have its claims against it released (Aple.Br. 11-15). Here, Minsky's was not identified by name or specific terminology in Mr. Szerwinski's release (Aplt.Br. 15-20). Therefore, Mr. Szerwinski's general release with its employee cannot extinguish Minsky's liability for its independent negligence in causing his injuries (Aplt.Br. 15-20). And even if this Court followed a stricter standard, Minsky's would remain liable because

viewing the record most favorably to Mr. Szerwinski, he never intended to release Minsky's from its independent liability (Aplt.Br. 20-22).

B. Scope of appeal

Before responding to Mr. Szerwinski's issue on appeal, Minsky's "[a]s a preliminary matter" takes time to discuss claims Mr. Szerwinski did *not* assert on appeal (Aple.Br. 7-8). It then argues the Court cannot consider these unasserted claims because Mr. Szerwinski did not adequately brief these issues and so either abandoned or waived them (Aple.Br. 7).

Minsky's aside is puzzling, because Mr. Szerwinski's issue on appeal is clear: the district court erred in granting Minsky's judgment on the pleadings on Mr. Szerwinski's independent negligence claim because the general release did not extinguish Minsky's liability (Aplt.Br. 11-22). Mr. Szerwinski agrees that this is what his appeal is entirely about.

C. Under Kansas's specific identity rule, the language in Mr. Szerwinski's general release with Minsky's employee did not extinguish Minsky's independent tort liability.

In response to Mr. Szerwinski's argument, Minsky's concedes that "Kansas courts generally follow the specific identity rule" to determine whether a party has been released from liability for an independent tort (Aple.Br. 9). But it asserts that it is still entitled to a release of liability because the general release "unambiguously released Minsky's employee, Mr. Crocker, and Minsky's" as the "specific identifying terminology in the Release of All Claims was sufficient to identify Minsky's" (Aple.Br. 9). Minsky's argument is in error.

1. The unpublished decisions Minsky's cites support Mr. Szerwinski's position, not Minsky's.

First, to support its argument under the specific identity rule, Minsky's relies on two unpublished decisions from this Court: *White v. Miller*, No. 66,734, 1992 Kan. App. LEXIS 173, at *1-2 (Kan. App. Mar. 13, 1992), and *Davis v. Kan. City Renaissance Festival Corp*., No. 109,859, 2014 WL 802452 (Kan. App. Feb. 28, 2014) (Aple.Br. 11-14). Both decisions are inapplicable.

At the outset, Minsky's choice of these unpublished decisions is curious. Unpublished decisions are not binding precedent and should only be cited if it "has persuasive value with respect to a material issue not addressed in a published opinion … and … would assist the court in disposition of the issue." Rule 7.04. (Minsky's mis-cites *White*, which is not even available on Westlaw.)

Here, the material issue is whether Minsky's was specifically identified in Mr. Szerwinski's general release with its employee such that the release extinguished his independent negligence claim against Minsky's, too. In his opening brief, Mr. Szerwinski discussed a number of published Kansas appellate decisions that defined and applied the specific identity rule to general releases in independent tort cases (Aplt.Br. 14-19). Minsky's does not explain how these do not sufficiently address the material issue such that citing an unpublished decision is proper.

In any case, neither *White* nor *Davis* helps Minsky's, because both are inapposite in key ways.

First, in *White*, the plaintiff in *White* was injured in a car accident in which she was a passenger. 1992 Kan. App. LEXIS 173, at *1-2. The

plaintiff then executed a release discharged "[one of the drivers], "Ranger Ins. Co. and Seneca Ins. Co. *and all other persons*, firms and corporations *from all claims and demands, rights and causes of action*" associated with the accident. *Id.* at *2 (emphasis added). This Court held the language was broad enough to encompass and release the liability of the other driver. *Id.* at *3-11. Minsky's argues that because of this, Mr. Szerwinski's release should be held broad enough to include Minsky's, too (Aple.Br. 11).

White is plainly inapposite, because the release here only stated it was releasing "**Michael Crocker** and **Marcia Shelby** with respect to claim #0688578327, against Allstate Insurance Company under policy #000000821589911, their heirs, executors and administrators, from the above-specified Allstate Claim," not "all other persons, etc." as in *White*, and later refers back to Mr. Crocker, Ms. Shelby, and Allstate as to that claim as "the parties hereby released" (R2 at 12) (emphasis in the original).

More importantly, the Court in *White* did not apply the "specific identity rule," because *White* predates the Supreme Court's adoption of that rule eight years later in *Luther v. Danner*, 268 Kan. 343, 346, 995 P.2d 865 (2000). Minsky's mentions this but does not address the difference in the legal analysis between the two decisions (Aple.Br. 12). The Court in *White* used the "flat bar rule," which held that "language such as all other persons, firms or corporations liable is unambiguous and discharges all potential tortfeasors from liability." *Luther*, 268 Kan. at 346. That was the exact language in the release in *White* on which this Court relied. 1992 Kan. App. LEXIS 173, at *10-11. But the Supreme Court in *Luther* explicitly rejected

the flat bar rule, 268 Kan. at 351-52, making *White* no longer good law. Minsky's omits this (Aple.Br. 12).

Davis, which Minsky's also cites, is factually inapposite, because the decision did not concern an independent tort claim, only a claim of *respondeat superior*. 2014 WL 802452, at *6. It was for this reason that the Court held "the specific identity rule did not apply," as that only applies – as here – in cases of independent negligence. *Id.*

Mr. Szerwinski concedes that he is not challenging the trial court granting judgment on the pleadings for his *respondeat superior* claim. Instead, his sole issue on appeal only concerns the dismissal of his independent negligence claim (Aplt.Br. 11-22). The specific identity rule applies (Aplt.Br. 11-15), and *Davis* is of no utility here.

2. Kansas appellate courts have uniformly concluded that the specific identity rule applies to general releases in independent negligence cases.

Instead of inapplicable, non-binding authority, the Court should stick to Kansas precedent, which commands reversal here.

