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STATE OF MICHIGAN
IN THE SUPREME COURT

HEATHER MALONE,

Plaintiff-Appellant,

v

CONOR THOMPSON MCRELL, and ZHETMAN BRIGHTON, LC,

Defendants/Appellees,

and

FARMERS INSURANCE EXCHANGE,

Defendant.

Supreme Court Case No. _____

Court of Appeals Case No. 356416

Livingston County Circuit Court
Case No. 2019-030275-NI
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PLAINTIFF/APPELLANT HEATHER MALONE'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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OPINIONS AND ORDERS APPEALED

Plaintiff/Appellant, Heather Malone, seeks leave to appeal from a published per curiam opinion of the Court of Appeals issued on remand on October 26, 2023.[1] Previously, in lieu of granting leave to appeal, this Court vacated the Court of Appeals' unpublished non-unanimous decision in this case and directed the parties to address on remand "whether the 1995 amendment of MCL 600.2925d(a) abrogated the common-law rule that "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal." See 511 Mich 878, 985 NW2d 526 (2023), citing *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 480 (1988) (opinion by Griffin, J.). See Appx at 183.

On remand, the Court of Appeals concluded that "our Legislature still has not clearly signaled its intent to abrogate this common-law rule, even with its enactment of 1995 PA 161. [Appx at 188]. It also restored the majority opinion previously reached in this case on September 22, 2022 by stating: "[b]ecause the common law has not been abrogated, our prior holding in this case stands." [Id]. In so doing, it affirmed the trial court's decision to dismiss Malone's vicarious liability claim against Defendant/Appellee, Zhetman Brighton.[2] Malone filed a timely motion for reconsideration from the Court of Appeals' published opinion on remand, but reconsideration was denied on December 7, 2023. [Appx at 190].

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[1]Appx 184, Ex. R, Malone v McRell, et al (On Remand), published per curiam opinion of the Court of Appeals, Docket No. 356416, issued October 26, 2023, at p 4.

[2]Appx 1, Ex. A, Malone v McRell, et al, unpublished per curiam opinion of the Michigan Court of Appeals, Docket No. 356416, issued September 22, 2022.

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JURISDICTION

This Court is entitled to exercise its jurisdiction to review a case after a decision in the Court of Appeals. MCR 7.303(B)(1). In a civil case, an application for leave to appeal must be filed with this Court within 42 days of the Court of Appeals' decision or its subsequent ruling on a timely motion for reconsideration. MCR 7.305(C)(2). Here, the Court of Appeals issued its published opinion on October 26, 2023. Malone sought reconsideration in a timely fashion, but her motion was denied on December 7, 2023. This application for leave to appeal was filed 42 days after reconsideration was denied. Accordingly, this Court has discretion to exercise its jurisdiction under MCR 7.303(B)(1).

QUESTIONS PRESENTED

I. Should leave to appeal be granted because the Court of Appeals erred by holding on remand that the common law rule that releasing the agent precludes recovery against the principal was not abrogated by the Legislature's decision to amend MCL 600.2925d?

Plaintiff/Appellant Malone says "Yes".

Defendant/Appellee Zhetman says "No".

The trial court would say "No".

The Court of Appeals would say "No".

This Court should say "Yes".

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QUESTIONS PRESENTED, Continued

II. Should leave be granted because the Court of Appeals erred by affirming the trial court's decision to summarily dismiss Malone's vicarious liability claim against Zhetman as it mistakenly equated the settlement agreement reached at facilitation with a release even though it expressly provided that it would not affect Malone's claims against Zhetman?

Plaintiff/Appellant Malone says "Yes".

Defendant/Appellee Zhetman says "No".

The trial court would say "No".

The Court of Appeals would say "No".

This Court should say "Yes".

III. Alternatively, should leave to appeal be granted for the reasons previously stated in Judge Krause's dissenting opinion because an evidentiary hearing is needed in this case to determine the intent of the parties in executing the settlement agreement consistent with Justice Boyle's concurring opinion under factually similar circumstances in *Theophelis*?

Plaintiff/Appellant Malone says "Yes".

Defendant/Appellee Zhetman says "No".

The trial court would say "No".

The Court of Appeals would say "No".

But, Judge Krause would say "Yes".

This Court should say "Yes".

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GROUNDS FOR APPEAL

The issue on appeal in this case "involves a legal principle of major significance to this state's jurisprudence" under MCR 7.305(B)(3). It is axiomatic that parties should be encouraged to resolve claims whenever possible. See generally, *Jackson v Barton Malow Co*, 131 Mich App 719, 722, 346 NW2d 591 (1984) ("this state has a very strong policy favoring settlements" and "courts will encourage settlements which avoid litigation"). Simply stated, judicial economy depends on settling claims. Not settling legal claims is a waste of resources for both the parties and the courts. "Especially during this time when our courts are flooded with litigation, we should encourage settlements." Id, 131 Mich App at 723.

The common law rule that settling a claim against the agent also releases the principal is contrary to that goal. It no longer serves a valid purpose in Michigan tort law. It negates the Legislature's decision to permit litigants to settle claims against one party without affecting claims against other parties under MCL 600.2925d(a). Leave should be granted to address whether this antiquated common law rule should continue to be applied.

The Court of Appeals held on remand that the common law vicarious liability rule was not clearly abrogated and it should still be applied. This Court should review that holding. The question was significant enough for this Court to remand this case to the Court of Appeals. It remains significant enough to warrant this Honorable Court's review and consideration because the Court of Appeals clearly set the bar too high for determining whether the Legislature intended to abrogate the common law when it amended MCL 600.2925d by effectively requiring that the Legislature expressly declare its intent to do so.

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Leave also should be granted under MCL 7.305(B)(5)(a) because the Court of Appeals' published opinion "is clearly erroneous and will cause material injustice" as it mistakenly equates a settlement agreement with a release to affirm the trial court's holding. Here, the Court of Appeals on remand also affirmed its prior holding that the settlement agreement reached at facilitation "functioned as a release instead of a covenant not to sue" despite its clear, unequivocal language stating that "[t]he settlement will not affect [her] cause of action against [Zhetman]. But, that holding cannot be reconciled with its actual wording, much less the Legislature's clear, unambiguous mandate that releases cannot be enforced against another party sued for the same injury or death under MCL 600.2925d(a).

Lastly, leave to appeal should be granted because the Court of Appeals' published opinion on remand "conflicts with a Supreme Court decision or another decision of the Court of Appeals". MCR 7.305(B)(5)(b). Specifically, it contradicts the result in *Theophelis*, supra, because this Court was absolutely clear in its majority opinion in *Theophelis* that the use of the word "tortfeasor" in the pre-amendment version of MCL 600.2925d was the key to its holding and the Legislature removed the word "tortfeasor" when it amended MCL 600.2925d in 1995. As an aside, it also contradicts Justice Boyle's concurring opinion, which should be controlling on how such disputes should be decided when the intent of the parties in settling a claim is not clear, as in this case. Slip op at 4 (J. Krause, dissenting).

