STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: OTHER CIVIL
Court File No.: 27-CV-09-13489
Judge: John Q. McShane

Chris Gregerson,

Plaintiff,

v.

Morgan Smith, Boris Parker, and Vladimir Kazaryan; Smith & Raver, LLP, Saliterman & Siefferman, PC, and Bassford Remele, PA, Minnesota Law Firms,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS BORIS PARKER, SALITERMAN & SIEFFERMAN, PC, AND BASSFORD REMELE, PA'S MOTION TO DISMISS

Introduction

In his Complaint, Gregerson alleges Boris Parker maliciously prosecuted Gregerson based on forged evidence (Complaint, ¶ 12), initiating and maintaining multiple legal claims without probable cause or reasonable belief they could prevail on their merits (Id., ¶ 102). Gregerson alleges there was "no credible evidence" to support the claims Parker represented (quoting Judge Ann D. Montgomery, Id. ¶ 29). Gregerson alleges Boris Parker attempted to deceive the court (Id., ¶¶ 14, 78) and was motivated by malice (Id., ¶¶ 89, 103). The litigation had the ulterior motive of trying to compel Gregerson to remove a truthful web page which publicized [OCP]'s[1] copyright infringement (Id., ¶¶ 73, 109).

The Parker defendants have raised various legal arguments that Boris Parker is immune from liability for this conduct because it is proper, legal conduct for an attorney. It is not. The Parker defendants have argued Gregerson's damages are not recoverable, but attorney's fees, costs, and lost income are recoverable for claims based on wrongful civil litigation.

1 Pursuant to a settlement with the Original Corporate Plaintiff (OCP), they are not being identified in the public version of legal briefs in this case, which this what this is. The rest of the brief is as it was filed with the court.

The Parker Defendants have argued Gregerson's good-faith settlement with [OCP] is a release of all past employees and agents of [OCP][2], and they should be dismissed. They are not a party to the settlement, paid no consideration, and were not named in the stipulation of dismissal. This is an attempt to "take gratuitous advantage of agreements in which they took no part....on the basis of a legal fiction arising from the chance insertion of boilerplate wording". *McInnis v. Harley-Davidson Motor Co.*, 625 F.Supp. 943, 952, 954-55 (D.R.I. 1986).

Allegations Against Boris Parker

Gregerson's Complaint alleges Boris Parker took over the state court defamation complaint (started by Morgan Smith), and brought six additional counterclaims in federal court, based on facts and evidence Parker knew to be false.

The Defamation Complaint Under Boris Parker

Gregerson alleges Boris Parker took over the defamation complaint on April 26th, 2006 (Plaintiff's Complaint at ¶¶ 66, 68). That complaint incorporated the forged "Zubitskiy photo agreement" at exhibit A. Id., ¶ 37. Gregerson had already filed a motion for sanctions alleging Zubitskiy didn't exist. Id., ¶¶ 51-54. Parker was aware "[T]here is no credible evidence to support the belief that 'Zubitskiy' exists or was the source of the controverted photos'" (Judge Ann D. Montgomery's findings of fact and conclusions of law, Id., ¶ 29).

Judge Mark Wernick ruled against an attempted voluntary dismissal of the defamation complaint on May 10th, 2006, because significant proceedings had already occurred (Id., ¶ 67). Boris Parker removed the state defamation complaint to federal court, filing an amended complaint for defamation on June 26th, 2006 (ECF docket #11 at attachment 8, see Id., ¶ 71). The amended complaint included the forged "Zubitskiy photo agreement", and alleged (a) Gregerson does not own the Skyline photo, (b) [OCP] did not use the disputed photos without

2 This interpretation would include all the remaining defendants, since Morgan Smith is also a former attorney of [OCP], and Vladimir Kazaryan is a former employee of [OCP].

permission, and (c) Zubitskiy is real and the photo agreement is genuine (Id., ¶ 62 and exhibit J).