In his opening brief, Mr. Szerwinski discussed three decisions in which this Court or the Supreme Court reversed judgments dismissing independent negligence claims in which the general releases used similar boilerplate language to his here (Aplt.Br. 14-19). *See Geier v. Wikel*, 4 Kan. App. 2d 188, 188, 603 P.2d 1028 (1979) (reversing dismissal of independent negligence claim in train collision case against car driver where release with railroad from train accident did not name the driver); *Luther*, 268 Kan. at 343 (reversing summary judgment on independent negligence claim against truck

driver and employer where release with motorcycle driver's estate contained language releasing "all other persons, firms, corporations, associations, or partnerships of and from any and all claims," as under specific identity rule that general language was insufficient to release the other parties); *Wright v. Bachmurski*, 29 Kan. App. 2d 595, 597-600, 29 P.3d 979 (2001) (applying *Luther*, reversing summary judgment on defamation claim against declarants in newspaper article where release with newspaper did not specifically identify those parties).

Each of these decisions is directly on point, but Minsky's ignores them entirely and fails to address them at all – except to address *Luther* in passing and concede that there, the Supreme Court adopted the "specific identity rule" (Aple.Br. 9, 12-13). As Minsky's noted in its own brief, "[i]ssues not adequately briefed are deemed waived or abandoned." *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (citation omitted). By not addressing these authorities at all, Minsky's tacitly concedes that they support Mr. Szerwinski.

Here, as in these decisions, Mr. Szerwinski did not name Minsky's in his release. Minsky's concedes this but argues the "language is broad enough to include Minsky's within the class of individuals and entities being released" (Aple.Br. 10). That makes no sense. The release does not contain any specific identifying terminology that would make Minsky's identity reasonably apparent. The pertinent language of the release states:

> This Indenture Witnesseth that, in consideration of the sum of **One Hundred Thousand Dollars ($100,000.00)** receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release forever

> discharge **Michael Crocker and Marcia Shelby** with respect to claim #0688578327, against Allstate Insurance Company under policy #000000821589911, their heirs, executors and administrators, from the above-specified Allstate Claim, demands, damages, costs, expenses, loss of services, actions, and causes of actions arising from any act or occurrence, up to the present time, and particularly an account of all personal injury, disability, property damage, loss of service and loss or damage of any kind sustained or that I hereafter may sustain in consequence of an accident that occurred on or about the **24th** day of **September, 2022** at or near Lackman Rd & 79th St.

(R1 at 12) (emphasis in the original). The only release is of "Michael Crocker and Marcia Shelby" and "Allstate Insurance Company" under a particular claim and policy, as well as "their heirs, executors and administrators."

Minsky's suggests it could be an heir, executor, or administrator of the Allstate claim (Aple.Br. 10). And as one or more of these, any liability it had in connection with the accident on September 24, 2022, would extinguish (Aple.Br. 10). But Minsky's does not elaborate on how or why it reasonably could be identified as one or more of these. Instead, Minsky's is really trying to resurrect the old common-law "unity of discharge" rule that determined language releasing "one joint tortfeasor discharges all others." *Mulroy v. Olberding*, 29 Kan. App. 2d 757, 764, 30 P.3d 1050 (2001). Again, in *Luther*, the Supreme Court rejected interpreting a release this way because a "tortfeasor who has taken no part in the satisfaction of a plaintiff's claim should not gratuitously benefit from settlement arrangements undertaken at the time and expense of others." *Luther*, 268 Kan. at 348.

This case and *Luther* are effectively the same. Mr. Szerwinski brought an independent negligence claim against an employer after executing a

release with a would-be joint tortfeasor (R1 at 1-6, 12). But the release did not specifically name the employer (R1 at 12). Nor did it contain specific identifying terminology that would plainly mean the employer (R1 at 12). Therefore, Mr. Szerwinski's general release does not satisfy Kansas's specific identity rule for the employer's independent negligence, and the trial court erred in holding otherwise. *Luther*, 268 Kan. at 346, 351-52.

Minsky's acknowledges that where an entity is not specifically named or identified in a release, there is a rebuttable presumption that its release was not intended (Aple.Br. 9). As such, *Minsky's* carried the burden of rebutting this presumption because it was not named in Mr. Szerwinski's general release (R1 at 12). It did not – especially as Minsky's motion required taking all facts in Mr. Szerwinski's pleadings as true and drawing all inferences in *his* favor. *Doe H.B. v. M.J.*, 59 Kan. App. 2d 273, 283, 482 P.3d 596 (2021).

Instead, the district court merely entered a judgment on the pleadings after failing "to follow the approach that is consistent with comparative fault principles." *Luther,* 268 Kan. at 352. This was reversible error. *Id.*

D. The effect of Mr. Szerwinski's release does not change because he was represented by counsel.

While Minsky's acknowledges that the "specific identity rule is the prevailing rule in Kansas," it suggests this Court should reject the specific identity rule and apply the flat bar rule rejected in *Luther* instead because Mr. Szerwinski was represented by counsel (Aple.Br. 13-15). To support this, Minsky's relies on mischaracterizations of *Davis* and *Mulroy* (Aple.Br. 13-14).

First, Minsky's likens this case to *Davis* because Mr. Szerwinski was represented by counsel, which it argues should negate any claim that he was an unwary plaintiff trapped by a boilerplate form (Aple.Br. 13). As Mr. Szerwinski explained above, *Davis* is inapposite because it solely involved a *respondeat superior* claim, not an independent negligence claim. *Davis*, 2014 WL 802452, *at 6. Nor has Mr. Szerwinski ever argued he was unwary. His counsel specifically crafted a release that *did not* include or even allude to Minsky's, but only released Mr. Crocker, Ms. Shelby, and Allstate.