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STANDARD OF REVIEW

A trial court's decision to grant of summary disposition under MCR 2.116(C)(7) is review de novo. *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554, 550 NW2d 262 (1996). When reviewing a motion for summary disposition under MCR 2.116(C)(7), all documentary evidence submitted by the parties is considered, and, where appropriate, the pleadings are construed in favor of the plaintiff's position. Id. A trial court's decision to grant summary disposition under MCR 2.116(C)(10) is also reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280, 807 NW2d 407 (2011). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423, 864 NW2d 609 (2014). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003). In reviewing a summary disposition motion under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507, 717 NW2d 855 (2006).

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INTRODUCTION

Unless this Court reviews the Court of Appeals' decision on remand in this case, Michigan courts will continue to apply the antiquated common-law rule that releasing the agent from tort liability precludes recovery from the principal on a vicarious liability claim despite a clear unequivocal statutory provision that states otherwise – MCL 600.2925d(a).

This Court narrowly affirmed its adherence to that common-law rule 35 years ago in a badly fractured decision in *Theophelis v City of Lansing*, 430 Mich 473, 424 NW2d 478 (1988) in 1988. But, in 1995, the Legislature amended MCL 600.2925d by eliminating the statutory wording, i.e., "any tort feasor", on which this Court's narrow holding in *Theophelis* was based. Yet, the common-law vicarious liability rule that releasing the agent releases the principal continues to be applied due to this Court's narrow holding in the *Theophelis*.

Contrary to the Court of Appeals' conclusion on remand, the Legislature did clearly abrogate the common law vicarious liability rule that releasing an agent also releases the principal when it amended MCL 600.2925d in 1995. It simply is not necessary for the Legislature to expressly state its intent to abrogate the common-law to achieve that result because there clearly is no other way of reading the current version of MCL 600.2925d(a).

The Court of Appeals does not offer an alternative reading of MCL 600.2925d(a) other than to say it was not "clear" that was what the Legislature intended. Respectfully, that is no more than a justification for sticking with its previous holding. It is not grounds for refusing to apply the clear, unambiguous language that the Legislature adopted in 1995.

Here, the Court of Appeals affirmed the trial court's decision to summarily dismiss Malone's vicarious liability claim against Zhetman because it concluded that the settlement agreement reached at facilitation between Malone and McRell (but not Zhetman)

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"functioned as a release, not a covenant not to sue" even though it expressly provided that "it will not affect Malone's claims against Zhetman". Slip op at 2. In so holding, the Court put form above substance and affirmed a manifestly unjust result that will deny Malone any recovery from Zhetman (and its corporate liability coverage). Her recovery will be limited to the policy limits of $50,000 that McRell agreed to pay her under his personal auto policy.

That result is not consistent with the current version of MCL 600.2925d, as amended in 1995, as it provides that "a release given in good faith to 1 of 2 or more persons for the same injury . . . . does not discharge 1 or more other persons from liability for the injury or wrongful death unless its terms so provide." Furthermore, it is a result that discourages parties from settling cases and creates a trap for unwary litigants and attorneys that represent them. This Court should take this opportunity to review whether the common-law vicarious liability rule that releasing the agent also releases the principal should continue to be applied in Michigan, even though its application clearly conflicts with MCL 600.2925d.

STATEMENT OF FACTS

Heather Malone was seriously injured in a rear-end motor vehicle collision that occurred on July 29, 2018. Connor McRell was driving the vehicle that struck Malone and caused her injuries.[3] When the collision occurred, McRell was delivering pizzas for Jet's Pizza, where he was employed by Zhetman.[4] McRell had $50,000 in liability coverage under his personal auto policy.[5] Zhetman had liability coverage for its business operations.[6]

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[3]Appx 61-62, Ex. F, Zhetman's SD Motion, Ex. 4, Police Report at pp 1-2.

[4]Appx 49-50, Ex. F, Zhetman's SD Motion, Ex. 1, Complaint, at pp 2-3.

[5]Appx 27, Ex. D, Settlement Agreement, dated February 3, 2020.

[6]Appx 91-92, Ex. H, Summary Disposition Hearing, July 9, 2020, at pp 12-13.

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Malone brought a tort action against McRell and Jet's Pizza.[7] She subsequently added Zhetman as a defendant because it employed McRell. As to Zhetman, she alleged a respondeat superior claim and claims for negligent entrustment, supervision and training.

Shortly after the lawsuit was filed, the parties agreed to go to facilitation in an effort to resolve the pending tort claims. At facilitation, Malone and McCrell agreed to settle her claim against McCrell for the $50,000 in coverage available to him under his auto policy.

A settlement agreement was prepared to memorialize the terms reached by the parties at facilitation. It was signed by Malone, her conservator, her attorney, and defense counsel for McRell.[8] That settlement agreement expressly provided that it was not intended to affect Malone's right to recover from Zhetman. It stated, in pertinent part, the following:

> The Plaintiff shall accept $50,000 in full settlement of her action against the Defendant Connor McRell only. **The settlement will not affect the Plaintiff's cause of action against Defendant Zhetman Brighton LC,** nor the action for PIP benefits against Defendant Farmers. [Emphasis added].

It further stated that "McRell shall be dismissed from the present action" but "his involvement as a potential witness will not be affected by this settlement". Lastly it stated that "[t]he action is to be dismissed with prejudice and without costs as to Defendant McRell only, and **appropriate releases** will be forwarded and signed." [Emphasis added].

Shortly after facilitation, Malone did as she was required to do by the terms of the settlement agreement by stipulating to the entry of an order dismissing with prejudice her claim against McRell. That order was entered by the trial court on February 13, 2020.[9] But,

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[7]Appx 14, Ex. C, Register of Actions, Lower Court Case No. 2019-030275, p 1.

[8]Appx 27, Ex. D, Settlement Agreement dated February 3, 2020.

[9]Appx 28, Ex. E, Order Dismissing McRell with Prejudice, February 13, 2020.