There was no further notice of withdrawal of the amended defamation complaint filed. Gregerson defended himself against this complaint until an August 31st, 2007, order by Judge Ann D. Montgomery that "...the Court finds the Defendant's removed, consolidated state court claims to be dismissed". Complaint at Exhibit K, footnote 1, p. 3. Gregerson thus alleges Boris Parker represented the defamation complaint against him from April 26th, 2006, to August 31st, 2007, a period of 16 months.

Boris Parker Knew [OCP]'s Claims Were Based on False Evidence

Gregerson's Complaint alleges Boris Parker knew the Zubitskiy photo agreement was false. ¶ 14 refers to to Smith and Parker's "...intent to deceive the court", and ¶ 78 states "Parker's motion was [brought]...to maintain the deception that Zubitskiy was real". The Complaint alleges Boris Parker relied upon facts he had no reasonable basis to believe to be true by quoting Judge Ann D. Montgomery's finding of fact that "The Court finds there is no credible evidence to support the belief that 'Zubitskiy' exists or was the source of the controverted photos". Id., ¶ 29. This is also implied by Judge Montgomery's finding that [Owner of OCP]'s story that he bought the photos from a stranger in a sauna for cash was "highly implausible". Id., ¶ 47.

Boris Parker Initiated Six Counterclaims Based on False Evidence

On August 28th, 2006, Boris Parker Answered Gregerson's copyright lawsuit (Id., ¶ 72) by *again* denying Gregerson owned the copyright to his photo (Complaint at exhibit L, ¶ 22), denying Gregerson's claim Zubitskiy doesn't exist (Id., ¶ 20) and denying [OCP] obtained the photo from Gregerson's website (Id., ¶ 21). Parker initiated six counterclaims against Gregerson based on [OCP]'s version of events (the "Zubitskiy" story), alleging specifically:

1. "In March, 2004, [OCP] purchased a photo of the Minneapolis skyline [from Zubitskiy]" (Id. ¶ 39);
2. "...[[OCP]] lawfully procured a number of photographs from a third party [Zubitskiy]

in March, 2004, including the photo allegedly owned by Gregerson" (Id., ¶ 44)

3. "...Gregerson set up a disparaging website, attacking [OCP] corporations and [Owner of OCP] personally be describing them as thieves engaged in fraudulent business conduct...". Id., ¶ 46. Gregerson's website truthfully reported [OCP]'s copyright infringement and fabrication of Michael Zubitskiy.
4. "[Gregerson engaged] in a course of conduct of defamation... " Id., ¶ 58(b)
5. "Count Four – Defamation...70. Gregerson willfully and maliciously has made numerous personal untrue statement about Counterclaimants..." Id. ¶ 14.

Parker repeatedly refers to "Untrue statements by Gregerson" Id., ¶¶ 73, 74, and 75, but following trial, Montgomery ruled that [OCP] and Parker "...did not identify any statements by Gregerson that were false." Complaint, ¶ 85.

In the Parker Defendants Memorandum, at Exhibit H (p. 2, ¶ 2), Federal Magistrate Judge Arthur Boylan writes that "Defendants [[OCP]] claim they lawfully purchased the photograph from Michael Zubitskiy and produced a purported sales agreement." This further establishes Boris Parker was advancing the false story about Zubitskiy during the litigation.

Conspiracy to Commit Malicious Prosecution/Abuse of Process

The Parker Defendants argue Gregerson's Count IV, "Conspiracy to Commit Malicious Prosecution/Abuse of Process" should be dismissed because "a conspiracy claim requires an underlying substantive wrong" (Defendant's Memo., pp. 11, ¶ 2, citing *Harding v. Ohio Cas. Ins. Co.,* 230 Minn. 327, 41 N.W.2d 818, 825 (1950)). The plain language of the Complaint clearly alleges an underlying substantive wrong – "IV. Conspiracy to Commit Malicious Prosecution and Abuse of Process". Complaint, pp. 17. *Harding v. Ohio Cas. Ins. Co.* continues by ruling "The true office of allegations of conspiracy is to show facts for vicarious liability of defendants for acts committed by others, joinder of joint tortfeasors, and aggravation of damages."