Minsky's then argues this Court held in *Mulroy* that "the defendant employer was not released by the release of its employee, in part, because of the apparent tactics used by defendant employer to convince the plaintiff to release its employee" (Aple.Br. 14). This is not true. This Court in *Davis* explained why *Mulroy* is yet another example of the failure to specifically identify a party in that release as not extinguishing an independent negligence claim against that party:

> In [*Mulroy*], Western Resources disputed that one of its employees was acting within the scope of his employment when he was involved in an automobile accident while under the influence of alcohol. 29 Kan.App.2d at 758-59, 30 P.3d 1050. At a conference on jury instructions, counsel for Western Resources and the employee suggested that the plaintiff dismiss the employee from the lawsuit because both parties had admitted liability at trial. In return, the parties agreed that the plaintiff would receive an instruction advising the jury that Western Resources was responsible for its employee's negligence. 29 Kan.App.2d at 760, 30 P.3d 1050. The plaintiff agreed and dismissed the employee with prejudice. Thereafter, Western Resources immediately moved for its own dismissal, arguing that the plaintiff could not proceed with his claim for vicarious

> liability against it because he had dismissed the employee with prejudice. The district court granted Western Resources' motion to dismiss. 29 Kan.App.2d at 761, 30 P.3d 1050.
>
> On appeal, this court noted that Kansas follows the specific identity rule involving general releases of *joint tortfeasors* in comparative negligence cases. 29 Kan.App.2d 757, Syl. ¶ 1, 30 P.3d 1050. This court found that although Western Resources' liability was premised upon respondeat superior, the controlling fact in the case was the comparative negligence of the employee and the plaintiff. 29 Kan.App.2d at 766, 30 P.3d 1050. This court concluded that the specific identity rule applied and that the dismissal of Western Resources was therefore inappropriate. 29 Kan.App.2d at 766, 30 P.3d 1050.

Davis, 2014 WL 802452 at *5 (emphasis in the original).

Here, as the plaintiff in *Mulroy*, Mr. Szerwinski brought an independent negligence claim against Minsky's (R1 at 1-6). Therefore, the specific identity rule applies. *Mulroy*, 29 Kan. at 766. Minsky's cites no decision supporting its notion that representation by counsel requires a stricter approach when evaluating a general release in an independent negligence claim. This is because that is not the law of Kansas.

Minsky's also argues that had Mr. Szerwinski "and his counsel intended to specifically reserve any claims against Minsky's they could have explicitly done so in the Release of All Claims" (Aple.Br. 14). They were under no obligation to do this. Kansas is a specific identity rule jurisdiction. *Luther*, 268 Kan. at 348. As such, it "conclusively presumes that the liability of a party not named or otherwise specifically identified by the terms of the release is *not* discharged." *Id*. at 347. (emphasis added). The release neither named nor specifically identified Minsky's (R1 at 12). Therefore, regardless of inconvenience to Minsky's, the release did not discharge its liability

E. The evidence clearly establishes that Mr. Szerwinski did not intend to release Minsky's from liability.

Finally, Minsky's argues that under the less strict "intent rule," which the Supreme Court in *Luther* also rejected, it would be entitled to a release of liability under the less strict intent rule (Aple.Br. 14-16). Although it acknowledges that in some jurisdictions adopting the intent rule "always allow parol evidence, regardless of whether the instrument being interpreted is ambiguous," it argues this Court should reject any of Mr. Szerwinski's parol evidence (Aple.Br. 14-15). Minsky's argues it would be inappropriate to consider a prior version of the release Mr. Szerwinski included in the record because the final version is unambiguous and the prior version was "considered part of the evidentiary record when deciding the Motion for Judgment on the Pleadings" (Aple.Br. 8, 14-15). This is in error.

First, the "intent rule" does not apply. The Supreme Court in *Luther* was clear and certain about that. Kansas is a "specific identity rule" jurisdiction. Mr. Szerwinski only included an argument about the "intent rule" at the end of his brief to illustrate the degree to which Minsky's argument that it was released is wrong (Aplt.Br. 20-22).

In any case, Mr. Szerwinski's argument does not rest on the prior version of the release. He merely provided the draft containing the rejected language to contextualize the parties' intent, should a court determine there was any ambiguity. Minsky's concedes that is a proper use of parol evidence (Aple.Br. 14-15).

Mr. Szerwinski agrees with Minsky's that the release of Mr. Crocker, Ms. Shelby, and Allstate is unambiguous. Nothing within its four corners

remotely indicates he intended to release Minsky's. The only parties expressly released are Michael Crocker, Marcia Shelby, and Allstate under a specific claim and policy number (R1 at 12). The release does not name or refer to Minsky's (R1 at 12). And the acknowledgment that the settlement was "made to terminate further controversy respecting all claims for damages that we have heretofore asserted or that I or my personal representatives might hereafter assert because of said accident" was expressly limited to "the parties hereby released" (R1 at 12). Without any clear reference to Minsky's, as in *Geier*, *Luther*, *Wright*, and *Mulroy* its identity could not be reasonably apparent. Therefore, this instrument cannot release Minsky's from its independent negligence that also caused Mr. Szerwinski's injuries.

Second, although Minsky's made a passing request that the district court "exclude the prior versions of the release" (R3 at 28), it did not move to strike the exhibit from the evidentiary record. This Court is precluded from reviewing an evidentiary challenge unless there was a recorded objection to the evidence that made clear the specific grounds for the objection. *City of Neodesha v. BP Corp. N. Am., Inc.*, 50 Kan. App. 2d 731, 761, 334 P.3d 830 (2014). And when the parties appeared before the district court and Mr. Szerwinski's counsel discussed the parol evidence, Minsky's again made no objection to this evidence (R2 at 6-11). As well, nothing in the district court's judgment suggests it struck the prior version from the evidentiary record (R1 at 17-26). Therefore, the parol evidence is in the record for review.

And should the Court consider the parol evidence, Mr. Szerwinski plainly showed his intent to limit the release to those named in the

instrument. The draft of the release removed the "flat bar rule" language discharging "any other person, partnership, firm, or corporation charged or chargeable with responsibility or liability" (R3 at 17, 26).

In his opening brief, Mr. Szerwinski explained this accomplished two things. First, he displayed his intent not to release Minsky's from liability because Minsky's *is* a corporation chargeable with responsibility or liability. Second, he removed the only "terms or descriptions as [to] make" Minsky's identity "reasonably apparent." *Luther*, 268 Kan. at 347.

Therefore, Mr. Szerwinski plainly intended to limit the scope of the release to the parties specifically named or referenced in it: Mr. Crocker, Ms. Shelby, and Allstate. The law of Kansas is that this did not release Minsky's.

Conclusion

This Court should reverse the district court's judgment on the pleadings on Mr. Szerwinski's independent negligence claim and remand the case for further proceedings on that claim.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Service

I certify that on July 14, 2025, I electronically filed a true and accurate Adobe PDF copy of this brief via the Court's electronic filing system, which notified the following of that filing:

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Appendix

318 P.3d 1020 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Kathryn D. DAVIS, Appellee,
v.
KANSAS CITY RENAISSANCE FESTIVAL CORP., Appellant.