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no release was ever signed because Zhetman moved for summary disposition shortly after McRell was dismissed with prejudice.[10] It did so even though the deadlines for seeking summary disposition had long since passed. Notwithstanding its long delay in moving for summary disposition, the trial court permitted its untimely motion to be filed and heard.[11]

Zhetman asked the trial court to dismiss not only the respondeat superior claim but also the claims for negligent entrustment and negligent supervision and training.[12] Initially, the trial court granted summary disposition on the respondeat superior and the negligent entrustment claims, but denied it on the negligent supervision and training claim.[13] But, after Zhetman sought reconsideration, the trial court changed its summary disposition ruling and held that the negligent supervision and training claim should also be dismissed.[14]

In moving for summary disposition, Zhetman argued that Malone no longer had a viable respondeat superior claim because the settlement agreement "released" McCrell and thus extinguished her right to recover on her vicarious liability claim. In short, Zhetman argued that Malone, by settling her claims with McRell, released Zhetman from liability on her respondeat superior claims (even though the settlement agreement expressly provided that it did not affect her claims against Zhetman).[15] In so arguing, Zhetman repeatedly

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[10]Appx 20-21, Ex. C, Register of Actions, Livingston Co Circuit Court, at pp 7-8.

[11]Appx 20-21, Ex. C, Register of Actions, Livingston Co Circuit Court, at pp 7-8.

[12]Appx 31, Ex. F, Zhetman's SD Motion and Brief in Support at pp 1-2 and 9-15.

[13]Appx 101-105, Ex. H, Summary Disposition Hearing, July 9, 2020, at pp 20-26.

[14]Appx 112, Ex. J, Opinion/Order Granting Reconsideration, August 28, 2020.

[15]Appx 31, Ex. F, Zhetman's SD Motion/Brief in Support at pp 1, 4, and 13-15.

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labeled the settlement agreement a "release" of her claim against McCrell, even though the settlement agreement provided that "appropriate releases will be forwarded and signed."[16]

Malone responded to Zhetman's motion for summary disposition, arguing that "the bargained-for exchange was that Plaintiff would accept Defendant McRell's policy-limit offer of $50,000.00 so long as her other claims remained unaffected."[17] She further argued that "[i]n contract terms, this was the meeting of the minds" and the parties "never truly had a settlement" if the result was that her claims against Zhetman were dismissed. In short, she argued that if the terms of the settlement agreement could not be fulfilled, it was void.[18]

At the summary disposition hearing, defense counsel for Zhetman argued that "there has been a release" and "[t]he release is by the facilitation settlement agreement.". He also observed that McCrell was dismissed with prejudice after the case facilitated.[19] In response, Malone's counsel informed the trial court that "[t]here's no release that's been signed", while also acknowledging that McCrell was dismissed as a mere courtesy to him and his counsel so that his counsel would no longer need to appear at scheduled hearings.

At the conclusion of that hearing, the trial court dismissed Malone's respondeat superior claim against Zhetman. It summarized its reasons for doing so when it stated:

> Under the doctrine of respondeat superior, an employer may be vicariously liable for its – for the torts of its employees committed within the scope of their employment. However, release of the agent discharges the principal from vicarious

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[16]Appx 27, Ex. D, Settlement Agreement dated February 3, 2020.

[17]Appx 67, Ex. G, Malone's Resp to Zhetman's SD Motion, at pp 10-11.

[18]Appx 67, Ex. G, Malone's Resp to Zhetman's SD Motion, at pp 10-11.

[19]Appx 83, Ex. H, Summary Disposition Hearing, July 9, 2020, at p 4.

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> liability. Plaintiff's claim under the doctrine – doctrine of respondeat superior against Zhetman is based upon the negligence of McRell, but McRell was dismissed with prejudice from this case as a result of a settlement agreement reached on February 3, 2020. Since McRell, the agent, was released from this case, Zhetman, the principal, must be released as well.[20]

The trial court further rejected the plaintiff's position that there was no "meeting of the minds" (despite acknowledging in the course of making that ruling that the settlement was intended to have "no effect on plaintiff's cause of action against Zhetman") when it stated:

> Plaintiff argues that if the settlement agreement would release Zhetman from liability, then it is void, because there's no meeting of the minds. However, it appears that there was a meeting of the minds between the parties to the settlement agreement between McRell and – the plaintiff, Heather Malone, the $50,000 in full settlement of the action against McRell only, with no effect on plaintiff's cause of action against Zhetman. This does not change the fact that the legal implication of releasing McRell is that Zhetman would also be released from any claims, rely – relying on a theory of respondeat superior. The settlement agreement is a valid contract at this time. Zhetman is entitled to summary disposition under MCR 2.116(C)(7) on plaintiff's count three.[21]

As previously noted, the trial court did not grant summary disposition for Zhetman on all claims initially as it did not dismiss the negligent supervision and training claim. But, on reconsideration, the trial court agreed with Zhetman and also dismissed that claim.[22]

Subsequently, Malone moved to set aside the stipulated order dismissing McRell with prejudice, arguing that relief was warranted under MCR 2.612 because the order

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[20]Appx 79, Ex. H, Summary Disposition Hearing, July 9, 2020, at pp 24-25.

[21]Appx 103-104, Ex. H, Summary Disposition Hearing, July 9, 2020, at pp 25-26.

[22]Appx 111, Ex. J, Order Granting Reconsideration, dated August 28, 2020.

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resulted in Zhetman being dismissed even though the settlement agreement expressly provided that it would not affect her claims against Zhetman. McRell responded, arguing that the order dismissing him with prejudice should not be set aside under MCR 2.612.[23]

At the motion hearing, counsel for McRell similarly argued that the stipulated order dismissing him with prejudice should not be set aside under MCR 2.612. In support of that position, he relied on the settlement agreement reached by the parties at facilitation. He acknowledged that no release was signed by the parties after the case facilitated because of the efforts by Zhetman in the interim to get the respondeat superior claims dismissed.[24]

Counsel for Malone responded by again observing that the settlement agreement expressly provided that it would not affect her claims against Zhetman and that the order dismissing McRell with prejudice was entered only because the parties agreed that it would not affect her claims against Zhetman. Because the trial court later dismissed her claims against Zhetman, the express terms of the settlement agreement had been violated, and therefore, the order dismissing McRell with prejudice must be vacated under MCR 2.612.[25]

The trial court disagreed with Malone' position. Accordingly, it denied the motion to set aside the order dismissing McRell with prejudice under MCR 2.612.[26] Malone brought a timely motion for reconsideration of that ruling, but reconsideration was also denied.[27]

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[23]Appx 13, Ex. C, Register of Actions, Livingston County Circuit Court, at pp 7-8.

[24]Appx 124-125, Ex. K, Transcript, Motion to Set Aside Hearing, at pp 8-9.

[25]Appx 120-122, Ex. K, Transcript, Motion to Set Aside Hearing, at pp 4-6.

[26]Appx 136-142, Ex. K, Transcript, Motion to Set Aside Hearing, at pp 20-26.

[27]Appx 147, Ex. M, Order Denying Reconsideration, November 20, 2020.