The Parker Defendants also argue for dismissal based on *Williams v. Grand Lodge of Freemasonry AF & AM,* 355 N.W. 2D 477(Minn. Ct. App. 1984). Def's. Memo. p. 11, ¶ 3. That court ruled "[n]othing alleged...indicates any impropriety". That is not the case here, Gregerson alleges Boris Parker engaged in malicious prosecution and abuse of process, representing claims based on forged evidence to shut down a truthful web site. *Williams* cites *McDonald v. Stewart,* 289 Minn. 35, 40, 182 N.W.2d 437 (1970), regarding an attorney's immunity to third parties. That case says, at 440 (emphasis added):

> [A]n attorney acting within the scope of his employment as attorney is immune from liability to third persons...**This immunity, to be sure, may not be invoked if the attorney...knowingly participates with his client in the perpetration of a fraudulent or unlawful act.**

The Parker Defendants go on to argue attorneys are immune from claims of conspiracy with their clients absent an allegation they acted outside the scope of their representation, citing 3rd Circuit cases and an Illinois Court of Appeals decisions based on "intracorporate conspiracy doctrine". Defs. Memo. p. 12, ¶ 2. Gregerson alleges that Boris Parker acted with personal animosity/malice (Complaint ¶ 89), which is beyond the scope of attorney-client representation.

The Parker Defendants further argue that "they did not engage in a conspiracy because the lawful goals they sought were...representing [OCP] in it's counterclaims against Gregerson." Defs. Memo. p. 13, ¶ 1. This ignores Gregerson's allegations of malicious prosecution and abuse of process, which are *not* lawful goals, but are tortuous conduct which have no immunity.

Gregerson does agree with the Parker Defendants that Minn. Stat. §§ 481.07 and 481.071 do not provide an independent cause of action. Defs. Memo p. 13, ¶ 2. That statute is cited in the Complaint to provide advance notice Gregerson may seek damages under it, which would presumably come after a finding of liability and calculation of damages.

Malicious Prosecution

After Boris Parker took over the state defamation complaint on April 26th, 2006, he did not withdrew the claims that Michael Zubitskiy was the true creator of Gregerson's photographs (Id., ¶ 45, 64, and 69). Parker took up the "Zubitskiy" story (Id. ¶ 72) and employed in the counterclaims brought in federal court against Gregerson's webpage (detailed above).

Partial Summary Judgment in the Underlying Litigation

The Parker Defendants argue that because some of [OCP]'s claims survived summary judgment[3], they had a reasonable basis to succeed "on the merits", and cannot be the subject of a malicious prosecution action[4]. However, Gregerson alleges two of the three surviving claims were "abuse of process", as well as "malicious prosecution" (Id., ¶ 75, 109). Furthermore, the surviving claims of deceptive trade practices and interference with prospective contractual relations targeted Gregerson's web page based on the allegation [OCP] lawfully obtained Gregerson's skyline photo from "Zubitskiy" and the web page was thus false and defamatory. Id., ¶ 72. Boris Parker knew [OCP]'s claims were false, which is an exception to the inference that surviving summary judgment means a claim had a reasonable basis.

> [W]hen...there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding.

See Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3D 863 (1989) (internal citations omitted). This applies equally to facts with no reasonable basis to believe to be true:

> A litigant will lack probable cause for his action

3 Those claims were deceptive trade practices, interference with prospective contractual relations, and appropriation of name and likeness.

4 The corollary of the Parker Defendant's argument regarding summary judgment would be an admission that the claims dismissed on summary judgment are actionable for malicious prosecution. Those claims are trademark infringement, unjust enrichment, and defamation.

> either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him

See *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 568 (underline added). This is consistent with rulings by the Circuit courts regarding probable cause being void if based on information known to be false or which *should have been known to be false*:

> Where the judicial finding of probable cause is based solely on information the officer knew to be false or would have known was false had he not recklessly disregarded the truth, not only does the arrest violate the fourth amendment, but the officer will not be entitled to good faith immunity.

