STATE OF MICHIGAN

COURT OF APPEALS

DEVEN PATEL,

Plaintiff-Appellant,

and

SHABHANA PATEL,

Plaintiff,

v

FISHERBROYLES, LLP, ANTHONY CALAMUNCI, FRANK & FRANK, PLLC, JEROME FRANK, and MATTHEW FRANK,

Defendants-Appellees.

FOR PUBLICATION
November 22, 2022
9:00 a.m.

No. 357092
Wayne Circuit Court
LC No. 18-012399-NM

Before: MURRAY, P.J., and CAVANAGH and CAMERON, JJ.

CAMERON, J.

In this legal malpractice action, plaintiff Deven Patel appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants FisherBroyles, LLP (FisherBroyles), Anthony Calamunci, Frank & Frank, PLLC (the Frank law firm), Jerome Frank, and Matthew Frank. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This case arises out of complex legal proceedings involving Deven, his family members, and their various businesses.[1] Relevant to this case is Deven's ownership of VPH Pharmacy, Inc.

[1] During these proceedings, there were a number of tangential cases involving Deven, his family members, and their businesses. For example, Deven pleaded guilty to healthcare fraud and unlawful distribution of controlled substances related to his operation of another pharmacy. As a

("VPH"). VPH was a "closed-door" pharmacy servicing primarily nursing homes, assisted living facilities, and group homes. Vincent Howard is the founder and original owner of VPH.

In 2009, Howard and Deven entered an agreement giving Deven the option to purchase all of VPH's outstanding Class A common stock. Deven exercised his rights under the option agreement in 2010, resulting in the execution of three documents: a promissory note, a security agreement, and a pledge agreement (collectively referred to as "the transactional documents"). Deven agreed under the promissory note to make monthly payments to Howard for the purchase of VPH, with the entire unpaid balance due on September 1, 2015. The purpose of the security agreement was "to extend credit to [Deven]" for the purchase of VPH. In exchange, Deven granted "a security interest in certain collateral of [VPH] as security for payment of the note." The pledge agreement was between Shabhana Patel, Deven's mother-in-law, and Howard. It granted Howard a security interest in VPH's shares of stock.

For the most part, Deven timely paid the monthly payments under the promissory note. But one day before the final balloon payment was due, Calamunci, an attorney and employee of FisherBroyles (collectively, "FisherBroyles defendants"), filed a complaint on behalf of Deven and VPH against Howard (the underlying case). Howard filed a 14-count counterclaim alleging, among other things, breach of contract, common-law conversion, and statutory conversion. The trial court dismissed the claims against Howard after Deven demonstrated a pattern of delays and failure to comply with orders regarding discovery and production of documents. Howard's counterclaims remained at issue.

Jerome and Matthew, attorneys with the Frank law firm (collectively, "Frank defendants"), appeared as cocounsel for Deven and VPH. Soon after, Howard moved for partial summary disposition with respect to his claims of breach of contract, common-law conversion, and statutory conversion. The trial court entered a scheduling order for a response, but defendants failed to file a timely response and did not appear at oral argument. The trial court concluded that Howard was entitled to summary disposition because Deven and VPH failed to present any evidence contradicting these counterclaims. The trial court later entered a judgment in Howard's favor for $1,278,310.55. The parties later stipulated to the dismissal of Howard's remaining counterclaims. VPH later filed a petition for Chapter 11 voluntary bankruptcy, which was eventually converted to a Chapter 7 bankruptcy for liquidation.

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result, Deven was sentenced to a term of imprisonment in a federal penitentiary. There was a bankruptcy proceeding involving VPH Pharmacy, Inc ("VPH") that started as a voluntary Chapter 11 bankruptcy, but was later converted to a Chapter 7 bankruptcy. The trustee in the Chapter 7 bankruptcy made claims against various parties, including Citibank, N.A. for alleged fraudulent transfers and preferential payments. The United States government also brought a forfeiture case involving fraudulent Medicare and Medicaid claims by VPH.

Deven then filed this lawsuit alleging legal malpractice and other claims against FisherBroyles[2] and the Frank defendants. Deven asserted that defendants' failure to respond to Howard's motion for partial summary disposition or attend the hearing were direct and proximate causes of the seven-figure judgment in the underlying case.