No. 109,859.
|
Feb. 28, 2014.
|
Review Denied Aug. 28, 2014.

Synopsis

Background: Patron of event brought personal injury action against owner of facility at which it was held. The District Court, Wyandotte, William P. Mahoney, J., denied owner's motion for summary judgment. Owner appealed.

Holding: The Court of Appeals held that release of owner's employee released owner from patron's personal injury claims.

Reversed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (1)

[1] **Compromise, Settlement, and Release** Multiple or Joint Wrongdoers

Release by patron of employee of owner of facility at which patron was injured and all other persons and organizations who were or could have been liable from all claims for damages arising from the accident released owner from patron's personal injury claims, where patron's intent was clearly and unequivocally stated within the four corners of the release.

Appeal from Wyandotte District Court; William P. Mahoney, Judge.

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Michael L. Sexton, of Sexton & Shelor, of Shawnee Mission, for appellee.

Before MALONE, C.J., BUSER, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** This is an interlocutory appeal by Kansas City Renaissance Festival Corporation (KCRFC) from the district court's order denying its motion for summary judgment. Kathryn D. Davis was injured while attending an event on the festival grounds when a truck parked atop a hill by a KCRFC employee rolled down and pinned her against a fence. Davis reached a $50,000 settlement with the employee and his automobile insurer and executed a written release of the employee, "and all other persons and organizations who are or might be liable," from all claims for damages arising from the accident. Davis subsequently filed a personal injury action against KCRFC based solely on a theory of respondeat superior. KCRFC filed a motion for summary judgment asserting that Davis' release of its employee in exchange for a settlement released it as well. The district court denied the motion. KCRFC filed an application for appeal to this court, which was granted. For the reasons set forth herein, we reverse the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2011, Gordon Jensen was a full-time permanent employee of KCRFC. His duties included gardening, landscaping, and routine maintenance. Jensen was at work on the festival grounds on the morning of October 16, 2011. All the vehicles owned by KCRFC were in use, so Jensen was driving his personal truck. Jensen noticed a maintenance task that required his attention, so he brought his truck to a stop.

He believed that he had activated his parking brake before getting out of his truck.

Davis was on the KCRFC premises that morning for a blacksmith exhibition. Shortly after exiting his truck, Jensen heard some screaming or noise and noticed that his truck had rolled down a small hill or embankment and struck Davis, pinning her between the truck and a fence. Jensen ran down the hill to his truck and backed it away from the fence. Davis alleges that she sustained injuries to her brain (post traumatic stress disorder), left shoulder, and left leg as a result of the accident, resulting in more than $100,000 in medical bills.

On May 5, 2012, Davis settled with Jensen and his automobile insurance company for the sum of $50,000 and executed a release in Jensen's favor. Davis and her husband signed the release, with Davis' attorney acting as a witness. The release read in part:

> "FOR THE SOLE CONSIDERATION OF fifty thousand Dollars ($50,000.00) receipt of which I acknowledge, I fully and forever release and discharge Gordon Jensen, their heirs, administrators, executors, successors and assigns, *and all other persons and organizations who are or might be liable,* from all claims for all damages which I sustained as the result of an accident which occurred on or about October 16, 2011, at Bonner Springs, Kansas.
>
> "By executing this release, I intend and agree that this release applies to all my claims arising from said accident, present and future, including, but not limited to, damage to or destruction of property, claims for known or unknown injuries, developments, consequences and permanency of those injuries, and there is no misunderstanding in this regard." (Emphasis added.)

***2** On September 5, 2012, Davis filed a personal injury action against KCRFC in the Wyandotte County District Court based on a theory of respondeat superior. In its September 26, 2012, answer to Davis' petition, KCRFC set forth the affirmative defense that the petition failed to state a claim upon which relief could be granted. On February 5, 2013, KCRFC filed an amended answer stating an additional affirmative defense that Davis' claim against it was barred by release.

On March 6, 2013, KCRFC filed a motion for summary judgment asserting that the release of an employee in exchange for settlement proceeds also releases the employer when the action is based on a theory of respondeat superior. Thus, KCRFC argued that Davis' action of releasing Jensen from further liability effectively released KCRFC as well. On April 4, 2013, Davis filed a response to the motion for summary judgment, arguing that the cases relied upon by KCRFC were not applicable because Davis' release did not contain an indemnity clause in favor of Jensen. Davis further argued that Kansas courts apply the "specific identity rule," which creates a rebuttable presumption that a party is not released unless that party's name appears in the release.

The district court held a hearing on April 30, 2013, and noted that there did not appear to be any factual issues about how Davis sustained her injuries. The district court identified the sole issue as whether Davis' release of Jensen also released KCRFC. At the end of the hearing, the district court denied the motion for summary judgment. On May 8, 2013, the district court filed a journal entry, which included the following findings:

> "6. Contrary to defendant's contention that the effect of the Gordon Jensen Release is a legal issue, the Court determines that there exists a factual dispute of whether plaintiff intended to release defendant when she signed the release and accepted the settlement money at the time of her settlement with Gordon Jensen.
>
> "7. No hold harmless and/or indemnification provision exists in The Gordon Jensen release signed by plaintiff and, over defendant's objection, the Court adopts plaintiff's representation that the only Kansas appellate cases granting summary judgment to an employer being sued on the basis of respondeat superior, where the employee has been released, have contained hold harmless and/or indemnification clauses in the release described in those cases.
>
> "8. Contrary to defendant's contention that the value of plaintiffs claim is not material to the issues presented, the Court determines that if this case is tried, there will be a factual dispute about whether plaintiff's claim was satisfied by her settlement with and release of her claims against Gordon Jensen."

The district court found that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the litigation. KCRPC timely filed an application for an interlocutory appeal, which this court granted.

A2

DID THE DISTRICT COURT ERR IN DENYING KCRFC'S MOTION FOR SUMMARY JUDGMENT?

***3** KCRFC argues that the district court erred in denying its motion for summary judgment by failing to find that a full, unconditional release of an employee bars a subsequent action against the employer based solely upon a theory of vicarious liability. Specifically, KCRFC contends that the district court erred by finding that the "specific identity rule" requires an employer to be named in the release of an employee to bar a subsequent action against the employer based solely upon vicarious liability. KCRFC also contends that the district court erred by finding that a hold harmless or indemnity provision is necessary in the release of an employee to bar a subsequent claim against the employer based solely upon a theory of vicarious liability.