See *Olson v. Tyler*, 771 F.2d 277, 282 (7th Cir.1985) (underline added). This is also consistent with Minn. R. Civ. P. 60.02, which allows to court to relieve a party from any order for "...Fraud....misrepresentation, or other misconduct of an adverse party", and stating the court can "...set aside a judgment for fraud upon the court...". Boris Parker made false statements of fact, claiming [OCP] obtained the disputed photos from "Michael Zubitskiy", who does not exist.

Basis of the Malicious Prosecution Claim

The Parker Defendants argue Gregerson's malicious prosecution claim is based on "his success in the federal court action" (Defs. Memo at p.17, ¶ 3). Gregerson's success in federal court does satisfy the last element of a malicious prosecution claim – that the Plaintiff prevailed in the underlying litigation. However, the first element – that the earlier litigation was baseless and could not prevail on the merits – is alleged in the Complaint at ¶ 102, "Boris Parker...initiated and maintained multiple legal claims against the plaintiff without probable cause or reasonable belief that they could ultimately prevail on the merits. These claims were: defamation, deceptive trade practices, unjust enrichment, trademark infringement, appropriation of name and likeness, injunction,..."

Gregerson agrees with the Parker Defendants that the October 24th, 2005, restraining order (Id., ¶ 102) was obtained by Morgan Smith and not Boris Parker.

Noerr-Penington doctrine

The Parker Defendants allege Gregerson "seeks to try to shut the courthouse doors" (Defs. Memo., p. 19, ¶ 2). Gregerson is seeking to shut out forged evidence, perjured testimony, baseless claims, and abuse of the judicial process, things which are *not* protected by the *Noerr-Pennington* doctrine. They clearly fall under the exception of being "illegal and reprehensible practices such as perjury, fraud...misrepresentation, or is so clearly baseless as to amount to an abuse of process...". *Noerr* does not legalize malicious prosecution, and "misrepresentations are not immunized". *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

Abuse of Process

The usual form of the tort is coercion to obtain a collateral advantage not the proper object of the proceeding. "There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Prosser, Law of Torts pp. 856-57 (4th ed. 1971).

[OCP] and Boris Parker only negotiated for one thing – that Gregerson remove his web page about [OCP] (a page which truthfully publicized [OCP]'s copyright infringement). Complaint, ¶ 73 and exhibit G ("...demand that you immediately and without delay remove the above-referenced site"). This was outside the scope of all of [OCP]'s claims – *no* claim can compel the removal of a truthful web page, in violation of the U.S. Constitution's protection of free-speech. [OCP]'s claims for trademark infringement, unjust enrichment (both of which Gregerson won on summary judgment), deceptive trade practices, and interference with prospective contractual relations did not seek to correct false statements by Gregerson on his web site – no false statements by Gregerson were even identified at trial (Id., ¶ 85). All negotiations

focused exclusively on removing the webpage, despite it being true, and compelling Gregerson to drop his copyright claims (see Plaintiff's Complaint, ¶ 73) This was beyond the scope of [OCP]'s litigation, and qualifies as an abuse of process.

Georgia State Law Not Controlling

The Parker Defendant's cite a Georgia State Appellate ruling that a claim under Georgia's "abusive litigation" statute is not actionable in Georgia state court if based on earlier, federal litigation (and Federal Rule 11 sanctions were available). Defendant's Memo at pp. 22-23. There is no such prohibition in Minnesota. The Parker Defendants even cite *Pourus Media Corp. v Pall Corp*, 186 F.3d 1077 (8th Cir. 1999) (Defs. Memo, p. 18, ¶ 3), a Minnesota common-law claim for malicious prosecution based on earlier, federal litigation.

