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I. Introduction

In *Lackey v. McDowell*,[1] the Supreme Court of Georgia modified its previous decisions on the effect of a release on non-parties to the release.[2] In reversing the court of appeals, the court held that "only those parties named in the release will be discharged by that instrument."[3] Previous decisions required that parties to a release had to intend to discharge the non-party seeking coverage under the release.[4]

For plaintiffs attempting to release only one of several tortfeasors, the effect of releases on non-parties is a critical issue, especially since standard release forms commonly contain language purporting to discharge all potentially liable persons. The court's holding that releases discharge only persons named in the release allows lower courts to disregard the intent of the parties and promises to eliminate the litigation created by the previous intention standard.[5] However, the new *Lackey* standard does not provide absolute certainty, and plaintiffs might still be able to unintentionally discharge tortfeasors unnamed in the release.[6]

II. Statement of the Case

McDowell slid off the road while driving. Lackey, an Emergency Medical Technician, arrived at the scene to render assistance to McDowell. A third party then ran off the road and injured Lackey. Lackey settled with the insurance company of the third party and executed a release of the third party.[7] The release discharged the third party and also discharged "any other person . . . chargeable with responsibility or liability . . . from all claims."[8]

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1. 262 Ga. 185, 415 S.E.2d 902 (1992).
2. *Id.* at 186, 415 S.E.2d at 903.
3. *Id.*
4. Posey v. Medical Ctr.-West, Inc., 257 Ga. 55, 354 S.E.2d 417 (1987); Williams v. Physicians & Surgeons Community Hosp., 249 Ga. 588, 292 S.E.2d 705 (1982).
5. *See infra* notes 47-48 and accompanying text.
6. *See infra* notes 65-68 and accompanying text.
7. 262 Ga. at 185, 415 S.E.2d at 902.
8. *Id.*

Lackey next filed suit against McDowell under the Georgia rescue doctrine.[9] McDowell claimed to be discharged by the release and moved for summary judgment. The trial court denied the motion, and McDowell filed an interlocutory appeal.[10] The court of appeals held that since a release is a contract, any question of ambiguity must be decided as a question of law under principles of contract interpretation.[11] The court of appeals stated that it was required to examine the intent of the parties only if it found the release ambiguous.[12] The court of appeals then held that the language in the release discharging "any other person" unambiguously discharged McDowell, and reversed the trial court.[13]

III. BACKGROUND

Lackey v. McDowell[14] is the latest in a line of cases altering the effect of a release on non-parties and can best be understood in the context of policy considerations enunciated in prior case law.[15] For over seventy years, Georgia courts followed the common law rule that the release of one joint tortfeasor releases all joint tortfeasors.[16] In *Knight v. Lowery*[17] the supreme court distinguished between joint and successive tortfeasors and abolished the common law rule as to successive tortfeasors.[18] The court held that a release would not discharge a successive tortfeasor not a party to the release unless all damages were paid in full or the parties intended to release the non-party.[19] The court also allowed the parties to use parol evidence to help determine intent.[20]

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9. *McDowell*, 200 Ga. App. at 506, 408 S.E.2d at 482. "The rescue doctrine applies when the defendant's negligent acts or omissions have created a condition or situation which involves imminent and urgent peril to life and property." Lorie v. Standard Oil Co., 186 Ga. App. 753, 754, 368 S.E.2d 765, 767 (1988). Defendants are "charged with the duty of anticipating that their negligence might attract rescuers" and are liable in tort to such rescuers. *Id.* at 755, 368 S.E.2d at 768.

10. 200 Ga. App. at 506, 408 S.E.2d at 482.

11. *Id.* at 507, 408 S.E.2d at 482-83.

12. *Id.*

13. *Id.* at 507-08, 408 S.E.2d at 483.

14. 262 Ga. 185, 415 S.E.2d 902 (1992).

15. *See, e.g.*, Donaldson v. Carmichael, 102 Ga. 40, 29 S.E. 135 (1897); Griffin Hosiery Mills v. United Hosiery Mills, 31 Ga. App. 450, 120 S.E. 789 (1923); Menendez v. Perishable Distrib., Inc., 254 Ga. 300, 329 S.E.2d 149 (1985) (joint tortfeasor rule).

16. *See infra* notes 36 and 39 and accompanying text.

17. 228 Ga. 452, 185 S.E.2d 915 (1971).

18. *Id.* at 454-55, 185 S.E.2d at 917-18.

19. *Id.*

20. *Id.* at 457, 185 S.E.2d at 918.

