The amendments further permit an insured to waive coverage which provides for stacking, and require a commensurate reduction in premiums for individuals who so waive stacked limits of coverage. While these amendments are not applicable to the case at bar, we believe that the new provisions lend additional support to our decision to adopt the reasoning in those cases which have found stacking of underinsured motorist coverage to be permissible.

We will, accordingly, order that Defendants' motion for summary judgment be granted and Plaintiff's motion be denied.

ORDER OF COURT

NOW, this 19th day of June, 1991, the motion for summary judgment filed by Defendants in the above-captioned matter is hereby GRANTED and the motion for summary judgment filed by Plaintiff is DENIED.

BONEBRAKE VS. HENRY, ET AL. C.P. Franklin County Branch, No. A.D. 1989-129

Malpractice Action - Prior General Release - Summary Judgment

1. Where plaintiff is injured in an auto accident, a general release discharging the driver may also release the physician in a medical malpractice action arising out of treatment of injuries sustained in the accident.
2. Tortfeasors may be released even though they are not specifically named in the release.

Neil J. Rorner, Esquire, Attorney for Plaintiff
Francis E. Marshall, Jr., Esquire Attorney for Defendant
Jame Saxton, Esquire, Attorney for Defendant

OPINION AND ORDER

KAYE, J., June 27, 1991:

OPINION

Jack F. Bonebrake, Jr. (herinafter "plaintiff") instituted the present medical malpractice action against Albert L. Henry, M.D., Surgical Associates of Waynesboro, Ltd. and Waynesboro Hospital (hereinafter "defendants"), by filing a complaint on April 12, 1989. Defendants, by way of New Matter, have alleged that the existence of a General Release executed by plaintiff on April 28, 1989 serves to release them from any and all liability in the present action. Defendants' motions for summary judgment on the basis of the aforementioned release are currently before the Court for disposition. For the reasons which follow, we conclude that defendants are entitled to the entry of summary judgment in this matter.

In ruling on a motion for summary judgment, the Court must accept as true all well-pleaded facts asserted by the non-moving party, as well as all reasonable inferences to be drawn therefrom. In order to grant summary judgment there must be an absence of genuine factual issues and clear entitlement to judgment as a matter of law. *Borysowski v. State farm Mutual Automobile Insurance Co.*, 368 Pa. Super. 399, 534 A.2d 496 (1987). The record must be read in a light most favorable to the non-moving party, resolving all doubts and ambiguities in his favor. *Wheeler v. Johns-Manville Corp.*, 342 Pa.Super. 473, 493 A.2d 120 (1985).

The complaint reflects that plaintiff was injured in a motorcycle accident on May 9, 1987, sustaining a comminuted open fracture of his right tibia and fibula. The complaint proceeds to detail the medical treatment provided to plaintiff from the time of the accident until March 7, 1988, when plaintiff underwent a below the knee amputation of his right leg at Hershey Medical Center. The complaint contains numerous allegations of medical malpractice by defendants, which focus on the care provided by Dr. Henry and his failure to properly diagnose a right leg infection during the course of his treatment of plaintiff.

Plaintiff concedes that, on April 28, 1989, he signed a general release discharging Doris M. Spangler, the driver of the automobile with which he collided, and her insurance carrier from further liability involving the May 9, 1987 accident. The release contains the following pertinent language:

FOR AND IN CONSIDERATION OF the payment to JACK F. BONEBRAKE, JR., 3830 Coseytown Road, Greencastle, Pennsylvania, the sum of FIFTY-EIGHT THOUSAND SEVEN HUNDRED FORTY-EIGHT AND FORTY HUNDREDTH DOLLARS ($58,748.40), and other good and valuable consideration, the receipt whereof is hereby acknowledged, I, being of lawful age, have released and discharged, and by these presents do for myself, my heirs, executors, administrators, successors and assigns, release, acquit and forever discharge DORIS M. SPANGLER, and her insurer, HARLEYSVILLE INSURANCE COMPANY, *and any and all other persons, firms, insurers, and corporations, of and from any and all past, present and future actions, causes of action,* claims, demands, damages, costs, loss of services, expenses, compensation, third party actions, suits at law or in equity, including claims or suits for contribution and/or indemnity, *of whatever nature,* and all consequential damage on account of, or *in any way growing out of any and all known and unknown personal injuries* and/or property damage *resulting or to result from an alleged accident that occurred on or about May 9, 1987,* in Washington Township, Franklin County, Pennsylvania, involving Laura Lynn Hartley, Jack F. Bonebrake, Jr., and Doris May Spangler. [Emphasis added].