Damages

The Parker Defendants argue Gregerson's damages are not recoverable based on an abuse of process because it only allows damages "for injury or loss of property". However, expenditures for legal defense are a financial loss (a "loss of property") and traditionally make up a major component of the damages recoverable for malicious prosecution and abuse of process. See Restatement (Second) of Torts, § 681(c) (damages for unjustifiable civil litigation for abuse of process), also W. Page Keaton et al., Prosser and Keeton on Torts, § 120, at 895 (civil malicious prosecution damages) (5th ed. 1984). "Compensatory damages awarded consisted of $500,000 for loss of income" in a malicious prosecution judgment upheld by the Connecticut Supreme Court in 2008. *Bhatia v. Debek*, 287 Conn. 397, 948 A.2d 1009 (2008).

Malicious Prosecution Requires no "Special Damages" in Minnesota

The Parker Defendants have further cited a "special damages" element of Michigan and Wisconsin common-law malicious prosecution claims, requiring damages beyond the cost of the litigation and lost revenue. Defs. Memo., pp. 24-25. Minnesota has no such special damages requirement. See Complaint, ¶ 101. This argument only applies if we were in Wisconsin or

Michigan. We are in Minnesota, and Gregerson's claim is under Minnesota law, where "special damages" are not a required element of a malicious prosecution claim.

Copyright Infringement Legal Fees

The Parker Defendants argued Montgomery's order denying Gregerson attorney's fees under 17 U.S.C. § 505 means they are not recoverable now. Def. Memo p. 24, ¶ 2. Gregerson never moved for attorney's fees and was never heard on the issue; Judge Montgomery issued her order preemptively and was never informed Gregerson had been paying attorneys for legal advise. Her order focused exclusively on the issue of pro-se litigants recovering legal fees for their own self-efforts under 17 U.S.C. § 505. Montgomery's order did not address the issue of Gregerson's legal fees being recoverable based on malicious prosecution, or address legal fees from before the federal litigation, or fees for Gregerson's defense of the federal counterclaims.

Gregerson's Settlement Agreement with [OCP][5]

The Parker Defendants have claimed they are intended third-party beneficiaries of a settlement agreement between Gregerson and [OCP]. They were excluded from the stipulation of dismissal that was included in that agreement, and ignore the agreement's arbitration clause (at clause 9) which prohibits enforcement of the agreement in court[6]. See Defs. Memo. p. 8 and at exhibit G, "settlement agreement". They ignore the obvious intention in the other clauses of the agreement that the litigation against the remaining defendants will continue. This is a bad-faith attempt to create a legal fiction by converting two present-tense references to "[OCP]'s agents" into "[OCP]'s past agents", where the document does not read that way. "A tortfeasor who has taken no part in the satisfaction of a plaintiff's claim should not gratuitously benefit from

5 Gregerson has requested sanctions in this case over the Parker Defendant's improper subpoenaing, and subsequent dissemination, of his Settlement Agreement with [OCP], including a request the defendants be prohibited from using the document in this litigation. That motion has not been heard as of this writing, so Gregerson responds to the arguments based on the settlement agreement.

6 Gregerson objects to arbitration with the Parker Defendants, because they are not a party to or beneficiaries of the settlement agreement with [OCP].

settlement arrangements undertaken at the time and expense of others...". See *Hansen v. Ford Motor Co*., (N.M. 1995) 900 P.2d 952, 958.

Gregerson and [OCP] ("[OCP]") and [Owner of OCP] entered into the settlement agreement on July 14th, 2009. Gregerson denies Parker is an intended beneficiary (see attached affidavit of Chris Gregerson), and [OCP] has not complained that Gregerson must dismiss the Parker Defendants (Id.). This argument is not properly part of a motion to dismiss for failure to state claim, but is a fact issue for a jury (at best, see below).

[OCP]'s Agents are Identified Exclusively in the Present Tense

The Parker Defendants pin their hopes on two present-tense references to [OCP]'s agents and/or attorneys (at clause 8 and 10 of the settlement agreement). Defs. Memo at p. 8, ¶ 2. Gregerson currently directs service of legal papers for [OCP] to Robert Smith, [OCP]'s current attorney, and *cannot* serve them to Boris Parker – Parker is not an agent of [OCP].