In *Maxey v. Hospital Authority*,[21] the supreme court overruled *Lowery* in part by eliminating the use of external evidence to show the intent of the parties.[22] The ruling effectively gutted *Lowery*.[23] However, the supreme court overruled *Maxey* two years later in *Williams v. Physicians & Surgeons Community Hospital*.[24] In *Williams* the supreme court emphasized the need to rely on the intent of the parties rather than on standard boilerplate language in a release.[25] Further, *Williams* changed the rule in *Lowery* that the releasor had the burden of proving the non-party as not discharged[26] to now place the burden on the non-party to prove coverage under the release.[27] However, the *Williams* rule applied only to successive tortfeasors[28] and created litigation over the difference between joint and successive tortfeasors.[29] The *Williams* rule placed courts in the difficult position of absolutely denying one class of plaintiffs relief while according a closely related class of plaintiffs an opportunity to pursue previously barred claims.

In *Posey v. Medical Center-West*,[30] the supreme court extended the *Williams* rule to apply to joint tortfeasors.[31] In *Posey* the court adopted the Restatement (Second) Torts rule that "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others for the same harm, unless it is agreed that it will discharge them."[32] The court followed *Williams* in allowing the use of external evidence to demonstrate the intent of the parties.[33]

The ruling in *Posey* placed Georgia among a number of states terming the intent of the parties as a question of fact controlling the effect of the release.[34] Both *Posey* and *Williams* espoused the same basic policy: The

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21. 245 Ga. 480, 265 S.E.2d 779 (1980).
22. *Id.* at 482, 265 S.E.2d at 781.
23. B. Morris Martin, *Contracts*, 35 MERCER L. REV. 87, 94 (1983).
24. 249 Ga. 588, 292 S.E.2d 705 (1982).
25. *Id.* at 590, 292 S.E.2d at 706.
26. 228 Ga. at 457, 185 S.E.2d at 918.
27. 249 Ga. at 591, 292 S.E.2d at 707-08.
28. *Id.*, 292 S.E.2d at 708.
29. Phillips v. Tellis, 181 Ga. App. 449, 352 S.E.2d 630 (1987).
30. 257 Ga. 55, 354 S.E.2d 417 (1987).
31. *Id.* at 59, 354 S.E.2d at 419-20.
32. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 885(1) (1979)).
33. *Id.* at 59, 354 S.E.2d at 420. For other states' treatment of the parol evidence rule as allowing the use of external evidence against a non-party to a release, see R.W. Gascoyne, Annotation, *Applicability of Parol Evidence Rule in Favor of or Against One Not A Party To Contract Of Release*, 13 A.L.R.3d 313 (1967 & Supp. 1992).
34. Richardson v. Eastland, Inc., 660 S.W.2d 7 (Ky. 1983) (adopting RESTATEMENT (SECOND) OF TORTS § 885(1); Neves v. Potter, 769 P.2d 1047 (Colo. 1989) (interpreting state version of the Uniform Contribution Among Tortfeasor's Act); Hurt v. Leatherby Ins. Co., 380 So. 2d 432 (Fla. 1980); A.L. Alvis, III, Note, *Parol Evidence and Standard Release*

prevention of general boilerplate language in releases from frustrating the releasor's intent to preserve his or her right to pursue non-parties to the release to gain full satisfaction for his or her injuries.

IV. THE SUPREME COURT OF GEORGIA'S OPINION

In *Lackey* the supreme court reversed the court of appeal's holding that when a release unambiguously stated it discharged all other persons, the intent of the contracting parties as to who would be discharged was irrelevant.[35] The supreme court affirmed its previous holding that the intent of the parties to the release determines which tortfeasors are discharged from liability.[36] The supreme court also modified the holding in *Posey*, holding that after the date of its opinion, releases would only discharge those parties named in the release.[37] The court's modification "should eliminate the need to inquire as to the intent of the parties to releases."[38]

The supreme court first analyzed the reasoning of the court of appeals finding that the court of appeals failed to properly ascertain the intent of the parties as required by *Posey*.[39] The court of appeals also erred in basing its interpretation solely on the language of the release and not examining external evidence of the intent of the parties.[40] The supreme court based its finding of error on language in *Posey* stating that " '[T]he intent of the parties to the release regarding its effect may be proven by external evidence as against a third party.' "[41] In its opinion, the court of appeals had dismissed this language as dicta.[42]

The supreme court also upheld the prior holding of *Posey* that " '[o]ne not a party to the release may not object to the external evidence under the parol evidence rule.' "[43] The court noted that a release discharging "all other persons" did not discharge a non-party to the release in light of

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Forms: The Problem of "Boilerplate" Language, 6 MISS. C.L. REV. 190, 193-94 (1986); Anne M. Payne, Annotation, *Release of One Joint Tortfeasor as Discharging Liability of Others Under Uniform Contribution Among Tortfeasors Act and Other Statutes Expressly Governing Effect of Release*, 6 A.L.R.5th 883 (1992).