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Malone then filed a delayed leave application from the trial court's decision to summarily dismiss her claims against Zhetman, as well as its refusal to set aside the stipulated order dismissing McRell with prejudice under MCR 2.612. The Court of Appeals granted leave to address the issues that Malone raised in her delayed leave application.[28]

After appellate briefing was completed, and the case was argued on appeal, the Court of Appeals issued an unpublished (and non-unanimous) per curiam opinion that affirmed the trial court's decision to summarily dismiss Malone's vicarious liability claim against Zhetman. The majority concluded that the settlement agreement "functioned as a release" because it "specifically stated that it settled [Malone's] claim against McRell". Appx at 3, slip op at 2. It also further held that "the substance of [that] agreement and its terms all establish that it was a release" as opposed to a "covenant not to sue." See slip op at 2.

In so holding, the majority noted, but never squarely addressed, the fact that the settlement agreement expressly stated that it would not affect her claims against Zhetman. Instead, the majority, having concluded that the settlement agreement was a release, relied on the common law rule that releasing an agent from tort liability bars recovery against the principal on a vicarious liability claim, citing this Court's prior holding in *Theophelis*, supra.

In the majority opinion, Judges Swartzle and Garrett summarized the grounds for the majority's holding, and thus, the decision to affirm the trial court's ruling, by stating:

> "At common law a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 480; 424 NW2d 478 (1988). To determine whether an instrument is a release or a covenant

[28]Appx 154, Ex. N, Order Granting Delayed Leave to Appeal, June 28, 2021.

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> not to sue, "the designation of the instrument as 'release' or 'covenant not to sue' is immaterial." *Id*. at 497 (quotation marks and citation omitted). Rather, "it is necessary to look to its terms, the words used, the amount paid, the substance of the agreement, and the intention of the parties." *Id*. (quotation marks and citation omitted). McRell agreed to pay Malone $50,000 in return for her dismissing with prejudice her claims against him and promising to sign "appropriate releases." As a result, the agreement did not merely prohibit Malone from bringing a cause of action against McRell in this case; rather, it specifically stated that it settled her claim against McRell, and thereby functioned as a release instead of as a covenant not to sue. See *Larkin v Otsego Mem Hosp Ass'n*, 207 Mich App 391, 393-394; 525 NW2d 475 (1994); *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569-570; 484 NW2d 408 (1992). That the parties did not in fact sign a release, as required by the settlement agreement, is inconsequential, because the substance of the agreement and its terms all establish that it was a release. See *Theophelis*, 430 Mich at 497. Accordingly, the settlement agreement released Malone's claims against McRell. Because Zhetman could only be liable through McRell's actions, the release also released Malone's claims against Zhetman despite its attempt to do otherwise. Zhetman cannot be liable for McRell's actions because Malone contracted away the opportunity to seek further relief based on McRell's actions. Thus, the trial court did not err by granting summary disposition to Zhetman.

Judge Krause dissented. She did so because she found the "parties' settlement agreement to be ambiguous on its face", and the parties' conduct to be equally unclear". See slip op at p 1 (Krause, J., dissenting). She would have instead "vacate[d] the trial court's order granting summary disposition in favor of Zhetman and remand[ed] the case for an evidentiary hearing regarding the parties' intentions, consistent with Justice Boyle's proposed resolution in [*Theophelis*, supra, 430 Mich at 493-497]." She also noted that she "also join[ed] Justice Levin in questioning whether there remains any value in retaining any

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distinction between [a release and a covenant not to sue], especially where the distinction mostly serves as a trap for the unwary." See slip op at p 2, citing *Theophelis* at 499-505.

In summarizing her view that a remand to the trial court for an evidentiary hearing consistent with Justice Boyle's opinion in *Theophelis* would be the "proper resolution" of this case on appeal, Justice Krause stated, in her dissenting opinion, the following:

> I think, under the circumstances, the proper resolution of this matter would be to follow Justice BOYLE's concurrence in *Theophelis* and remand for an evidentiary hearing to take parol evidence to resolve the ambiguity of the parties' intentions. *Theophelis*, 430 Mich at 493-497 (BOYLE, J.). I recognize that plaintiff did not advance an argument referring to a "covenant not to sue" by name until late in the litigation. However, the dispositive question is what the parties intended, not whether they invoked the correct terminology. As discussed, further compounding the problem is that the settlement agreement was apparently drafted by a facilitator, not by the parties. It is probable that it simply never even occurred to anybody whether some hypertechnical turn of phrase would have such significant consequences. See *id*. at 499-505 (LEVIN, J). [Footnote omitted].

Malone filed a timely motion for reconsideration, but it was denied. Judge Krause would have granted reconsideration for the reasons stated in her dissenting opinion. [Appx 12].

Malone sought leave to appeal arguing that the majority opinion affirming the trial court's decision to summarily dismiss her vicarious liability claim against Zhetman based on the settlement agreement reached at facilitation with McRell was clearly erroneous as that agreement expressly provided that it would not affect her claims against Zhetman. She also argued that the antiquated common law rule in Michigan that releasing the agent releases the principal under such circumstances should be reconsidered as it no longer has any utility since it discourages parties from settling and poses a "trap for the unwary". Lastly, Malone agreed with Judge Krause's conclusion in her dissenting opinion that the

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"proper resolution" in this case would be to remand to the trial court for an evidentiary hearing to determine the parties intent in signing the settlement agreement at facilitation.

In lieu of granting leave to appeal, this Court vacated the Court of Appeals' decision. It also remanded this case to the Court of Appeals to address the following question:

> [W]hether the 1995 amendment of MCL 600.2925d(a) abrogated the common-law rule that "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal." Theophelis v Lansing Gen Hosp, 430 Mich 473, 480 (1988) (opinion by Griffin, J.). [511 Mich 878, 985 NW2d 526 (2023)].

On remand, the Court of Appeals concluded that "our Legislature still has not clearly signaled its intent to abrogate this common-law rule, even with its enactment of 1995 PA 161. Accordingly, it further concluded on remand that "[b]ecause the common law has not been abrogated, our prior holding in this case stands." It thus affirmed the trial court's decision to summarily dismiss Malone's vicarious liability claims against Zhetman, stating:

> [T]he settlement agreement released Malone's claims against McRell. Because Zhetman could only be liable through McRell's actions, the release also released Malone's claims against Zhetman despite its attempt to do otherwise. [Slip op at 4, citing *Malone v McRell*, unpublished opinion of the Court of Appeals, Docket No. 356416, issued September 22, 2022, slip op at 2].

Malone again seeks leave to appeal to this Court. She does so to challenge the Court of Appeals' decision on remand that the common-law vicarious liability that releasing the agent releases the principal was not abrogated by MCL 600.2925d. She also contests its re-affirmation of its previously vacated holding that the settlement agreement reached with McRell at facilitation precluded her vicarious liability claims against Zhetman even though it expressly said otherwise – exactly as contemplated under MCL 600.2925d(a).