The Parker Defendants view these two references in isolation, separate from the other terms of the contract. The agreement cannot logically be read to include past agents, attorneys, and employees, or it would be an illegal contract – Gregerson and [OCP] do not have any legal authority to make a contract binding upon their past agents and employees. The Parker Defendant's cite *Goldberg v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734 (Minn. Ct. App. 1995) in their memo at p. 9, ¶ 4. That case addresses a release of attorneys which *was* specific to former attorneys. The *Goldberg* release read:

> ...[appellants] hearby release, acquit and forever discharge LEO WOLK and his former and present attorneys...

The Settlement Agreement Must be Read as a Whole

The goal of contract interpretation is to determine and enforce the intent of the parties. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003).

"The law requires us to construe a contract as a whole so as to harmonize all provisions, if possible, and to avoid a construction that would render one or more provisions meaningless". See *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001). "Where there is an apparent conflict between two clauses or provisions of a contract, it is the court's duty to find harmony between them and to reconcile them if possible." *Oster v. Medtronic, Inc*., 428 N.W.2d 116, 119 (Minn. App. 1988).

Looking within the four corners of the agreement, the terms are in complete harmony when read to release [OCP] and [Owner of OCP] alone. The alternative – a release of all past employees and agents of [OCP], and thus all defendants – creates an absurd result. The first clause states:

> 1. Gregerson agrees to immediately dismiss the Complaint against [OCP] and [Owner of OCP] with prejudice. Immediately upon the execution of this agreement, Gregerson agrees to file a Stipulation of Dismissal in the form attached hereto as Exhibit A.

See Defs. Memo at exhibit G, "Settlement Agreement", clause 1. Gregerson and [OCP] were aware of the other defendants (referred to in the introduction as "numerous lawyers and law firms"). It is not plausible that [OCP] and Gregerson intended to release those parties, but simply "forgot" to include them in the list of parties being dismissed and "forgot" to include them in the stipulation of dismissal (which was submitted to the court). Robert Smith, the drafter of the agreement, would be guilty of gross negligence if that were the case.

This is supported by the "well-recognized rule of '*expressio unius est exlcusio alterius*', [which] provides that the expression of certain things in a contract implies the exclusion of all not expressed." *Weber v. Sentry Ins. Co.*, 442 N.W.2d 164, 167 (Minn. App. 1989). By listing [OCP] and [Owner of OCP], and those parties only, the contract expressly excludes any other parties.

In clause 2, [OCP] agrees to pay Gregerson a financial settlement. The Parker defendants are not parties to the contract and provided no consideration to Gregerson. The Plaintiff would reasonably have requested compensation from parties he is dismissing, if they were intended to be covered by the release. The small settlement amount has not compensated Gregerson for the damages in his Complaint, and he is entitled to pursue the remaining tortfeasors.

Clause 3 of the agreement (below, emphasis added) addresses discovery in the ongoing lawsuit. [Owner of OCP] agrees to answer interrogatories and acknowledges he may still be deposed in the lawsuit. The parties clearly expect the litigation to continue against the remaining defendants:

> [Owner of OCP] agrees to answer, via email, all reasonable questions...**This paragraph does not prevent Gregerson or any other party to the lawsuit from taking [Owner of OCP]'s deposition** pursuant to the Minnesota Rules of Civil Procedure.

In clause 4, [OCP] agrees to respond to requests for documents from Gregerson, which again shows the litigation will continue.

In clause 5, [OCP] waives attorney-client privilege as to "Attorneys Morgan Smith and Boris Parker" (who are not identified as "[OCP]'s agents" or "past agents", but are identified by name). [OCP] agrees to sign a waiver "to permit attorneys Morgan Smith and Boris Parker to answer questions and respond to document requests." This clause only makes sense if the contract is read as intending the litigation against those parties to continue, as Gregerson has negotiated terms that will aid his discovery in that litigation.