When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a disputed material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Waste Connections of Kansas, Inc. v. Ritchie Corp.,* 296 Kan. 943, 962, 298 P.3d 250 (2013).

KCRFC initially asserts that the amount of Davis' alleged injuries and damages is not a genuine issue of material fact because the value of Davis' claim has no bearing on the legal effect of her release of Jensen. KCRFC cites as support K.S.A.2013 Supp. 60–256(d)(2), which states: "An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages."

In denying KCRFC's motion for summary judgment, the district court found that the amount of Davis' claim and whether it was fully satisfied by the settlement she received from Jensen was likely to be a material issue of fact at trial:

> "8. Contrary to defendant's contention that the value of plaintiffs claim is not material to the issues presented, the Court determines that if this case is tried, there will be a factual dispute about whether plaintiffs claim was satisfied by her settlement with and release of her claims against Gordon Jensen."

We disagree with the district court's finding that the value of Davis' claim created a genuine issue as to a material fact. The relevant issue in this case is whether Davis' written release of Jensen bars a subsequent vicarious liability action against Jensen's employer, KCRFC. The value of Davis' claim has absolutely no bearing on whether KCRFC was released. *Cobb v. Corbett,* 32 Kan.App.2d 1184, 95 P.3d 1028, *rev. denied* 278 Kan. 843 (2004), which Davis cites for support, did not place any particular emphasis on the amount of the settlement in discussing whether the release of the employee also released the employer. As KCRFC asserts, summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages. K.S.A.2013 Supp. 60–256(d)(2).

***4** Next, KCRFC argues that the district court misapplied the specific identity rule when it found that Davis' release of Jensen did not bar a subsequent vicarious liability claim because the release did not specifically name KCRFC. Furthermore, KCRFC contends that Davis' proclaimed intent not to release KCRFC at the time she signed the written release of Jensen has no bearing on the legal effect of that release.

Davis disagrees with KCRFC's claim that her intent at the time she signed the release of Jensen has no legal bearing on its effect. To the contrary, she argues her intent in signing the release is a material issue of fact. In her response to the motion for summary judgment, Davis submitted an affidavit stating that she never intended to release KCRFC when she signed the release of Jensen. Davis further stated that when she signed the release, she believed she could and would pursue her claim against KCRFC.

In denying the motion for summary judgment, the district court noted in its journal entry that Davis' release of Jensen did not specifically name KCRFC. The district court found that Davis' intent when she released Jensen created a dispute as to a material fact:

> "6. Contrary to defendant's contention that the effect of the Gordon Jensen Release is a legal issue, the Court determines that there exists a factual dispute of whether plaintiff intended to release defendant when she signed the release and accepted the settlement money at the time of her settlement with Gordon Jensen."

Regarding Davis' intent when she signed the release, the language of the release clearly states that it releases Jensen, "and all other persons and organizations who are or might be liable," from all claims for damages arising from the accident. Generally, the effect of a release of one tortfeasor with respect to liability of another party is to be determined by the intention of the parties *as manifested by the instrument.* See *Sade v. Hemstrom,* 205 Kan. 514, Syl. ¶ 4, 471 P.2d 340 (1970). More particularly, the intent of parties when signing a release " 'is to be gleaned from the instrument itself and where that expresses the intent, the inquiry is ended.' " 205 Kan. at 522, 471 P.2d 340 (quoting *Reynard v. Bradshaw,* 196 Kan. 97, 101, 409 P.2d 1011 [1966]); see also *Atkinson v. Wichita Clinic, P.A.,* 243 Kan. 705, 708, 763 P.2d 1085 (1988) (effect of release is determined by intentions of parties as manifested by instrument itself).

Davis correctly notes that our Supreme Court in *Luther v. Banner,* 268 Kan. 343, 352, 995 P.2d 865 (2000), held that a general release creates a rebuttable presumption that only those persons specifically designated in the release are discharged. This principle is commonly known as the "specific identity rule." 268 Kan. at 348, 995 P.2d 865. The *Luther* court recognized that many settlements are executed with boilerplate forms and determined that Kansas law should adapt to this reality rather than trap unwary plaintiffs into surrendering their claims. 268 Kan. at 349, 995 P.2d 865. *But Luther* is distinguishable from the facts herein because it involved multiple active tortfeasors who were potentially comparatively liable, and only some were specifically named in the release. Here, KCRFC's liability stems only from its position as Jensen's employer.

***5** Likewise, in *Geier v. Wikel,* 4 Kan.App.2d 188, 190, 603 P.2d 1028 (1979), this court refused to find that the release of one tortfeasor barred claims against other tortfeasors not named in the release. This court reasoned: "An injured party whose claim for damages is exclusively subject to the Kansas comparative negligence statute may now settle with any person ... without that settlement in any way affecting his or her right to recover from any other party liable under the act." 4 Kan.App.2d at 190, 603 P.2d 1028. Again, *Geier* involved a claim against multiple active tortfeasors whereas KCRFC's liability is strictly under a theory of respondeat superior. Kansas cases applying the specific identity rule appear to be limited to actions involving multiple active tortfeasors who were comparatively liable for the plaintiff's damages. See also *Stueve v. American Honda Motors Co., Inc.,* 457 F.Supp. 740, 748–49 (D.Kan.1978) (release of tortfeasor did not bar claim against joint active tortfeasor not named in the release).

Davis points to this court's decision in *Mulroy v. Olberding,* 29 Kan.App.2d 757, 30 P.3d 1050 (2001), *rev denied* 213 Kan. 1036 (2002). In that case, Western Resources disputed that one of its employees was acting within the scope of his employment when he was involved in an automobile accident while under the influence of alcohol. 29 Kan.App.2d at 758–59, 30 P.3d 1050. At a conference on jury instructions, counsel for Western Resources and the employee suggested that the plaintiff dismiss the employee from the lawsuit because both parties had admitted liability at trial. In return, the parties agreed that the plaintiff would receive an instruction advising the jury that Western Resources was responsible for its employee's negligence. 29 Kan.App.2d at 760, 30 P.3d 1050. The plaintiff agreed and dismissed the employee with prejudice. Thereafter, Western Resources immediately moved for its own dismissal, arguing that the plaintiff could not proceed with his claim for vicarious liability against it because he had dismissed the employee with prejudice. The district court granted Western Resources' motion to dismiss. 29 Kan.App.2d at 761, 30 P.3d 1050.