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ARGUMENT

I. LEAVE SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED BY HOLDING ON REMAND THAT THE COMMON LAW RULE THAT RELEASING THE AGENT PRECLUDES RECOVERY AGAINST THE PRINCIPAL WAS NOT ABROGATED BY THE LEGISLATURE'S DECISION TO AMEND MCL 600.2925d.

A. MCL 600.2925d(a) unequivocally provides that a release (or covenant not to sue) 1 of 2 or more persons for the same injury or wrongful death does not discharge 1 or more of the other persons from liability "unless its terms so provide" and here, the alleged release expressly stated that it would not affect Malone's vicarious liability claims against Zhetman.

The statutory language is the clearest expression of the Legislature's intent so it is the logical starting point for any argument that the Court of Appeal erred on remand when it concluded that the common-law vicarious liability rule that releasing the agent does not release the principal was abrogated when MCL 600.2925d was amended in 1995. MCL 600.2925d could not be clearer that a release or covenant not to sue as to the agent does not discharge a vicarious liability claim against the principal. It states in full, the following:

> **If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death**, both of the following apply:
>
> (a) **The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.**
>
> (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death. [Emphasis added].

Yet, the Court of Appeals on remand concluded otherwise on remand because it believed that the Legislature had not signaled its intent to abrogate the common-law clearly enough. Respectfully, the Court of Appeals' analysis of what is required to demonstrate the

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Legislature's intent to abrogate existing law is not consistent with its own previous decisions and it reflects nothing more than the Court's inability to acknowledge that its prior decision in this case conflicts with a clear legislative mandate that limited the effect of releasing one party on claims against other parties for the same injury or wrongful death.

B. The Court of Appeals wrongly concluded on remand that the common law rule that releasing the agent releases the principal was not "clearly abrogated" when the Legislature amended MCL 600.2925d in 1995 so that it applied to all parties and not just tortfeasors as it previously did.

The Court of Appeals held on remand that the common law vicarious liability rule that releasing the agent releases the principal was not abrogated because the Legislature did not say so expressly in 1995 when it amended MCL 600.2925d to change the operative word, i.e., tortfeasor, on which the Supreme Court based its holding in *Theophelis*, supra. It based that decision on this Court's majority holding in *Theophelis* where a similar claim based on amendments previously made to MCL 600.2925d was rejected. It also relied on this Court's more recent holding in *Velez v Tuma*, 491 Mich 1, 11, 821 NW2d 432 (2012).

In *Velez*, this Court held that the Legislature's decision to delete subparagraph (b) of MCL 600.2925d did not abrogate common law set off rules for medical malpractice cases in Michigan because the Legislature retained common law joint and several liability rules. Thus, there was no conflict between the amended statute and the common law rules. The same, however, cannot be said in this case about common law vicarious liability rules.

To the extent that the Court of Appeals once again relied on *Theophelis* to support its holding, it clearly erred as the very rationale on which the majority's holding was based in *Theophelis* was destroyed by the clear, unambiguous language of MCL 600.2925d, as amended in 1995. But, even more importantly, the Court of Appeal on remand

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compounded its error in relying on *Theophelis* despite the changes made to MCL 600.2925d, by mistakenly concluding *Velez*, "although admittedly not directly on point" – see slip op at 4 – supported its holding, when, in actuality, it supports a contrary holding.

The Legislature made only two substantive changes to MCL 600.2925d when it was amended in 1995. As previously noted in *Velez* (and as this Court accurately described in its opinion on remand), the Legislature deleted subparagraph (b) of MCL 600.2925d. But, unlike the changes to MCL 600.2925d(a), it was not clear that the Legislature intended to abrogate the common law set off rules for medical malpractice cases by doing so as it also simultaneously opted to retain joint and several liability in medical malpractice cases. Simply put, the common law set off rules needed to be reconciled with the Legislature's decision to delete subparagraph (b) of MCL 600.2925d, as it existed before 1995 PA 161.[29]

Unlike this case, the Supreme Court had not addressed subsection (b) of MCL 600.2925d before it removed that provision in 1995. Accordingly it was free to conclude in *Velez* that the Legislature had not clearly abrogated the common law rule of setoff in Michigan for medical malpractice cases by removing subsection (b) from MCL 600.2925d.

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[29]Before 1995 PA 161 was enacted, MCL 600.2925d provided that "[w]hen a release or covenant not to sue or not to enforce a judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death: (a) [i]t does not discharge any of the other tort feasors from liability for the injury or wrongful death unless its terms so provide[;] (b) [i]t reduces the claim against the other tortfeasors to the extent of any judgment stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is greater[;] [i]i discharges the tort feasor to whom it is given from all liability for contribution to any other tort feasor. Subparagraph (b) was deleted. Subparagraph (c) became subparagraph (a) after 1995 PA 161 was enacted. And, most importantly, the word "tort feasor" on which this Court focused its decision in Theophelis was removed, thus changing its meaning.

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But, clearly, the same cannot be said in this case because the Legislature amended the remaining subsections of MCL 600.2925d to eliminate the use of the word "tortfeasor." That word, i.e., tortfeasor, was the linchpin upon which this Court's majority holding in Theophelis was based! Without it, the same result simply cannot be reached in this case because the amended statute's clear, unambiguous wording mandates a different result.

Without question, the changes that the Legislature made to MCL 600.2925d(a) after *Theophelis* was decided clearly abrogated the common law vicarious liability rule that releasing the agent releases the principal in Michigan. It is impossible to read MCL 600.2925d(a) in any other fashion without rendering nugatory its clear, unambiguous wording which states that "[i]f a release . . . is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death . . . [it] does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide."

While it may be preferable for the Legislature to always expressly declare its intent to abrogate the common law, that has not stopped Michigan appellate courts from gleaning the Legislature's intent to do so without an express statement of intent. See this Court's recent published opinion in *Britten v Circle H Stables, Inc,* ___ Mich App ___, ___ NW2d ___ (2023), which concluded, without any such express statement of legislative intent to abrogate the common law, that "the only plausible reading of the Equine Activity Liability Act (EALA) is that the Legislature intended to abrogate the common-law rule against waiving liability for willful or wanton misconduct with its enactment of 2015 PA 87". Slip op at 10-11. Similarly, in *Al-Hajjaj v Hartford Accid & Indem Co*, ____ Mich App ____, ____ NW2d _____ (2023), the Court of Appeals in a published opinion authored by Judge Swartzle, who also was on the panel in this case, concluded that the plaintiff "correctly

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points out that our Legislature appears to have abrogated the common law when it enacted 2018 PA 449", although that abrogation was too narrow to change the result in his case.