In clause 6, Gregerson agrees to redact his website to remove the name "[OCP]", "[OCP]", "[OCP]", "[Owner of OCP]", and "[Owner of OCP]". If the Parker Defendants were intended beneficiaries, it should expressly list "Saliterman & Siefferman, Boris Parker, Bassford Remele, Bassford, Saliterman, Parker".

In clause 7, Gregerson agrees not to contact [OCP]. If the agreement is interpreted to be for the benefit of [OCP]'s past agents and employees, Gregerson's cannot contact Morgan Smith or Boris Parker – despite having negotiated a waiver of attorney-client privilege to enable him to ask them questions. This is an absurd result.

Clause 10, cited by the Parker Defendants, states the agreement shall "inure to the benefit of and be binding upon the attorneys, agents, spouses, executors, heirs, successors and assigns of all parties to this Agreement.". This present-tense language is only legal if it refers to [OCP] and Gregerson's *current* employees and attorneys, because it is illegal and absurd that Gregerson has bound his former attorney, Molly Loussaert, to this agreement, and [OCP] has bound Boris Parker – Gregerson cannot discharge any claims Molly Loussaert may have against Boris Parker.

Minnesota Case Law on Settlement Agreements and Multiple Defendants

To determine whether a release of one of several joint tortfeasors will operate to release the remaining wrongdoers, Minnesota law states that if there is "manifestation of anything to the contrary in the agreement, the injured party should not be denied his right to pursue the remaining wrongdoers until he has received full satisfaction". See *Gronquist v. Olson*, 242 Minn. 119, 128-29, 64 N.W.2d 159, 165 (1954). Gregerson's Settlement Agreement with [OCP] is filled with manifestations of Gregerson's intent to continue against the remaining defendants (outlined above), including that the stipulation of dismissal only included [OCP] and [Owner of OCP]. *Gronquist* also advises that technicalities should not be used to favor tortfeasors over the injured party:

> "Certainly, tortfeasors who brought about harm to the injured party ought not to receive more consideration and protection than the injured party, when the true intentions of the parties to the agreement...can be gathered from the four corners of the instrument without resort to artificial reasoning and mere technicalities that hamper and interfere with the duty and capacity of

> the court to adjudicate disputes and administer justice between parties."

Settlement Agreements and Extrinsic Evidence in Minnesota

The U.S. Supreme Court has held that "The straightforward rule is that a party releases only those other parties whom he intends to release.". See *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U. S. 321, 342-343 (1971). "[T]he parole evidence rule is usually understood to be operative only as to parties to a document..." Id. The Parker Defendants are not parties to the settlement agreement between Gregerson and [OCP], and Minnesota law (consistent with the *Zenith* decision) directs the Court to consider parol evidence "beyond the language of the release itself." when a third party seeks to benefit from a release. See *Couillard v. Charles T. Miller Hosp. Inc*., 253 Minn. 418, 92 N.W.2d 96, 102 (1958). Minnesota law provides that waiver is the *intentional* relinquishment of a known right, and "waiver generally is a question of fact, and it is rarely to be inferred as a matter of law". See *Valspar Refinish Inc. v. Gaylord's Inc.* 764 N.W.2d 359 (2009 Minn). The issue of a party's intent is generally a matter of fact for the jury. *Couillard*, 92 N.W.2d at 103.

In this case, there is extremely specific email and conversations between the parties during negotiation of the agreement in which it's agreed the other defendants are not covered by the settlement (see Affidavit of Chris Gregerson). A portion of one email is quoted below.

> [Owner of OCP] will sign a waiver...so I can get discovery from Morgan Smith and Boris Parker...I still plan to try the merits of my case against the remaining defendants...I changed the last reference to "any party" to "any above-named party" to avoid any confusion the remaining defendants are part of the dismissal.

See Affidavit of Chris Gregerson at exhibit A, "July 14th email from Gregerson to Robert Smith and [Owner of OCP]". There is additional extrinsic evidence, some available upon subpoena, which is beyond the scope of the current motion to dismiss for failure to state a claim.