On appeal, this court noted that Kansas follows the specific identity rule involving general releases of *joint tortfeasors*

in comparative negligence cases. 29 Kan.App.2d 757, Syl. ¶ 1, 30 P.3d 1050. This court found that although Western Resources' liability was premised upon respondeat superior, the controlling fact in the case was the comparative negligence of the employee and the plaintiff. 29 Kan.App.2d at 766, 30 P.3d 1050. This court concluded that the specific identity rule applied and that the dismissal of Western Resources was therefore inappropriate. 29 Kan.App.2d at 766, 30 P.3d 1050. This court also found that the district court erred in dismissing Western Resources because "the plaintiff did not receive anything from [the employee] for the dismissal by way of settlement." 29 Kan.App.2d at 766, 30 P.3d 1050.

Davis argues that the *Mulroy* decision stands for the proposition that the specific identity rule applies in a respondeat superior case. However, *Mulroy* is distinguishable because it involved the dismissal of parties from a lawsuit rather than a release. Also, the court's ruling in *Mulroy* was based in part on the fact that the plaintiff received no consideration for the employee's dismissal, whereas Davis received $50,000 in exchange for Jensen's release. Finally, it appears that the court's holding in *Mulroy* was driven, in part, by the bait-and-switch tactic used by Western Resources in order to convince the plaintiff to dismiss the employee from the lawsuit.

***6** We conclude that the district court erred in finding that a factual dispute existed as to whether Davis intended to release KCRFC when she signed the release. Although KCRFC was not named in the release, the specific identity rule does not apply because KCRFC's liability is based solely upon a theory of respondeat superior. As previously stated, the effect of a release of one tortfeasor with respect to liability of another party is to be determined by the intention of the parties as manifested by the instrument. *Sade,* 205 Kan. 514, Syl. ¶ 4, 471 P.2d 340. More particularly, the intent of the parties when signing a release " 'is to be gleaned from the instrument itself and where [the release] expresses the intent, the inquiry is ended.' " 205 Kan. at 522, 471 P.2d 340.

Here, Davis' release included Jensen, "and all other persons and organizations who are or might be liable," from all claims for damages arising from the accident. Moreover, the release stated: "By executing this release, I *intend* and agree that this release applies to all my claims arising from said accident, present and future, including ... claims for known or unknown injuries, ... and there is no misunderstanding in this regard." (Emphasis added.) Thus, Davis' intent in signing the release is clearly and unequivocally stated within the four corners of the instrument. Because the release unambiguously releases all other potentially liable organizations, such as KCRFC, Davis' affidavit stating that she did not intend to release KCRFC did not create a genuine issue of material fact.

Next, KCRFC argues that the district court erred by finding that a hold harmless or indemnity provision is necessary in the release of an employee to bar a subsequent claim against the employer based solely on vicarious liability. While Davis' release of Jensen does not contain a hold harmless or indemnity provision, KCRFC argues that the release clearly releases Jensen and all other persons and organizations who might be liable from any claim for injury or damage Davis suffered in the accident of October 16, 2011.

Davis contends that the only Kansas appellate decisions that have prohibited pursuit of a claim against an employer on a vicarious liability theory after the negligent employee was fully released involved situations in which the claimant agreed to hold harmless the released employee from the employer's potential indemnity claim. Davis argues that these decisions emphasized the presence of a hold harmless agreement as the rationale for releasing the employer from liability.

The district court, in its journal entry of judgment, found the absence of a hold harmless or indemnity clause in Davis' release of Jensen to be significant:

> "7. No hold harmless and/or indemnification provision exists in The Gordon Jensen release signed by plaintiff and, over defendant's objection, the Court adopts plaintiffs representation that the only Kansas appellate cases granting summary judgment to an employer being sued on the basis of respondeat superior, where the employee has been released, have contained hold harmless and/or indemnification clauses in the release described in those cases."

***7** Essentially, the arguments of both parties on this issue are supported by caselaw. KCRFC argues that where the liability of a master or principal for a tort committed by his servant or agent is predicated solely upon the doctrine of respondeat superior, a valid release of the agent operates to release the principal. This statement is supported by the caselaw of this court and our Supreme Court. See *York v. InTrust Bank, N.A.*, 265 Kan. 271, 284, 962 P.2d 405 (1998); *Atkinson*, 243 Kan. at 714, 763 P.2d 1085; *Wilkerson v. Lawrence*, 193 Kan. 92, 96, 391 P.2d 997 (1964); *Jacobson v. Parrill*, 186 Kan. 467, 475–76, 351 P.2d 194 (1960); *Cobb*, 32 Kan.App.2d at 1191, 95 P.3d 1028.

Davis argues that a plaintiff is barred from recovering from the principal due to the fault of its agent only when the plaintiff released the negligent agent with a hold harmless agreement insulating that agent from liability to the principal. Davis correctly points out that the releases in *York, Atkinson, Wilkerson, Jacobson,* and *Cobb* all contained a hold harmless/indemnification clause, while Davis' release of Jensen does not contain a hold harmless/indemnification clause.

KCRFC argues that Kansas courts have not relied solely on the existence of a hold harmless/indemnity clause in deciding whether the release of an employee also releases the employer from a claim based on respondeat superior. KCRFC maintains that the existence of such a clause in a release is just one factor to examine in determining the parties' intent. Thus, KCRFC argues that the existence of a hold harmless/indemnity clause is not a *necessary* prerequisite for a finding that the release of an employee bars a subsequent claim against the employer based solely on vicarious liability.

Davis acknowledges that she executed a written release of Jensen, "and all other persons and organizations who are or might be liable," from all claims for damages arising from the accident. Davis claims that the broad language releasing all other persons and organizations "means nothing" because the release does not contain a hold harmless/indemnification clause insulating Jensen from liability to KCRFC. According to Davis, she can pursue her claims against KCRFC based solely on Jensen's fault, and in turn, KCRFC can cross-claim against Jensen for indemnification. If Davis is correct, the release without the hold harmless clause does not prevent KCRFC from seeking indemnification against Jensen even though Jensen and his insurer paid $50,000 to be released from liability for all claims arising from the accident.