35. 262 Ga. at 186, 415 S.E.2d at 903.

36. *Id.* (citing Posey v. Medical Ctr.-West, 257 Ga. 55, 354 S.E.2d 417 (1987)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (quoting 257 Ga. at 59, 354 S.E.2d at 420).

42. *McDowell*, 200 Ga. App. at 508, 408 S.E.2d at 483 (on motion for reconsideration).

43. 262 Ga. at 186, 415 S.E.2d at 903 (quoting 257 Ga. at 59, 354 S.E.2d at 420).

correspondence between the parties showing a lack of intent to discharge the non-party.[44]

The supreme court held that because the trial court correctly followed the *Posey* rule in refusing to grant summary judgment on the basis of the release, the court of appeals erred in reversing the trial court.[45] Finally, the supreme court modified the *Posey* rule and held prospectively that releases would only discharge those parties named in the release.[46]

V. ANALYSIS

The court's decision in *Lackey* ends much of the uncertainty that *Posey* and *Williams* introduced into the area of releases.[47] The required examination of the intent of the parties produced a variety of conflicting decisions and encouraged litigation that would not have taken place under the old bright-line common-law rule.[48] The unstable state of the law also increased the risk of attorney malpractice.[49] As the court of appeals stated in a decision after *Posey*, "There are perhaps few areas of Georgia law in which legal expertise and precision are more crucial than in the negotiation and execution of releases."[50]

The supreme court's holding, like the common law rule in effect before *Posey*,[51] applies a bright-line test to releases. Under the common law rule, all tortfeasors were presumptively discharged by a valid release of one

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44. *Id.* (citing Jackson v. Dyches, 200 Ga. App. 174, 175, 407 S.E.2d 126 (1991)).

45. *Id.* at 186, 415 S.E.2d at 903.

46. *Id.*

47. Because the Georgia State Legislature has statutorily declared the release of one joint obligor to release all joint obligors in O.C.G.A. § 13-4-80 (1992), *Williams*, *Posey*, and *Lackey* have no effect on the release of joint obligors. However, a judge on the court of appeals has suggested that the legislature repeal the statute and eliminate "the anomalous treatment of different classes of defendants (the contractually obligated versus those liable in tort) . . . ." J & S Properties, Inc. v. Sterling, 192 Ga. App. 181, 184, 384 S.E.2d 194, 197 (1989) (Benham, J., concurring specially). If the statute were repealed, "Justice would be the beneficiary of that change." *Id.*

48. *Compare* Jackson v. Dyches, 200 Ga. App. 174, 407 S.E.2d 126 (1991) (general language releasing "all other persons" ineffective to release a non-party when parol evidence showed an opposite intent on the part of the parties) and Malta Constr. Co. v. Henningson, Durham & Richardson, Inc., 694 F. Supp. 902 (N.D. Ga. 1988) (general language in release did not name non-party, court required to examine intent of the parties) *with* McDowell v. Lackey, 200 Ga. App. 506, 408 S.E.2d 481 (1991) (general language effectively released a non-party; rules of contract interpretation prohibit use of parol evidence to determine intent) and Driscoll v. Schuttler, 697 F. Supp. 1195 (N.D. Ga. 1988) (general language released a non-party; ambiguity a question of law to be decided before examining intent of the parties).

49. Little v. Middleton, 198 Ga. App. 393, 401 S.E.2d 751 (1991).

50. *Id.* at 395, 401 S.E.2d at 753.

51. *See supra* note 15 and accompanying text.

tortfeasor, while under the new *Lackey* test, tortfeasors are presumptively not discharged unless specifically identified in the release.[52] The new test thus avoids the difficulty raised by the *Williams* and *Posey* rules of examining the subjective intent of the parties through parol evidence.[53] The court in *Lackey* apparently intends to put teeth into the policy of *Williams* and *Posey* that "courts should look to the real intention of the parties to a general release rather than relying on an artificial conclusive presumption of law based on general, boilerplate language . . . ."[54]