In short, there are numerous examples of the appellate courts in Michigan, including this Court, concluding that the common law was abrogated without the Legislature expressly declaring its intent to abrogate a specific common law rule in Michigan. See generally, *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74, 711 NW2d 340 (2006). ("the language of the statute shows that the Legislature . . . clearly intended that the statute would abrogate the common law on [accord and satisfaction]"). Yet, the Court of Appeals on remand in this case reached a different conclusion, despite the clear, unambiguous statutory wording of MCL 600.2925d, as amended in 1995. Respectfully, the Court of Appeals on remand focused too much on finding a way to reach the same holding.

Determining whether a statute preempts the common law is a matter of legislative intent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183, 413 NW2d 17 (1987). Where legislation is comprehensive, providing "'in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions,'" then there is a legislative intention that a statute preempt common law. *Hoerstman*, supra at 74, quoting *Millross* at 183. It is axiomatic that the Legislature has the authority to abrogate the common law. Id. Moreover, if a statutory provision and the common law conflict, the common law must yield. *Trentadue v Buckler Lawn Sprinkler Co,* 479 Mich 378, 738 NW2d 664 (2007), citing *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n 8, 515 NW2d 728 (1994). Simply put, "[t]he Legislature is the superior institution for creating the public policy of this state[.]" *Woodman v Kera LLC*, 486 Mich 228, 245, 785 NW2d 1 (2010). Stated

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differently, "[a]s a general rule, making social policy is a job for the Legislature, not the courts.'" Id, quoting from *Van v Zahorik*, 460 Mich 320, 327, 597 NW2d 15 (1999).

"The Legislature is presumed to know of the existence of the common law when it acts." Woodman, supra, 486 Mich at 234. The common law remains in force until modified. Id. The abrogative effect of a statutory scheme is a question of legislative intent, and "legislative amendment of the common law is not lightly presumed." Id. Rather, the Legislature "should speak in no uncertain terms" when it exercises its authority to modify the common law. Hoerstman, supra, 474 Mich at 74. Here, the Legislature did precisely that because there is simply no other way to read MCL 600.2925d(a), as amended in 1995, as not abrogating the common law rule that releasing the agent also releases the principal.

Often, the legislative record less clearly states that the change abrogated an existing common law rule in Michigan. But, there are no such questions in this case because this Court's majority holding was clear in *Theophelis* and the Legislature's subsequent amendment of MCL 600.2925d in 1995 squarely addressed that problem by removing the one word, i.e., tortfeasor, on which the narrow majority decision in *Theophelis* was based. While it is true that MCL 600.2925d was amended as part of a larger package of "tort reform" bills, it is unclear why that supports the Court of Appeals' unsubstantiated holding on remand. The Court made no attempt to justify its reading other than noting that the changes to MCL 600.2925d were made as part of a "tort reform" package. Evidently, we must just assume that no compromises were made in passing that "tort reform" package, even if it means ignoring the clear, unambiguous wording of amended MCL 600.2925d(a).

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C. The Court of Appeals also erred by affirming – both in its original opinion and again on remand – the trial court's decision to dismiss the vicarious liability claim against Zhetman based on this Court's majority holding in *Theophelis* in 1988 under the pre-amended MCL 600.2925d.

The Court of Appeals originally issued a split 2-1 decision in this case on whether to affirm the trial court's decision to summarily dismiss the vicarious liability claim against Zhetman. That ruling was reinstated by the Court of Appeals on remand. Previously, the majority opinion and dissenting opinion disagreed on whether the settlement agreement was a release or whether parties intended it to serve as a covenant not to sue. But, there was one point on which both the majority and dissenting opinions agreed, i.e., that this Court's holding in *Theophelis* was controlling and the common law rule that releasing the agent will bar recovery against the principal in a tort case remains good law in Michigan.

In summarizing the view that *Theophelis* is controlling, and that the Court of Appeals was thus required to follow it in this case, Judge Krause stated, in dissent, the following:

> No opinion in *Theophelis* was signed by more than three Justices. Justice GRIFFIN's opinion was also signed by Justice BRICKLEY and Chief Justice RILEY, and Justice BOYLE specifically agreed with Justice GRIFFIN "that the release of the agent of a vicariously liable principal operates to discharge the principal." *Theophelis*, 430 Mich at 493. This Court has therefore treated *Theophelis* as binding as to that particular point of law. See *Larkin v Otsego Mem Hosp Ass'n*, 207 Mich App 391, 393 n 1; 525 NW2d 475 (1994). This Court is now bound to follow that determination. MCR 7.215(J)(1).

The majority opinion similarly relied upon *Theophelis* as controlling authority in this case, as well as its application in the *Larkin* case. Slip op at 2. In so doing, it quoted the plurality opinion in *Theophelis* that "[a]t common law a valid release of an agent for tortious conduct

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operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal." *Theophelis*, 430 Mich at 480.

But, in the nearly 35 years since *Theophelis* was decided, it has not gone unquestioned. In *Stamplis v St. Johns Health System*, 474 Mich 1017, 708 NW2d 377 (2006), this Court granted leave to appeal and directed the parties "to include among the issues briefed the impact, if any, of the 1995 amendment of MCL 600.2925d on the current viability of [Theophelis]." That issue was not decided by this Court as the parties later stipulated to dismiss the appeal. *Stamplis*, 725 NW2d at 662. It is now time for this Court to address that important question, i.e., whether the common law rule is still worth keeping, especially as it no longer appears to be consistent with MCL 600.2925d as amended.

Justice Levin challenged the utility of the common law rule that releasing the agent bars recovery against the principal in his opinion in the *Theophelis* case. 430 Mich at 505. He observed that "adopt[ing] the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation", as it provided for no exceptions at all. He also observed that adopting a version of the common law rule with a limited exception for when a covenant not to sue was signed "would create a trap for unwary plaintiffs' attorneys." Id. For him "[t]he straightforward rule is that a party releases only those other parties whom he intends to release." Id at 505. He thus favored adopting that straightforward rule because he saw "no reason to perpetuate 'the ancient common-law rule', where the piece of paper reflecting the settlement is in the form of a release rather than in the form of a covenant not to sue, as 'a trap for unwary plaintiffs' attorneys' and their unfortunate clients."

Justice Levin's criticisms of the common law rule are no less compelling today than when he made them nearly 35 years ago. Justices Cavanagh agreed with him and signed

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on to his opinion. Justice Archer also agreed with Levin, as he stated in his opinion that "[t]o allow the common-law rule to survive would deter the parties from settling because they would risk losing other claims necessary to obtain full compensation. Id at 529-540. Justice Boyle expressed no disagreement; she merely sided with the plurality opinion due to the wording of MCL 600.2925d. Justice Levin's views are only more compelling today because MCL 600.2925d was amended after this Court issued its decision in *Theophelis*.