We are unable to find any Kansas cases involving a release with language identical to the release signed by Davis. *York, Atkinson, Wilkerson, Jacobson,* and *Cobb* are all distinguishable from the facts herein because none of those cases involve a release whereby the plaintiff purports to release "all other persons and organizations who are or might be liable" from all claims for damages arising from the accident. We find that the outcome of this case is controlled by the fundamental rule that the effect of a release is to be determined by the intention of the parties as manifested by the instrument, *i.e.,* the intent of the parties when signing a release " 'is to be gleaned from the instrument itself and where [the release] expresses the intent, the inquiry is ended.' " *Sade*, 205 Kan. at 522, 471 P.2d 340.

***8** Here, Davis was represented by counsel when she entered into the settlement with Jensen, and she signed the release along with her husband and her attorney. The release clearly provided that in consideration for the sum of $50,000, Davis was releasing Jensen, "and all other persons and organizations who are or might be liable," from all claims for damages arising from the accident on October 16, 2011. We conclude that this language means exactly what it says. Even though the release does not contain a hold harmless or indemnification clause, we find that the broad language of the release bars a subsequent claim against KCRFC based solely upon a theory of vicarious liability.

Finally, Davis argues that the district court's decision denying KCRFC's motion for summary judgment is consistent with Kansas public policy promoting settlement of claims. Davis argues that KCRFC will receive an unjust windfall if it is released from liability and Kansas law should protect unwary plaintiffs from surrendering valid claims based on boilerplate forms. But we do not perceive how enforcement by the courts of the clear and unambiguous language in the release form signed by Davis violates Kansas public policy. Moreover, the fact that Davis was represented by counsel negates her claim of being an unwary plaintiff who was trapped by signing a boilerplate form. We conclude the district court erred in denying KCRFC's motion for summary judgment.

Reversed.

All Citations

318 P.3d 1020 (Table), 2014 WL 802452

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White v. Miller

Court of Appeals of Kansas

March 13, 1992, Filed

No. 66,734

Reporter
1992 Kan. App. LEXIS 173 *; 827 P.2d 84

NOLA WHITE, Appellant, v. DOUGLAS MILLER, Appellee.

Notice: [*1] NOT DESIGNATED FOR PUBLICATION

Prior History: Appeal from Wyandotte District Court; LAWRENCE G. ZUKEL, judge.

Disposition: Affirmed.

Counsel: Tuere Sala and Michael McIntosh, of Kansas City, Missouri, and Rosie M. Quinn, of Rosie M. Quinn & Associates, of Kansas City, for appellant.

Thomas D. Billam, of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, for appellee.

Judges: Before BRAZIL, P.J., REES, J., and JOHN W. WHITE, District Judge, assigned.

Opinion by: JOHN W. WHITE

Opinion

MEMORANDUM OPINION

WHITE, J.: In this personal injury action, Nola White appeals from a district court order granting summary judgment in favor of Douglas Miller. Prior to filing this proceeding, White signed a form releasing Nina Collins, a joint tortfeasor, from liability for the injuries suffered by White. The district court found the form to be a general release and granted Miller's motion for summary judgment. We affirm the judgment of the district court.

White was a passenger in a car owned and operated by Nina Collins. The vehicle was involved in a collision with an automobile driven by Miller. White sustained personal injuries as a result of the accident. White signed a document entitled "Release and Settlement of Claim" under which she **[*2]** received $ 6,000 for her injuries from Collins, Ranger Insurance Company, and Seneca Insurance Company. The release contained the following language:

"For the sole consideration of Six Thousand and no/100 dollars . . . the undersigned hereby releases and forever discharges Nina Collins, Ranger Ins. Co. and Seneca Ins. Co. *and all other persons,* firms and corporations *from all claims and demands, rights and causes of action* of any kind the undersigned now has or hereafter may have on account of or in any way growing out of Personal Injuries known or unknown to me at the present time . . . resulting or to result from an occurrence which happened on or about July 2, 1988." (Emphasis added.)

White filed suit against Miller for her personal injuries and medical expenses sustained in the accident. Miller answered, denying any negligence. At some point during the discovery process, Miller's counsel learned of the release and obtained a copy of it from Seneca Insurance. Miller then filed his motion for summary judgment.

The district court granted Miller's motion for summary judgment based upon the language of the release. The district court held summary judgment was proper "as plaintiff's **[*3]** general release signed in settlement with a third party prohibits the bringing of this suit."

On appeal, White contends that the trial court's entry of summary judgment was improper as there were controverted material facts to yet be resolved, the document signed by White was a covenant not to sue, not a general release, and the court improperly determined that Miller should be entitled to the benefit of the release. We disagree.

In granting the motion for summary judgment, the trial court correctly applied the directives in *Kennedy v. City of Sawyer,* 228 Kan. 439, 618 P.2d 788 (1980), to the undisputed facts of this case. *Kennedy* involved a negligence action filed by Paul and Alice Kennedy against the City of Sawyer and a city councilman for damages caused to their cattle from a herbicide the City sprayed along the fence surrounding the Kennedys'

pasture. 228 Kan. at 440-41. The defendant filed a third-party petition to bring Continental Research Corporation into the action, who in turn impleaded Huge Company, Inc., the company that manufactured the herbicide. 228 Kan. at 442. The trial court **[*4]** dismissed Continental and Huge from the case prior to the trial. 228 Kan. at 444.

While the appeal was pending, the City settled the Kennedys' claim for $ 29,000, which represented the entire liability for the Kennedys' damages. 228 Kan. at 444, 453. The release signed by the Kennedys provided in relevant part: "'Plaintiffs . . . release and forever discharge the said *defendants and all other persons, firms, and corporations . . . from any and all claims, demands, damages . . .*'" stemming from the negligent use of the herbicide. 228 Kan. at 444. The Supreme Court found this document to be a general release, stating: "When one considers not only the plain wording of this release and the fact the pending action brought by the Kennedys was dismissed with prejudice there can be little doubt that all third-party defendants were relieved of possible future liability to the Kennedys, along with the [defendants]." 228 Kan. at 453.