The FisherBroyles defendants moved for summary disposition primarily because Deven could not prove that their actions were the proximate cause of the adverse judgment. The Frank defendants also moved for summary disposition, on the basis that they had no duty to respond to the motion because their representation was limited to negotiating a settlement—not to litigating the underlying case. The trial court granted the motions for summary disposition. As to the Frank defendants, the trial court opined that it was "not a close case," because the evidence demonstrated that Deven understood the Frank defendants' only involvement in the case was to negotiate a settlement. Regarding the FisherBroyles defendants, the trial court specifically addressed Howard's breach-of-contract claim. The trial court reasoned that the judgment in the underlying case would have been entered regardless of defendants' actions. Therefore, Deven was unable to prove the FisherBroyles defendants were the proximate cause of the adverse judgment. This appeal followed.

II. STANDARD OF REVIEW

A trial court's summary disposition ruling is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 160. A party seeking summary disposition under this rule can satisfy its burden by "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim, or by demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (quotation marks and citation omitted; alterations in original). The standard of review for dispositive motions brought under MCR 2.116(C)(10) is well-settled:

> In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Trueblood Estate v P&G Apartments, LLC*, 327 Mich App 275, 284; 933 NW2d 732 (2019), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

[2] The trustee in VPH's bankruptcy case filed a legal malpractice case on behalf of VPH in Oakland Circuit Court arising from similar issues alleged as malpractice in this case. The parties apparently settled and the Oakland Circuit Court case was dismissed.

"A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted).

Resolution of this issue also requires this Court to interpret contract provisions, which presents a question of law reviewed de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). This Court's goal in interpreting a contract is always to ascertain and give effect to the intent of the parties as reflected in the plain language of the contract. *Bayberry Group, Inc v Crystal Beach Condo Ass'n*, 334 Mich App 385, 393; 964 NW2d 846 (2020). "The words of a contract are interpreted according to their plain and ordinary meaning, and this Court gives effect to every word, phrase, and clause while avoiding interpretations that would render any part of the document surplusage or nugatory." *Id*. (quotation marks and citation omitted). An unambiguous contract term must be enforced as written unless contrary to public policy. *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, 337 Mich App 529, 542; 976 NW2d 674 (2021). A contract is ambiguous if it is capable of irreconcilably conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). If a contract is ambiguous, the proper interpretation presents a question that must be decided by a fact-finder. *Id*. at 469.

III. GOVERNING LAW

The plaintiff in a legal malpractice claim must prove four elements: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The first element correlates with the duty element of a traditional negligence claim because the existence of the attorney-client relationship gives rise to a duty as a matter of law. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

The second element requires proof that the defendant breached a professional standard of care. *Broz v Plante & Moran, PLLC*, 331 Mich App 39, 52-53; 951 NW2d 64 (2020). Stated generally, an attorney "must only act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." *Simko*, 448 Mich at 650. This Court recently explained that professional malpractice claims ordinarily require expert testimony to establish the applicable standard of care and that the defendant breached that standard. *Broz*, 331 Mich App at 53. This is because "the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community." *Id*. (quotation marks and citation omitted).

As with any other form of negligence action, the third element requires the plaintiff to prove "that the defendant's action was a cause in fact of the claimed injury." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). To do so, the plaintiff must demonstrate that he or she would have been successful in the underlying matter but for the attorney's malpractice. *Id*. "In other words, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding." *Id*. (quotation marks and citation omitted).

IV. SCOPE OF REPRESENTATION

Deven first argues that the trial court erred by concluding that the Frank defendants did not owe him a duty to respond to Howard's motion for partial summary disposition. The parties agree that the Frank defendants' representation was limited to the settlement negotiations. But Deven reasons that the Frank defendants filed a general appearance and were therefore not at liberty to ignore a critical motion in the litigation. We disagree.