In *Theophelis*, this Court examined an earlier version of MCL 600.2925d and four justices concluded that its wording did not change the common law rule because it applied only to "any other tort feasor" and a defendant liable on respondeat superior grounds was not technically a tortfeasor. Three justices disagreed with that reading of MCL 600.2925d. But, in 1995, the Legislature amended MCL 600.2925d so that it now applies to "any other person" and not "any other tort feasor" as it previously did when *Theophelis* was decided.

MCL 600.2925d now states that "a release given good faith to 1 of 2 or more persons for the same injury . . . . does not discharge 1 or more other persons from liability for the injury or wrongful death unless its terms so provide." Clearly, it is not the same statutory provision that caused the badly fractured decision in *Theophilis* in 1988. Yet, the same antiquated common law rule stands unchanged decades after *Theophelis* was decided and the Legislature amended MCL 600.2925d to change the wording, i.e. "any tort feasor", that garnered just enough votes in *Theophilis* to keep the common law rule around.

As a consequence, Michigan courts continue to apply that antiquated common law rule and vicarious liability claims against the principal are often routinely dismissed when a claim against the agent is settled. See *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich

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App 565, 569, 484 NW2d 408 (1992). In support of such holdings, the common law rule that was reaffirmed in *Theophelis* is cited as black letter law in Michigan without any mention of the subsequent changes to MCL 600.2925d. Alternatively, the parties end up disputing, as in this case, whether the settlement released the agent or whether a covenant not to sue was provided. See *Larkin, supra,* 207 Mich App at 393-394. Presumably, there are also litigants in Michigan that simply elect not to resolve claims against the agent due to concerns about violating the common law rule and inadvertently releasing the principal.

Since *Theophelis* was decided in 1988, a number of appellate decisions have addressed whether the common law rule in Michigan should be applied in similar circumstances where the question was whether the agent was released from liability or whether there was merely a covenant not to sue the agent. Aside from *Larkin,* supra, and *Stamplis v St. John Health*, unpublished per curiam opinion, Docket No. 241801 (June 1, 2004); see *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 357-358, 696 NW2d 681 (2005); *Hewitt v McCrary*, 387 F Supp 3d 761, 764 (2019); and *Vickers v St. John Hospital*, unpublished per curiam opinion, Docket No. 196365 (April 14, 1998).

Such disputes are a waste of time and resources that stems directly from the continued adherence in Michigan to an antiquated common law that has been legislatively modified. This Court should now revisit its badly fractured decision in the *Theophelis* case. It should consider whether Justice Levin's dissenting opinion was correct in concluding that the common law rule should be jettisoned, or alternatively, that all three of the dissenting justices in *Theophelis* were correct in concluding that MCL 600.2925d abrogated that rule, especially as it does not seem to be consistent with MCL 600.2925d as amended in 1995.

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II. LEAVE SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED BY REINSTATING ITS EARLIER UNPUBLISHED OPINION AFFIRMING THE TRIAL COURT'S DECISION TO DISMISS MALONE'S VICARIOUS LIABILITY CLAIM AS IT MISTAKENLY EQUATED THE SETTLEMENT AGREEMENT AT FACILITATION WITH A RELEASE EVEN THOUGH IT EXPRESSLY PROVIDED THAT IT WOULD NOT AFFECT MALONE'S CLAIMS AGAINST ZHETMAN.

The Court of Appeals, in its majority decision, affirmed the trial court's holding that Malone released her vicarious liability claim against Zhetman when she agreed to settle her tort claim against its employee, Conor McRell, at facilitation. But, the majority clearly erred because it wrongly concluded that "the substance of [that] agreement and its terms all establish that it was a release" as opposed to a "covenant not to sue." Slip op at p 2.

Simply put, the majority opinion did not faithfully apply Michigan law governing "whether an instrument is a release or a covenant not to sue", despite accurately quoting *Theophelis*, 430 Mich at 480, in stating that "it is necessary to look to its terms, the words used, the amount paid, the substance of the agreement, and the intention of the parties." Here, all of those factors favored Malone's position that the settlement agreement reached at facilitation was not a "release" of her claims against McRell, but rather, a covenant not to sue him to enforce her claim against him so long as he paid his policy limits of $50,000.

The "terms used" in the settlement agreement included a clear, unequivocal statement that it would not "affect [her] cause of action against [Zhetman]." It also stated that she "shall accept $50,000 in full settlement of her action against Defendant Conor McRell only." [Emphasis in original]. Moreover, the "words used" in that agreement did not include a statement that Malone "released" her claims against McRell, much less Zhetman. The word "release" was used only to clarify that "appropriate" documentation would be signed. As Judge Krause observed, slip op at 4, "the parties expressly specified that some

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kind of *future* release would be entered as a separate transaction". [Italics in original]. That never happened because Zhetman, in the interim, moved for summary disposition. Similarly, the "amount paid" was supposed to be $50,000, but it was never actually paid.

Here, the "substance" of the agreement was merely a settlement at facilitation of Malone's claims against McRell. As such, it was not a "release" of Malone's claims against Zhetman. The "intention of the parties", meaning Malone and McRell, not Zhetman, was to settle Malone's claims against McRell in exchange for paying his policy limits of $50,000. It was not to release McRell in a manner that would also affect her claims against Zhetman. While it would have been clearer to use the words "covenant not to sue" instead of "releases" in describing the "appropriate" documentation to be forwarded and signed, it is well-established, as the majority acknowledged in its opinion, that "the designation of the instrument as 'release' or 'covenant not to sue' is immaterial." *Theophelis*, 430 Mich at 497.

Consequently, the majority opinion mistakenly equates a settlement agreement with a release in order to affirm the trial court's holding. According to the majority, the settlement agreement signed by Malone and McRell at facilitation "functioned as a release" because it "specifically stated that it settled [Malone's] claim against McRell". Slip op at 2. But, that holding is not accurate as it confuses her claim against McRell with her lawsuit against him.

The agreement reached at facilitation settled Malone's lawsuit against McRell. She was required under the settlement agreement to "accept $50,000 in full settlement of her action" against him and dismiss her "action" against him "with prejudice, which she did. McRell, in turn, was required to pay her $50,000. He never did because Zhetman moved for summary disposition, arguing that the settlement agreement "released" her claim against McRell. It is simply incorrect to broadly conclude, as the majority did, that the

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settlement agreement settled her "claim" against McRell when, in actuality, it settled her "action" against him. It also begs the question in this case. Settling a lawsuit is not the same as releasing a legal claim. If it was the same, there would be no need for parties to execute a release after a lawsuit has settled. If it was the same, there would have been no need for "appropriate releases" to be "forwarded and signed" after this case resolved.

Here, Malone and McRell entered into a settlement agreement at facilitation. McRell was dismissed from this case with prejudice based on that agreement. But, no release was signed because, in the interim, Zhetman moved for summary disposition claiming (wrongly) that the settlement agreement was a release of Malone's tort claim against McRell even though it expressly provided that it "will not affect [her] cause of action against [Zhetman].