While past decisions of the supreme court espoused such a policy,[55] the *Lackey* test offers a better chance of fulfilling it. The *Posey* rule provided loopholes through which courts could avoid examining the intent of the parties. Although the determination of the intent of the parties to the release was a "factual question[] . . . normally properly resolved by the trier of fact,"[56] courts avoided examining intent altogether by characterizing the question as one of contract interpretation.[57] Such courts held contract interpretation to be a question of law and examined only the release itself in applying contract construction techniques.[58] Also, courts could apply the *Posey* test but still hold general language such as "all other parties" to express the intent of the parties of the release to discharge non-parties.[59] Such courts in allowing a discharge based on general language ignored the intent of the supreme court in *Williams* and *Posey* to eliminate the common law rule.[60] The *Lackey* test is a direct response to such attempts and displays the supreme court's disapproval of such machinations. Several other states have adopted rules similar to the

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52. 262 Ga. at 186, 415 S.E.2d at 903.

53. In McMillen v. Klingensmith, 467 S.W.2d 193 (Tex. 1971) the Supreme Court of Texas similarly moved from an intent of the parties test to a rule requiring the release to specifically identify any discharged parties. *Id.* at 196. The court changed the rule partially because of the difficulty and aggravation of examining the intent of the parties. *Id.*

54. 249 Ga. at 590, 292 S.E.2d at 706.

55. *Id.* Posey v. Medical Ctr.-West, Inc., 257 Ga. 55, 354 S.E.2d 417 (1987).

56. 249 Ga. at 592, 292 S.E.2d at 708.

57. *McDowell*, 200 Ga. App. at 508, 408 S.E.2d at 483; *Driscoll*, 697 F. Supp. at 203.

58. *McDowell*, 200 Ga. App. at 508, 408 S.E.2d at 483; *Driscoll*, 697 F. Supp. at 1203. The court of another jurisdiction similarly first examined the release under principles of contract interpretation before examining intent, but implied that words such as "all other persons" are inherently ambiguous. Bjork v. Chrysler Corp., 702 P.2d 146, 160 (Wyo. 1985).

59. *McDowell*, 200 Ga. App. at 508, 408 S.E.2d at 483.

60. In Bjork v. Chrysler Corp., 702 P.2d 146 (Wyo. 1985) the court rejected such reasoning and stated that "to permit discharge of . . . tortfeasors . . . based upon broad, general language which does not identify the tortfeasors, effectively perpetuates the English rule" that the release of one joint tortfeasor releases all joint tortfeasors. *Id.* at 162. Another court similarly rejected the argument that general language expressed the intent of the parties to release all tortfeasors and stated it would not allow "the legislative intendment of nullifying the common law rule to be frustrated through the use of what are often general release forms." Alsup v. Firestone Tire & Rubber Co., 461 N.E.2d 361, 364 (Ill. 1984).

Lackey rule,[61] while still more have reached the same rule through interpreting state statutes.[62]

Thus the *Lackey* test is apparently a less litigation-provoking rule that will better carry out the intention of the parties. However, the test falls short of providing certainty. While the court held that "only those parties *named* in the release will be discharged,"[63] it further stated that "named" means identifying the tortfeasor "either by proper name or such other description as leaves no question of the identity of the party released."[64]

The court's explanatory language seems to have opened the door to uncertainty in the form of varying interpretation of general language in releases by the courts. What "leaves no question of the identity"[65] to one court might well seem ambiguous to another. Even before *Lackey*, a federal district court on the basis of *Posey* held language discharging "officers, directors, shareholders, employers, agents, advisors, attorneys, underwriters"[66] to specifically identify and discharge the accountant of the party to the release.[67] On the basis of the "identity" language in *Lackey*, courts can effectively return to the common law rule by holding general language to sufficiently identify non-parties.

Also, as happened in the aftermath of the *Posey* rule, courts reluctant to abandon the common law rule once again can avoid following the intent of the parties to the release. The supreme court in *Lackey* states that "this [rule] should eliminate the need to inquire as to the intent of the parties to releases . . . ."[68] Eliminating intent as a factor apparently eliminates the need under the previous *Posey* rule to use external evidence outside of the release to demonstrate the intent of the parties. Thus, courts can justify looking solely at the four corners of the release and can ignore external evidence altogether in determining the effect of ambiguous language in a release. If courts force releasors to use only the language of the release to argue the non-coverage of a tortfeasor, courts will have more power to hold general language as being sufficiently specific to discharge the tortfeasor.

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61. Young v. State, 455 P.2d 889 (Alaska 1969); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

62. Alsup v. Firestone Tire & Rubber Co., 462 N.E.2d 361 (Ill. 1984); Beck v. Cianchetti, 439 N.E.2d 417 (Ohio 1982); Bjork v. Chrysler Corp., 702 P.2d 146 (Wyo. 1985) (all interpretating statutes based on the Uniform Contribution Among Tort-feasors Act to require construing general language in a release as not releasing a party not specifically named in the release).