Counsel for White argues that, before summary judgment could properly be granted, Miller was required to prove that White intended to release Miller **[*5]** by signing the settlement agreement with Nina Collins. White claims there is "a genuine issue of material fact as to whether or not the instrument was intended to release the defendant." Citing *Fieser v. St. Francis Hospital & School of Nursing, Inc.,* 212 Kan. 35, 510 P.2d 145 (1973), and *McCullough v. Bethany Med. Center,* 235 Kan. 732, 683 P.2d 1258 (1984), White argues that, because Miller was not a party to the written release, parol evidence may be introduced to show the intent of the parties at the time the release was signed. We do not disagree with counsel's interpretation of the *Fieser* and *McCullough* decisions. We do not agree, however, that the decisions are applicable to the present case.

The facts in *Fieser* concerned a release given to an original tortfeasor and its effect on a subsequent malpractice action. The court held that, based on the language of the release, "when a successive tort occurs at the hands of an independent tortfeasor a general release given to the original tortfeasor does not automatically release the successive tortfeasor." 212 Kan. at 41. The court **[*6]** declared that in this situation, "the release shall be considered ambiguous," and "the party pleading said release can fairly be called upon to show that the release was intended to discharge him or that the releasor has received full compensation." 212 Kan. at 42.

The court in *Fieser* distinguished the situation where the "tortious acts are concurrent and result in a single injury." 212 Kan. at 39. The court also cautioned that the facts of the case did not require them "to consider the effect of a general release upon the liability of joint tortfeasors whose acts are concurrent as to time and injury. The rule which we now declare applies only to general releases . . . as they affect the liability of successive tortfeasors." 212 Kan. at 42. The present case involves multiple tortfeasors causing a single incident, not successive tortfeasors.

In *McCullough v. Bethany Med. Center,* 235 Kan. 732, the court applied the rule announced in *Fieser* to a case of joint tortfeasors whose acts were concurrent as to time and injury. The plaintiff in that case sued her doctor, **[*7]** the anesthetist, the hospital, and the drug manufacturer when she suffered permanent injury from negligent use of anesthesia. 235 Kan. at 734. Plaintiff signed a release discharging the drug manufacturer. The hospital and the anesthetist moved for summary judgment, contending the release was a general release of all claims arising from the incident. 235 Kan. at 735.

Reversing the trial court's order granting summary judgment, the Supreme Court, citing *Fieser,* held: "'Since the defendant was not a party to the written release, *parol evidence may be introduced to determine the intention of the parties.*'" 235 Kan. at 739. The court also held this rule to be consistent with the Restatement (Second) of Torts § 885, Comment d, p. 335 (1979), which provides as follows: "'The agreement as to the effect of the release may be proved by external evidence; and the objection of the parol evidence rule is met by the fact that the second tortfeasor who raises the question is not a party to the instrument.'" 235 Kan. at 739.

The uncontroverted facts and the language of the release **[*8]** distinguish the present case from *Fieser* and *McCullough.* In *Fieser,* the court carefully limited its holding to situations involving successive tortfeasors. *McCullough* differs from the present case by the precise language of the release in that case. The release in *McCullough* was carefully drawn to discharge only those possible defendants *'"involved in any way . . . with the* manufacture, *distribution, or dispensing of the drug*

A9

Nesacaine'" used as the anesthesia. 235 Kan. at 741. The release was modified a day later to make absolutely certain that Pennwalt, the drug manufacturer, was the only defendant released. 235 Kan. at 742. The court found that the other defendants carried the burden of proof to show that the plaintiff intended to release them as well when all indications were that plaintiff intended to retain their liability. 235 Kan. at 744. The release in the present case contains no limiting language as did the release in *McCullough.*

White argues that Miller failed to prove that the document at issue was a release and not a covenant not to sue. "The document signed **[*9]** by Nola White . . . operated only to discharge Nina Collins' proportionate share which made it no more than a covenant not to sue." Miller chooses to rely on the plain language of the document.

The trial court held that "the unambiguous wording of the release shows that the document is a general release and not merely a covenant not to sue." The court stated: "Whether an instrument is to be construed as a release or a covenant not to sue is determined by the terms of the instrument, the words used, the amount shown as paid and accepted, the substance of the agreement and the intention of the parties as manifested by the instrument." (Citing *Atkinson v. Wichita Clinic, P.A.,* 243 Kan. 705, 708, 763 P.2d 1085 [1988].) On appeal, "the construction of a written instrument is a question of law, and the instrument may be construed and its legal effect determined by an appellate court." *Kennedy & Mitchell, Inc. v. Anadarko Prod. Co.,* 243 Kan. 130, 133, 754 P.2d 803 (1988).

Miller contends the document is clearly a release, while White suggests it could as readily be construed as a covenant not to sue.

"The distinction between **[*10]** a release and a covenant not to sue refers to the effect of a settlement contract between two litigants. It is generally said that a 'release' is a discharge of all wrongdoers, while a 'covenant not to sue' operates only to discharge a non-settling wrongdoer to the extent of recovery against the covenantee. It is a 'discharge *pro tanto.'"* *Stueve v. American Honda Motors Co., Inc.,* 457 F. Supp. 740, 746 (D. Kan. 1978).

In *Reynard v. Bradshaw,* 196 Kan. 97, 100, 409 P.2d 1011 (1966), the court was called upon to determine the legal effect of an instrument entitled "Release of all Claims" in an action based upon tort liability arising out of an automobile collision. "The first question, as it is in the construction of any written instrument, is, what was the intention of the parties? This is to be gleaned from the instrument itself and where that expresses the intent, the inquiry is ended." 196 Kan. at 101. See *Stueve,* 457 F. Supp. at 746; *Sade v. Hemstrom,* 205 Kan. 514, 522, 471 P.2d 340 (1970).

The specific language of the document in the present case "releases **[*11]** and forever discharges Nina Collins, Ranger Ins. Co. and Seneca Ins. Co. and all other persons . . . from all claims and demands, rights and causes of action . . . the undersigned . . . has . . . resulting . . . from an occurrence on . . . July 2, 1988." The language could not be more clear.

Summary judgment was proper, and the lower court decision is affirmed.

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A10