The majority clearly erred by concluding that it was "inconsequential" that "the parties did not in fact sign a release" because its holding ignored the fundamental distinction between a settlement agreement and a release. See slip op at p 2, citing *Theophelis,* 430 Mich at 497. In *Theophelis*, the plaintiff settled medical malpractice claims against her son's doctors by signing a settlement agreement and release. Here, the settlement agreement neither stated that it was a "release" nor described McRell as being "released" from Malone's claims against him. Instead, it merely provided that "appropriate releases" would be " signed" and it "will not affect [her] cause of action against [Zhetman].

Simply put, a settlement agreement is not a release of all claims, unless it expressly says so. Here, the settlement agreement reached between Malone and McRell at facilitation did not address whether all claims against him were released. But, it did expressly provide that it "will not affect [her] cause of action against [Zhetman] and that language supports Malone's position that a covenant not to sue is all that was agreed to.

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As such, the settlement agreement in this case merely provided that the lawsuit against McRell would be dismissed with prejudice – which is consistent with a covenant not to sue as it precludes Malone from suing McRell but does not release the tort claim against him.

III. ALTERNATIVELY, LEAVE SHOULD BE GRANTED FOR THE REASONS PREVIOUSLY STATED IN JUDGE KRAUSE'S DISSENTING OPINION BECAUSE AN EVIDENTIARY HEARING IS NEEDED TO DETERMINE THE PARTIES' INTENT IN EXECUTING THE SETTLEMENT AGREEMENT AT FACILITATION.

To the extent that any ambiguity existed regarding whether Malone and McRell intended that the settlement agreement reached at facilitation would require them to sign a release of all claims as opposed to a covenant not to sue that preserved Malone's claims against Zhetman, that concern should be addressed by remanding this case to the trial court for the reasons stated by Judge Krause in her dissenting opinion - see slip op at 5-6.

Such a result would be consistent with Michigan law governing the use of parol evidence to determine whether a broadly worded release should preclude claims against defendants not parties to that release agreement. See *Shay v Aldrich*, 487 Mich 648, 790 NW2d 629 (2010), which overruled this Court's decision in *Romska v Opper*, 234 Mich App 512, 594 NW2d 853 (1999).[30] It also would be consistent with Justice Boyle's concurring opinion in *Theophelis*, 430 Mich at 494, as Judge Krause astutely noted. See slip op at 5.

As the Supreme Court affirmed in *Shay v Aldrich,* supra, "[t]he cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." Id at 660. Here, the majority opted to forego that endeavor by making its own determination as to what the

[30]In *Shay v Aldrich*, supra at 651, the Supreme Court overruled *Romska* "to the extent that its holding precludes the use of parol evidence when an unnamed party asserts third-party beneficiary rights based on broad language included in a release from liability and an ambiguity exists with respect to the intended scope of that release".

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parties intended; it did so by misinterpreting its "substance" and by misreading its "terms" while ignoring other key factors such as the words actually used and the amount (not) paid.

But, in so doing, the majority clearly erred because this case should have been remanded to the trial court, as Judge Krause concluded, so that a proper determination can be made by the trier of fact as to what the parties actually intended. The trier of fact should have had the opportunity to assess the factors stated in the *Theophelis* case, including, most importantly, what Malone and McRell truly intended in settling at facilitation.

Here, the majority opinion analyzed the settlement agreement reached at facilitation in a cursory fashion based on what it concluded was its "substance" and "terms", without any substantive discussion of those factors, much less other important factors previously identified in *Theophelis*, including the parties stated "intent" and the words actually used.

The majority's holding not only was clearly erroneous under the circumstances, it also will result in manifest injustice for Malone as her recovery for the serious personal injuries that she sustained as a result of McRell's clear negligence in rear-ending her motor vehicle while delivering pizzas on behalf of Zhetman will be limited to $50,000, when she should have been fully compensated for her injuries by his corporate employer, Zhetman.

CONCLUSION

The Court of Appeals erred in its opinion on remand by concluding that MCL 600.2925(a), as amended in 1995 (after Theophelis was decided), did not clearly abrogate the common law rule that releasing the agent also releases the principal. That holding simply cannot be reconciled with the clear, unambiguous wording of MCL 600.2925(a). The Court of Appeals further erred by concluding that Malone's vicarious liability claim

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against Zhetman was extinguished by the settlement agreement that she reached with McRell at facilitation. Both the trial court and the majority opinion on appeal mistakenly viewed the settlement agreement between Malone and McRell as a release (as opposed to a covenant not to sue) even though it expressly provided that it would not affect her claims against Zhetman. There also is no way to reconcile that unambiguous provision in the settlement agreement with a holding that it released Malone's claims against McRell. And, to the extent that any ambiguity remains as to what Malone and McRell intended, this case should have been remanded to the trial court for an evidentiary hearing to determine the intent of the parties in executing the settlement agreement reached at facilitation.

This Court should review this case not only because the result should be corrected, but also because it presents an opportunity to address whether the antiquated common law rule that releasing the agent releases the principal should be overruled. *Theophelis* affirmed the vitality of that common-law rule, but it did so under a very different version of MCL 600.2925d. Moreover, concerns about the common law rule, as discussed by Justice Levin in *Theophelis*, have only become stronger since *Theophelis* was decided. The common law rule may be black letter law but it should not be followed for that reason alone. The time clearly has come for this Court to assess whether it is a rule worth keeping.

RELIEF REQUESTED

Plaintiff/Appellant, Heather Malone, respectfully requests that this Honorable Court grant leave to appeal or otherwise review the Court of Appeals' majority decision to affirm the trial court's holding that summarily dismissed her vicariously liability claims against Defendant/Appellee Zhetman because the Court of Appeals in its opinion on remand

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wrongly concluded that MCL 600. 2925d(a), as amended in 1995, did not clearly abrogate the common law vicarious liability rule that releasing the agent releases the principal. It also erred by concluding that the settlement agreement reached at facilitation "functioned as a release" of all claims, and consequently, extinguished her claims against Zhetman. Alternatively, she asks this Court to remand this case to the trial court for an evidentiary hearing to determine the parties' intent in settling her claim against McRell at facilitation.

Respectfully submitted:

Dated: January 18, 2024

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CERTIFICATE OF COMPLIANCE

I, Steven A. Hicks, certify that Plaintiff/Appellant's Application for Leave to Appeal complies with the type-volume limitation stated in MCR 7.212(B). I am relying on the word count of the word-processing software used to produce this application. It uses a 12 point proportional font and the word count for this brief on appeal is calculated as 10,512 words.

Dated: January 18, 2024

/s/ Steven A. Hicks
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