Neither Deven nor the Frank defendants direct this Court's attention to any binding authority directly addressing whether an attorney's duty is limited by the agreed upon scope of the attorney's representation for purposes of a malpractice action. There are, however, a number of cases from other jurisdictions addressing this issue.[3] For example, in *AmBase Corp v Davis Polk & Wardwell*, 8 NY3d 428, 434-435; 866 NE2d 1033 (2007), the plaintiff retained the defendants to resolve a dispute with the Internal Revenue Service (IRS) regarding a tax liability incurred by the plaintiff's parent company. *Id*. at 432. After nearly six years of litigation, the defendants successfully obtained a ruling that rejected the IRS's claim. *Id*. at 432-433. Despite the defendants' legal victory, the plaintiff commenced a malpractice action alleging that it suffered substantial damages during the lengthy litigation because the defendants failed to advise that another entity was primarily liable for the disputed tax liability under an agreement the plaintiff entered with its parent company. *Id*. at 433. The New York Court of Appeals affirmed the dismissal of the malpractice claim because "the plain language of the retainer agreement indicates that [the defendants were] retained to litigate the amount of tax liability and not to determine whether the tax liability could be allocated to another entity." *Id*. at 435. The court reasoned that in light of the limited representation, the defendants "exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession when they focused their efforts on the controversy between [the plaintiff] and the IRS—the subject of the retainer agreement—resulting in a most favorable outcome . . . ." *Id*.

In another case from Nevada, the plaintiffs sued their accountants and attorneys after necessary liquidation paperwork was not filed within 12 months of the sale of the corporate plaintiff's principal asset. *Warmbrodt v Blanchard*, 100 Nev 703, 704-705; 692 P2d 1282 (1984), superseded by statute on other grounds as stated in *Countrywide Home Loans, Inc v Thitchener*, 124 Nev 725; 192 P3d 243 (2008). During discovery, the plaintiffs denied having retained counsel "to advise them in the matter of liquidation, to prepare the legal documents in connection with such liquidation, and to advise them of the relevant deadlines," but admitted that "they had hired an attorney to draft and file documents necessary to effectuate the sale, and had 'partially' relied upon an attorney to advise them when the twelve-month period expired." *Warmbrodt*, 100 Nev at 705. The plaintiffs explained, however, that the attorneys warned that they lacked tax expertise and made clear that they were "not acting as tax counsel in connection with the liquidation." *Id*. at 706.

[3] "Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

The Supreme Court of Nevada concluded that the issue turned on the scope of the duty owed by the attorneys, noting that "it is the contractual relationship creating a duty of due care upon an attorney which is the primary essential to a recovery for legal malpractice." (Quotation marks and citation omitted.) Further, "the attorney must be employed in such a capacity as to impose a duty of care with regard to the particular transaction connected to the malpractice claim." *Id*. "Even with regard to a particular transaction or dispute, an attorney may be specifically employed in a limited capacity." *Id*. The court held that summary judgment was properly granted in favor of the attorneys because discovery revealed that the plaintiffs had no expectation that the attorneys would file the liquidation paperwork. *Id*. at 707. Thus, "[i]n the absence of a contractual duty to plaintiffs to perform the act which plaintiffs alleged as a cause of their damages, the court could properly find that there was no genuine issue of material fact." *Id*. Accord *Majumdar v Lurie*, 274 Ill App 3d 267, 270; 653 NE2d 915 (1995) (reasoning that even when legal malpractice is presented as a tort, it arises from a contractual relationship "the duty owed by the attorney . . . is necessarily limited by the scope of the contract of engagement.").

On the basis of these persuasive authorities, we hold that where an attorney and a client expressly limit terms of the attorney's representation, the duty imposed on the attorney for purposes of a legal malpractice action is limited to the agreed-upon scope of representation.[4] In this case, the trial court did not err when it determined that the Frank defendants could not be held liable for failing to respond to Howard's motion for partial summary disposition. The parties agree that the Frank defendants' "role was primarily to negotiate." Therefore, the Franks defendants had no duty to respond to Howard's partial motion for summary disposition because the motion was unrelated to settlement negotiations and outside the scope of the Frank defendants' representation.

