

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DISTRICT COURT
Tomblingh

FILED



AN 20 2009

Harold and Kimberly Voss, individually and as parents
and next friends for A.V.,
Plaintiffs/Appellees,

Case Number: 105746

SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA: TULSA COUNTY

vs.

Lower Court Case Number: CJ-2007-2729

MANDATE RECEIVED AND ORDERED
FILED AND SPREAD OF RECORD THIS
20th DAY OF JAN, 2009

Jenks Public Schools aka Independent School District
#5 of Tulsa County, State of Oklahoma, State
Department of Education,
Defendants/Appellants.

Lower Court: TULSA

P. Thomas
CLERK

MANDATE

Pursuant to Rules 1.183 and 1.16, Oklahoma Supreme Court Rules, 12 O.S. Supp. 1997, Ch. 15, App. 1, on the 30th day of October, 2008, the Honorable Chief Justice Winchester directed the Clerk of the Supreme Court to issue mandate in the above styled and numbered cause.

On the 27th day of June, 2008, the Supreme Court of the State of Oklahoma promulgated an Opinion in the above styled and numbered cause. Appeal was taken from the TULSA. On appeal, the following judgment was entered:

Affirmed

Costs of \$0.00 are taxed and allowed pursuant to 12 O.S. 1991 §978 and Rule 1.14(a), Oklahoma Supreme Court rules, 12 O.S. Supp. 1997, Ch. 15, App. 1.

Therefore, the TULSA, State of Oklahoma, is ordered to enter of record the judgment of the Supreme Court of Oklahoma of the State of Oklahoma. The TULSA shall issue process or take further action as required by the Opinion issued.

MICHAEL S. RICHIE
Clerk of the Appellate Courts

By Deborah Keys, Deputy

2009 JAN 20 AM 9:32

*Deborah Keys
Court Clerk*

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NOT FOR OFFICIAL PUBLICATION

ORIGINAL

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA ✓

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

HAROLD and KIMBERLY VOSS,)
individually and as parents and next friends)
for ASHLEY VOSS,)

JUN 27 2008

MICHAEL S. RICHIE
CLERK

Plaintiff/Appellees,)

vs.)

Case No. 105,746

JENKS PUBLIC SCHOOLS a/k/a IND.)
SCHOOL DISTRICT NO. 5 OF TULSA)
COUNTY,)

Defendant/Appellant,)

and,)

STATE OF OKLAHOMA,)
DEPARTMENT OF EDUCATION,)

Defendants.)

Rec'd (date)	6-27-08
Posted	FE
Mailed	FE
Distrib	FE
Publish	yes <input checked="" type="checkbox"/> no

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE P. THOMAS THORNBRUGH , TRIAL JUDGE

AFFIRMED

J. Douglas Mann,
Kent B. Rainey,
Jerry A. Richardson,
ROSENSTEIN, FIST & RINGOLD,
Tulsa, Oklahoma,

For Plaintiff/Appellants.

OPINION BY CAROL M. HANSEN, JUDGE:

¶1 Appellant, Independent School District No. 5 of Tulsa County, Oklahoma (School), appeals from the trial court's order denying its motion for summary judgment and granting the motion for summary judgment of Appellees, Harold and Kim Voss (Parents).¹ In granting the motion, the trial court found Parents' claim for relief, *i.e.* School violated the terms of their daughter's Individualized Education Plan (IEP), was not precluded by an earlier settlement agreement between the parties. We affirm.

¶2 During the times relevant to the issues before us, Parents' child, Ashley (Child), was a special needs student at School. In December 2004, Parents, as Co-Guardians of the person and estate of Child, submitted a claim to School pursuant to the Oklahoma Governmental Tort Claims Act, 51 O.S. 2001 §§151 *et seq.* The claim

¹ Appellees did not file a Response to the Petition in Error, nor did Appellees' counsel enter appearance before the Supreme Court; therefore, the Supreme Court assigned the matter to this Court on Appellant's Petition in Error and record only. The appeal is submitted without appellate briefing in accordance with the accelerated procedure under Rule 1.36, Oklahoma Supreme Court Rules, 12 O.S. Supp. 2003, Ch.15, App.

alleged School had negligently allowed Child to be exposed to “dangerous particulants and pollutants” during a renovation project at School, causing her injury.

¶3 The parties agreed to settle the tort claim for \$50,000.00, which was to be paid by School’s insurer. Counsel for School prepared the settlement documents. Parents’ counsel, and Parents, approved the documents, with two minor changes. Parents executed the documents, including a *Release and Settlement Agreement* (the Release), signed on June 3, 2005. The documents were used in a “friendly suit” to gain court approval of the settlement. On June 28, 2005, the Tulsa County District Court, after questioning Parents about their understanding of the settlement documents, approved the settlement.

¶4 On October 2, 2005, Parents filed an administrative complaint with Defendant, Oklahoma State Department of Education (Department),² alleging School had violated several Federal Acts³ by failing to comply with the terms of Child’s IEP.⁴ The complaint laid out an extensive list of asserted deficiencies regarding Child’s educational program for the period 2002-2005, including lack of [a] use of “assistive

² Department’s motion to dismiss was granted by the trial court on May 25, 2007. It is not a party to this appeal.

³ Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §24; Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*; Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq.*; and the Carl Perkins Vocational and Applied Technology Act, 20 U.S.C. §§2301 *et seq.*

⁴ The IEP is required under the Individuals with Disabilities Education Act, note 3 *supra*.

technology,” [b] necessary training of School’s personnel, and [c] provision of a “consistent form of communication (*i.e.*, augmentative communication and/or sign).” Expressing a lack of confidence School would comply with any plan of action to correct the alleged deficiencies, Parents, in the complaint to Department, asked for “a monetary settlement in a sufficient amount to reimburse [them] for the acquisition of services elsewhere from qualified personnel.”

¶5 Department, in a letter dated October 18, 2005, apprised Parents it had been advised by School’s counsel that because of the Release, “[a]ny claims asserted against the Jenks School district arising before June 3, 2005 have been released by the Parents.” Consequently, Department stated it would address solely the only allegation in the complaint arising after June 3, 2005, that is, failure to start services for the school year 2005-2006 until almost one month late, despite “continuous requests.”

¶6 Parents initiated this action by their *Petition* filed April 23, 2007⁵, naming School and Department as defendants. The *Petition* sets out that Parents had filed the complaint with Department, but that “Defendant had refused to consider any claim

⁵ The *Petition* states it was a “refile pursuant to 12 O.S. §100.” The record does not disclose when the original petition may have been filed.

for IEP services prior to June 8, 2005⁶ based upon the personal injury settlement.” Parents asserted the “settlement was for Ashley’s personal injury and nothing else,” and asked the court to find the Release did not release School “from liability regarding ... claims for special services.” Parents also asked the court to award “money damages” for violation of the federal Acts cited in their complaint to Department.

¶7 School filed an *Answer and Counterclaim* in which it, *inter alia*, asserted the Release as one of a number of affirmative defenses. As its counterclaim, School asked that if the Release was “vacated, reformed, modified or otherwise limited by the court” to other than a full release of any and all claims as of the date of execution, the court should order return of the \$50,000.00 because of a “failure of consideration” and to prevent unjust enrichment. Thereafter, School moved for summary judgment based on the Release, arguing “[t]he undisputed facts establish that [Parents] cannot present evidence entitling them to reformation of the Release and Settlement Agreement.”

¶8 Parents then concurrently filed their response and objection to School’s motion for summary judgment and their own motion for summary judgment. Parents

⁶ Although not material to any issue in controversy, the record shows the date was actually June 3, 2005, the day Parents signed the Release pursuant to the personal injury settlement.

reiterated their argument the Release “was completely separate and apart from the IEP Complaint” and did not preclude the IEP action. Parents asked for a finding to that effect and an award of money damages resulting from the alleged IEP violations.

¶9 On December 12, 2007, the trial court denied School’s motion for summary judgment and granted summary judgment in favor of Parents, finding “their claims for relief that Defendant Jenks violated the terms of their daughter’s IEP are not precluded by the Settlement Agreement approved by the Court on June 28, 2005.”

The trial court specifically found:

... that the evidentiary materials tendered for the Court’s review establishes (sic) the existence of an ambiguity which should be resolved in favor of the Plaintiffs as a matter of law. See *Oklahoma Oncology & Hematology v. US Oncology*, 2007 OK 12, 160 P.3d 936.

¶10 On March 10, 2008, the trial court, in accordance with 12 O.S. 2001 §994(A), determined there was “no just reason for delay of an appeal as to the court’s decision of December 12, 2007 granting [Parents] judgment as to their claim for declaratory relief only.” This finding allowed an immediate appeal of the trial court’s order of December 12, 2007, which School did by its *Petition in Error* filed on April 8, 2008.⁷

⁷ The Supreme Court issued a show cause order as to why this appeal should not be dismissed because it only resolved a portion of a single claim, but allowed the appeal to proceed after response by School to the effect there were two separate claims before the trial court.

¶11 On appeal, School contends the trial court erred by [1] finding the language of the Release was ambiguous, [2] finding the Release should be construed against it, and [3] modifying the scope of the Release.⁸ A release executed in settlement of legal claims is a contract and is to be construed as any other contract. *Cleveland v. Dyn-a-Mite Pest Control, Inc.*, 2002 OK CIV APP 95, 57 P.3d 119. Interpretation of a contract, and whether it is ambiguous, is a matter of law for the court. *Whitehorse v. Johnson*, 2007 OK 11, 156 P.3d 41. We review matters of law by a de novo standard. *Upton v. State ex rel. Department of Corrections*, 2000 OK 46, 9 P.3d 84. Our de novo review of a trial court's legal rulings is plenary, independent and non-deferential. *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶ 5, 66 P.3d 442, 445.