Third Party Beneficiaries in Minnesota Law

Unless a contract expresses an intent to benefit a third party through contractual performance, the third party is, at best, no more than an incidental beneficiary and cannot enforce the contract. *Wurm v. John Deere Leasing Co.*, 405 N.W.2d 484, 486 (Minn. App. 1987). The Parker Defendants can only establish third-party beneficiary status and associated rights by showing that [OCP] and Gregerson intended to benefit them at the time the contract was executed. *Julian Johnson Constr. Corp. v. Parranto*, 352 N.W.2d 808, 811 (Minn. App. 1984). This intent must be found in the contract as read in light of all the surrounding circumstances. *Buchman Plumbing Co. v. Regents of the Univ. of Minn.*, 298 Minn. 328, 334, 215 N.W.2d 479, 483 (1974). There is no such indication Gregerson or [OCP] intended to benefit Boris Parker, so even if he were considered an incidental beneficiary, he can't enforce the agreement.

> Strangers to a contract acquire no rights under the contract...If no intent to benefit is shown, a beneficiary is no more than an incidental beneficiary and cannot enforce the contract....Whether the parties intended to benefit a third party is a question of fact.

Gold'n Plump Poultry, Inc. v. Simmons Eng'g Co., 805 F.2d 1312, 1318 (8th Cir. 1986) (internal citations omitted). This is supported by a 1984 Minnesota appellate court decision.

> "A release is invalid if the party executed the release under circumstances showing the release was not intended or if the party did not receive sufficient consideration."

Sorensen v. Coast-to-Coast Stores, Inc., 353 N.W.2d 666, 669 (Minn. App. 1984), review denied (Minn. Nov. 7, 1984).

Third Parties and Boilerplate Language in Releases

There is little Minnesota case law addressing specific boiler-plate language in a settlement agreement releasing third parties, but Arizona has found such language to not be an

express provision of a release, and it therefor does not release third parties.

> The issue in this case is whether the boiler plate language...is an "express" provision of release. We conclude that it is not...If defendants are to have any rights under the contract it can only be as third party beneficiaries of it. They can make such a claim, however, only if Allstate and Spain intended directly to benefit them....The record here provides no support for such a finding. Spain denies that she so intended. Allstate does not claim that it did so intend...

Spain v. General Motors Corp., 829 P.2d 1272, 1273 (Ariz. Ct. App. 1992) (internal citations omitted, emphasis added). A California decision addresses the term "agents" in a release.

> ...section 1.1 of the release agreement broadly provides: "...forever discharge each other party, their agents, servants, assigns, employees, successors, principals, and all other persons, firms or corporations, of and from any and all past, present or future claims, demands, obligations, actions, or causes of action...."
>
> ...the burden is on the third party to prove the parties to the release agreement intended to benefit the third party...It is not enough that a literal interpretation of the contract would result in a benefit to the third party.
> ...The burden of proof is on the third party, under both contract law and the summary judgment statute. Because the court must consider the circumstances of the contracting parties' negotiations to determine whether a third party not named in the release was an intended beneficiary, it will seldom be sufficient for the third party simply to rely on a literal application of the terms of the release....

Vahle v. Barwick 113 Cal. Rptr. 2d 793, 796-97. (Cal. Ct. App. 2001) (internal quotations and citations omitted, underline added).

Conclusion

Gregerson has alleged that Boris Parker knowingly represented forged evidence and

perjured testimony in litigation against him for 18 months. The litigation was brought as leverage to get Gregerson remove his truthful web page about [OCP]'s copyright infringement, which was beyond the scope of the litigation. The courts and society have an interest in keeping lawsuits based on manufactured evidence out of court, and holding attorneys accountable for their knowing participation in tortuous conduct.

Respectfully submitted,

Dated: _____ _____

Chris Gregerson
Plaintiff, *pro se*
150 N Green Ave.
New Richmond, WI 54017
Telephone: 612-245-4306