V. PROXIMATE CAUSATION

Deven next argues that the trial court erroneously applied the case-within-a-case doctrine. According to Deven, the causation standard required him to demonstrate only that the outcome was worse than it would have been but for defendants' malpractice. Alternatively, he contends that under the terms of the transactional documents, he would not have been held personally liable for the debt, and that defendants were ineffective for failing to pursue a defense based on these terms. In Deven's view, the trial court erred by granting summary disposition despite the clear

[4] Our holding is consistent with several unpublished decisions of this Court. See, e.g., *Heller v Donaldson*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 1998 (Docket No. 194219), pp 1-2; *Mohamed v Mostafa*, unpublished per curiam opinion of the Court of Appeals, issued November 3, 2016 (Docket No. 327308), p 4. This proposition was also implicitly affirmed by other unpublished decisions of this Court. See *Tubbergen v Dykema Gossett*, unpublished per curiam opinion of the Court of Appeals, issued December 16, 2021 (Docket No. 355795), pp 4-5. "Although unpublished opinions of this Court are not binding precedent . . . they may, however, be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted); see also MCR 7.2015(C)(1).

language of the transactional documents. We agree that the trial court's reasoning was partially flawed, but we disagree this error warrants reversal.

The first issue is whether the trial court applied the correct causation standard. As noted earlier, the causation element of a malpractice claim typically requires the plaintiff to prove a case-within-a-case. *Charles Reinhart Co*, 444 Mich at 586. That is, "*but for* the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id*. (quotation marks and citation omitted). However, our Supreme Court acknowledged that proof of a case-within-a-case is not "universally applicable" to malpractice claims and there may be other situations where a plaintiff need not prove a case-within-a-case. *Id.* at 587.

For instance, in *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 693; 310 NW2d 26 (1981),[5] this Court considered a circumstance in which proof of a case-within-a-case was unnecessary. In *Basic Food Indus*, the lawyer defendant defended the plaintiff in a lawsuit for unpaid attorney fees filed by the plaintiff's former law firm. *Id*. at 688-698. The plaintiff also asked, and the defendant agreed, that a counterclaim should be pursued as a means to force a settlement. *Id*. at 688. The defendant delayed doing so, and the counterclaim was time-barred. *Id*. Among other errors, the defendant failed to conduct discovery in preparing for trial. *Id*. at 688-689. The defendant did not introduce any proofs at trial, and the jury returned a $25,000 verdict against the plaintiff. *Id*. at 689. This Court agreed that the plaintiff need not demonstrate that it would have *fully* prevailed in the underlying case. *Id*. at 693-694. Rather, it would be sufficient for the plaintiff to establish that the defendant's negligence caused the entry of a verdict larger than it would have been absent the negligence. *Id*. at 694. In reaching this conclusion, this Court opined that the traditional case-within-a-case requirement ought to be limited to certain types of cases, including "where an attorney's negligence prevents the client from bringing a cause of action (such as where he allows the statute of limitations to run), where the attorney's failure to appear causes judgment to be entered against his client or where the attorney's negligence prevents an appeal from being perfected." *Id*. at 693-694.

Contrary to Deven's assertions, the case-within-a-case doctrine applies to his malpractice claim. Although the underlying case involved competing claims and counterclaims similar to those in *Basic Food Indus*, Deven's theory of malpractice is not that the proper representation of another claim would have partially offset his liability to Howard. Rather, Deven contends that the judgment would not have been entered against him at all had defendants timely responded to Howard's motion and took appropriate actions to enforce the remedies under the transactional documents. This claim falls squarely within the second category of cases described in *Basic Food Indus*. *Id*. at 693 (opining that case-within-a-case concept applies when "the attorney's failure to appear causes judgment to be entered against his client"). Therefore, the causation element of Deven's claim requires proof that he would have been able to assert a successful defense to Howard's counterclaims. *Charles Reinhart Co*, 444 Mich at 586.

[5] Opinions from this Court issued before November 1, 1990, are not precedentially binding, but may be considered as persuasive authority. *Redmond v Heller*, 332 Mich App 415, 431 n 7; 957 NW2d 357 (2020).