¶12 To determine if School's appellate contentions have merit, we must look to the operative document which forms the basis for both the parties' settlement and disagreement, the Release. Contractual intent is determined from the entire agreement. *Whitehorse v. Johnson*, 156 P.3d at 47. We will "give effect to the

⁸ Because Parents failed to respond to School's *Petition in Error*, we will not search the record for matters that support the summary judgment, but will proceed to decide the issues tendered by the *Petition in Error*. *Broken Arrow Partnership v. PBC Investment Opportunities, Inc.*, 2001 OK CIV APP 118, 33 P.3d 694; *State ex rel. Oklahoma State Employment Com'n v. Thompson*, 2003 OK CIV APP 75, 76 P.3d 88. However, reversal is never automatic and is only warranted where the allegations in the *Petition in Error* are reasonably supported by those portions of the record on which the appellants rely. See, *Sears, Roebuck and Co. v. Cosey*, 2002 OK CIV APP 39, 44 P.3d 582.

intention of the parties as ascertained from the four corners of the contract, and, where the language is ambiguous, it will be interpreted in a fair and reasonable sense.” *Okla. Oncology & Hematology v. US Oncology*, 2007 OK 12, 160 P.3d 936.

¶13 School’s contentions are premised upon the following provisions in the Release purporting to release School from “any and all” liability:

Vosses have agreed to execute this Release to Releasees in settlement of any and all disputes and differences, known and unknown, existing between the Vosses and Releasees as of the date of the execution of this Release.

... Vosses by this instrument release the School District and its agents, representatives, board members, employees, attorneys, predecessor-in-interest, insurers, assigns and successors, from any and all claims, liabilities or actions, known or unknown, which they presently have or have ever had against Releasees as of the date of the execution of this Release, and the Vosses further agree to cause a dismissal with prejudice to forthwith be filed in the Lawsuit. (Emphasis in original).

¶14 School, however, ignores other provisions of the Release which put the parties’ intentions in context. Other relevant provisions of the Release state:

Vosses assert various claims against Releasees *stemming from personal injuries Ashley Voss sustained as a result of pollutants in Tulsa County, Oklahoma in or about April 2004*. (Emphasis added).

Vosses acknowledge that the sum of Fifty Thousand and no/100 Dollars (\$50,000.00) paid by Releasees herein specifically includes payment of all of Ashley Voss’s medical bills and/or liens, subrogated or otherwise. Vosses agree to pay in full all medical bills and expenses, and all others known and unknown ... arising out of any claims, demands, causes of actions, liens or suits of whatever nature, in law or equity, brought by

any person or legal entity against the Releases *relating to the incident in April 2004*, including the subsequent medical treatment of Ashley Voss. (Emphasis added).

¶15 It is clear the events that gave rise to the Release relate only to Child's exposure to pollutants at School in April 2004. The provisions purporting to release "any and all claims" "in settlement of any and all disputes and differences, known and unknown, existing between the Vosses and Releasees as of" June 3, 2005, arguably could cover any IEP violations up to that time. However, the other quoted provisions arguably limit the release to any and all claims, known or unknown, "relating to the incident in April 2004."

¶16 The test to be applied in determining if there is ambiguity in a contract is whether the contract is susceptible to two interpretations on its face. *Kerr-McGee Corp. v. Admiral Ins. Co.*, 1995 OK 102, 905 P.2d 760. Where it is so susceptible, the contract will be interpreted consistent with the mutual intent of the parties. *Id.*, at 762. When applying the test for ambiguity, it must be done from the standpoint of a reasonably prudent lay person, not from that of a lawyer. *Cranfill v. Aetna Life Ins. Co.*, 2002 OK 26, 49 P.3d 703. If the terms of a contract are ambiguous, it must be construed against the drafter of the contract." *Cleveland v. Dyn-a-Mite Pest Control, Inc.*, 57 P.3d at 129.

¶17 The terms of the Release, as drafted by School's counsel and purporting to release "any and all" claims, could lead a "reasonably prudent lay person" to believe he or she was waiving only those rights or claims arising from Child's injuries "relating to the incident in April, 2004." A release will not be construed to include claims not contemplated by the parties at the time of its execution. *Cleveland v. Dyna-Mite Pest Control, Inc.*, at 128. Further, generally, "a release must be construed in the light of the circumstances surrounding the parties at the time the release was entered into." *Id.* quoting *Kay Pharmacal Co. v. Dalious Construction Co.*, 1954 OK 306, 276 P.2d 756.

¶18 The four corners of the Release reflect the parties were contemplating only the Governmental Tort Claims Act claim when they reached the settlement agreement and the Release was drafted and executed. If School was contemplating Parents' waiver of any and all claims from controversies other than "the incident in April 2004," and we have not been directed to any persuasive evidence it was, it was incumbent on School, as the drafter of the Release, to ensure there were no ambiguities in the document. They failed to do so. In applying the rules of construction set out above, we hold the trial court was correct in finding Parents were not precluded by the Release from pursuing a claim on behalf of Child for the alleged violations of federal law pertaining to the IEP. Finally, we note the trial court, in so

holding, did not reform the Release or otherwise modify its scope, but merely construed the Release according to Oklahoma contract law.

¶19 The trial court's judgment is accordingly, **AFFIRMED**.

ADAMS, P.J., and JOPLIN, J., concur.