63. 262 Ga. at 186, 415 S.E.2d at 903 (emphasis in original).

64. *Id.* at 186 n.3, 415 S.E.2d at 903 n.3.

65. *Id.*

66. Driscoll v. Schuttler, 697 F. Supp. 1195, 1203 (N.D. Ga. 1988).

67. *Id.* at 1203-04.

68. 262 Ga. at 186, 415 S.E.2d at 903.

Further, while the *Lackey* test apparently strengthens the *Posey* policy of allowing the injured party to control who they release, the test actually expands the ability of non-party tortfeasors to claim coverage under a release. Tortfeasors can, as before, claim coverage under ambiguous language in a release, but in addition can seemingly use the parol evidence rule to avoid the introduction of external evidence of the intent of the parties to the release.

The experience of another jurisdiction that adopted a rule essentially identical to the *Lackey* rule shows that the above unintended results are not improbable.[69] In *McMillen v. Klingensmith*,[70] the Supreme Court of Texas held that a release discharges only the "parties named or otherwise specifically identified."[71] The intermediate appellate courts split in interpreting the rule.[72] One court held that a release containing general language releasing all persons who might be liable reflected the intent of the parties to specifically identify and thus discharge all unnamed liable parties.[73] The court in so holding essentially returned to the policy of the common law rule. The same year, another court held that a release containing almost identical general language did not sufficiently identify a party not named in the release.[74] The Supreme Court of Texas reviewed the entire area of releases once again in *Duncan v. Cessna Aircraft Co.*[75] and reemphasized the overriding intent to "narrowly construe general, categorical release clauses."[76] The supreme court apparently ended interpretive problems by adopting the holding of the court of appeals that the "requirement of specific identification is not met unless the reference in the release is so particular that 'a stranger could readily identify the released party.' "[77]

Another court adopting a rule essentially identical to the *Lackey* rule also dealt with interpretative problems.[78] The court stated that the release must "designate by name or . . . otherwise specifically . . . identify" the party.[79] However, the court further stated that to specifically identify a party meant giving detailed information such as "the driver of

69. McMillen v. Klingensmith, 467 S.W.2d 193 (Tex. 1971).

70. 467 S.W.2d 193 (Tex. 1971).

71. *Id.* at 196.

72. *Compare* Bell v. First Nat'l Bank, 597 S.W.2d 521 (Tex. Civ. 1980) *with* Lloyd v. Ray, 606 S.W.2d 545 (Tex. Civ. 1980).

73. *Bell*, 597 S.W.2d at 522.

74. *Lloyd*, 606 S.W.2d at 547.

75. 665 S.W.2d 414 (Tex. 1984).

76. *Id.* at 422.

77. *Id.* at 419 (quoting Duncan v. Cessna Aircraft Co., 632 S.W.2d at 381 (Tex. Civ. 1982)).

78. Beck v. Cianchetti, 439 N.E.2d 417 (Ohio 1982).

79. *Id.* at 420.

the car which struck the motorcycle."[80] Such a standard seems to examine, as does the Texas standard, whether " 'a stranger could readily identify the released party.' "[81]

VI. CONCLUSION

The supreme court clarified the law of releases in Georgia by holding in *Lackey* that a release will discharge only those named in the release.[82] However, the supreme court introduced ambiguity by holding that naming a party could consist not only of including the party's proper name in the release, but also of giving "such . . . description as leaves no question of the identity of the party released."[83] If courts treat the *Lackey* test in the same way they dealt with the *Posey* rule,[84] by ignoring the basic policy of *Posey* and *Williams* and giving unintended effect to general language in releases, the supreme court will be forced to strengthen the requirements for identifying the non-party in a release. If the supreme court reconsiders the *Lackey* test and adopts the gloss placed on the basic test by other jurisdictions,[85] the test would truly become a bright-line rule enabling releases to better serve the intent of the parties and fulfill the expectations of the releasor.

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80. *Id.*
81. 665 S.W.2d at 419 (quoting Duncan v. Cessna Aircraft Co., 632 S.W.2d at 381 (Tex. Civ. 1982)).
82. 262 Ga. at 186, 415 S.E.2d at 903.
83. *Id.* at 186 n.3, 415 S.E.2d at 903 n.3.
84. *See supra* notes 48, 56-60 and accompanying text.
85. *See supra* notes 77-81 and accompanying text.