Having defined the appropriate causation standard, we turn to whether Deven could have prevailed against Howard's breach-of-contract claim, given Deven's failure to make the September 1, 2015 balloon payment. Relevant to this issue is Paragraph 4 of the promissory note, which states:

> Personal Liability. If Borrower is in default herewith and Borrower causes VPH Pharmacy, Inc. (the "Corporation") to voluntarily surrender its collateral under the Security Agreement as hereinafter identified and if Borrower does not [sic[6]] comply with his obligations under the Pledge Agreement hereinafter identified, Borrower shall have no personal liability under this Note in the event of default and Lender's sole remedies shall be under the Pledge Agreement and Security Agreement referred to in the Option Agreement (the "Security Documents").

Notably, "[i]f a contract incorporates another document by reference, the two writings should be read together." *Bayberry Group*, 334 Mich App at 393. As such, this Court must consider not only the promissory note, but also the security agreement, pledge agreement, and option agreement referenced therein to determine the parties' intent.

In plain language, Paragraph 4 applies in the event of a default by Deven, the borrower, and identifies two conditions that must be satisfied in order for Deven to "have no personal liability under this Note." First, Deven had to "cause[] VPH Pharmacy, Inc. (the "Corporation") to voluntarily surrender its collateral under the Security Agreement," and, second, he had to "comply with his obligations under the Pledge Agreement . . . ."

Concerning the first requirement, the trial court reasoned:

> The note and the Security Agreement ha[ve] to be read in conjunction, they're not independent of each other. When the security note says that the creditor has the option of taking the security back, they mean the security, it necessarily means the security as it was originally configured. It cannot mean that [Howard] has got to take back a worthless security, [it] can't mean that.

The security agreement recitals explained that Howard extended credit to Deven to allow him to purchase VPH and that Deven, in turn, agreed to cause VPH to grant Howard a security interest in certain assets to secure payment of the promissory note. The assets at issue were VPH's accounts and inventory, which were collectively referred to as "the collateral". Defendants take the position that Deven could not satisfy the first requirement in Paragraph 4 because VPH granted purchase money security instruments ("PMSIs") to at least two pharmaceutical suppliers, in

[6] FisherBroyles defendants asserted below, and continue to maintain on appeal, that the inclusion of the word "not" in Paragraph 4 was a scrivener's error. Deven's expert witness was of the same opinion. Deven disagreed, but has abandoned this position on appeal. See *MOSES Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.").

violation of a provision prohibiting VPH from "grant[ing] any other security interest in any of the Collateral."[7] Defendants' reasoning is flawed because Paragraph 4 merely required Deven to cause VPH to "voluntarily surrender its collateral under the Security Agreement," but said nothing about complying with any or all provisions of the security agreement. The absence of "compliance" language is especially telling in light of the second requirement identified in Paragraph 4, i.e., that Deven "comply with his obligations under the Pledge Agreement." The use of different words in describing the two requirements that had to be met to avoid personal liability implies that the parties intended different meanings. See *Andrusz v Andrusz*, 320 Mich App 445, 454; 904 NW2d 636 (2017) ("[D]ifferent words are presumed to have distinct meanings . . . ."). Because the contractual parties unambiguously required compliance with the pledge agreement and did not use the same language with respect to the security agreement, we cannot presume that the parties intended that Deven be foreclosed from relying on Paragraph 4 for failure to comply with every term of the security agreement. Rather, Deven only needed to cause VPH to surrender its accounts and inventory (the security agreement collateral) to Howard. The trial court erred by concluding that Deven was foreclosed from relying on Paragraph 4 because superior security interests may have rendered the collateral "worthless." The security agreement contained its own remedies for a default, and those remedies did not include the invalidation of Paragraph 4.

The second requirement of Paragraph 4 is that Deven comply with his obligations under the pledge agreement.[8] The pledge agreement granted Howard a security interest in VPH's stock.

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[7] The security agreement contained an exception for PMSIs granted in inventory, but the exception required VPH to "(1) give prior written notice thereof to Secured Party, (2) obtain the prior written consent of Secured Party, and (3) require Third Party to give written notice to Secured Party in the manner required by law." Deven did not produce any evidence that he caused VPH to comply with these requirements and, instead, reasons that it was unnecessary to do so because Howard was aware that security interests would be granted in accordance with the standard industry practice.

[8] The compliance requirement in Paragraph 4 is problematic in that the pledge agreement was made between Howard and Shabhana, not Deven. Because Deven is not a party to the agreement, he therefore did not technically assume any obligations with which he could comply to satisfy Paragraph 4. That said, we note that the other transactional documents were incorporated into the promissory note by reference to better ascertain the parties' intent. *Bayberry Group*, 334 Mich App at 393.

The option agreement allowed Deven to exercise his option to purchase VPH by notifying Howard in writing of his intent to do so. The option agreement also contained the following provision regarding payment:

> The Buyer shall issue his Promissory Note (the "Note") for the Purchase Price in the form attached as Exhibit A. Payment of the Note shall be secured by a pledge of the Stock in the form attached as Exhibit B. Buyer shall cause the Corporation to grant Seller a security interest in the assets of the Corporation in the Form of Exhibit C (the "Security Agreement").

It also contained a promise that "[t]he Debtor will deliver the certificate evidencing his ownership of the Stock (the "Stock Certificate") to Secured Party endorsed in blank at the time this Agreement is signed . . . ." Howard testified that this requirement was not fulfilled because no stock certificates were ever delivered. Deven, on the other hand, thought the stock certificate *was* delivered to Howard when they executed the pledge agreement. The actual stock certificates were never produced to clarify whose recollection was accurate.

Although the conflicting testimony would ordinarily create a question of fact, FisherBroyles defendants served discovery requests asking Deven to admit that the stock certificates were not delivered to Howard by Shabhana or any subsequent shareholder, including Deven. MCR 2.312(B)(1) provides, "Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request . . . the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." Deven did not respond to the request for admission, thereby resulting in those matters having been deemed admitted by operation of MCR 2.312(B)(1). This admission conclusively established that the stock certificate was not delivered to Howard as contemplated by the pledge agreement. MCR 2.312(D)(1).

Again, the release of personal liability under Paragraph 4 was conditioned on two requirements. Deven could escape personal liability only if he (1) caused VPH "to voluntarily surrender its collateral under the Security Agreement" and (2) "does not [sic: does] comply with his obligations under the Pledge Agreement . . . ." Because Deven did not "deliver the certificate evidencing his ownership of the Stock" to Howard "endorsed in blank at the time [the pledge agreement was] signed," he could not avoid personal liability under Paragraph 4. Consequently, the trial court correctly concluded that Paragraph 4 would not have provided a successful defense to Howard's breach-of-contract claim.

Deven seems to believe that all he had to do to take advantage of Paragraph 4 was affirmatively tender the "keys"—that is, the security agreement collateral (VPH's accounts and inventory) and the pledge agreement collateral (the stock certificate)—to Howard. This position does not comport with the plain language of the relevant documents. While Paragraph 4 only

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This paragraph plainly describes the parties' intent to consummate the sale by executing a promissory note, which was to be secured by both the pledge agreement and security agreement. The pledge agreement likewise includes a provision confirming that the security required by the agreement would be given "to secure payment and performance of a promissory note with Debtor as maker and Secured Party as payee . . . ." This reference to "Debtor as the maker" suggests that the parties intended that the person who executed the promissory note and the pledge agreement would be one and the same. The notice provision of the agreement also indicates that required notices should be sent to "Debtor" at the address identified in the option agreement, which lends further support to the notion that the parties intended all the transactional documents be executed between the same parties. Thus, it is reasonable to construe Paragraph 4 as requiring that Deven, the maker of the promissory note and the buyer under the option agreement, comply with the terms of the pledge agreement—particularly in this context, where Deven is attempting to avoid personal liability by enforcing a provision that calls for compliance with the pledge agreement.

required that the security agreement collateral be voluntarily surrendered, it conditioned the release of personal liability on actual compliance with the pledge agreement. The pledge agreement did not call for delivery of the stock certificate at Deven's pleasure or in the event of a default—it had to be done at the time the agreement was signed.

Deven was unable to establish a material question of fact as to whether he could have successfully defeated Howard's breach-of-contract claim but for defendants' alleged negligence. Therefore, defendants were entitled to judgment as a matter of law and the trial court did not err by granting their summary disposition motions. Given this conclusion, we need not address Deven's remaining arguments.

Affirmed.

/s/ Thomas C. Cameron
/s/ Christopher M. Murray
/s/ Mark J. Cavanagh