Defendants acknowledge that they were not involved in any fashion in the negotiation or execution of the above-cited release. They, nevertheless, contend that they may benefit from the terms of the release on the basis of the Pennsylvania Supreme Court's decision in *Buttermore v. Aliquippa Hospital,* 522 Pa. 325, 561 A.2d 733 (1989).

Buttermore involved the interpretation of a general release with terms similar to those included in the release in the instant matter. The release, executed without the benefit of counsel, was in settlement of Mr. Buttermore's claim against the driver of the other vehicle involved in the accident at issue. The release, which was signed on November 14, 1983, predated by less than a month, the filing of a medical malpractice action against Aliquippa Hospital *et al.* Mr. Buttermore alleged that he did not intend to release the defendants in the malpractice case when he executed the general release in question. He did not allege, however, that he failed to understand the nature of the contents of the release or that it was procured through fraud.

The Court noted that the effect of a release must be determined "from the ordinary meaning of its language." *Id.* at 329, 561 A.2d at 735. The Court found that the terms of the release, which rendered it applicable to "any and all other persons, associations and/or corporations, whether known or unknown", served to release all tort-feasors despite the fact that they were not specifically named in the release and did not contribute consideration for the release. *Id.* at 327, 561 A.2d at 734. In giving full effect to the boilerplate language of the release, the Court reasoned that

> "[h]owever improvident their agreement may be or subsequently prove for either party, their agreement, absent fraud, accident or mutual mistake, is the law of their case." *Id.* at 329-30, 561 A.2d at 735.

See also Emery v. Mackiewicz, 429 Pa. 322, 240 A.d 68 (1968); *Hasselrode v. Gnagey,* 404 Pa. 549, 172 A.2d 764 (1961).

A review of the terms of the release executed by plaintiff reveals little distinction from those present in the release which was analyzed in *Buttermore.* Plaintiff contends, however, that the final textual paragraph of the release operates to limit the broad effect of the language employed at the beginning of the document. The final paragraph states the following:

> It is understood and agreed that this Release is executed in connection with the settlement of the claims of the undersigned as set forth in a Civil Action entered to No. A.D. 1988-102 in the Court of Common Pleas of Franklin County, Pennsylvania, which action is to be marked discontinued, settled and withdrawn.

While it is clear that the primary intent of the release was to settle the civil action filed by plaintiff against Doris Spangler, we must disagree with plaintiff's argument that the above-quoted language serves to modify or limit the earlier language releasing "any and all other persons, firms, insurers, and corporations" from liability. Although the release was certainly prompted by the then pending litigation, we believe its unambiguous terms, including its caption of "GENERAL RELEASE", demonstrate that the release operates to discharge *all* tort-feasors from liability for personal injuries resulting from

plaintiff's motorcycle accident. We further note that plaintiff was represented by counsel in connection with the execution of the release and has not alleged fraud, accident or mutual mistake in the procurement thereof. Moreover, plaintiff was aware of the full extent of his injuries at the time the release was signed and, in fact, had already filed the subject medical malpractice action when the release was executed. Since the terms of the release render it applicable to "all past, present and future actions", we must conclude that the ordinary meaning of the release renders it applicable to the present litigation.

In so concluding, we recognize the harshness of the result in this ruling, but nonetheless feel compelled by the precedent established by our Supreme Court in ***Buttermore, supra***, to arrive at this result. We would certainly invite a reconsideration of the rule established therein by the appellate courts of the Commonwealth, but believe we are given no choice but to defer to the mandates of that decision.

We will, accordingly, order that summary judgment be entered in favor of defendants.

ORDER OF COURT

NOW, this 27th day of June, 1991, the motions for summary judgment filed by Albert L. Henry, M.D., Surgical Associates of Waynesboro, Ltd. and Waynesboro Hospital are hereby granted.

NAUGLE V. WASHINGTON TOWNSHIP ZONING HEARING BOARD, C.P. Franklin County Branch, Misc. Doc. Vol AA, Page 98

Zoning - Variances - Hardship - DeMinimis

1. A 7'x30' deck is part of the house and must meet the setback requirement of the zoning ordinance.
2. An unnecessary hardship is not established where the variance is based on inability to rent a facility.
3. A request for a 5' variance is not deminimis where there is a 30' setback.

Deborah K. Hoff, Esq., Attorney for Appellant
Jeffery S. Evans, Esq., Attorney for Zoning Hearing Board

OPINION AND ORDER

WALKER, J. June 13, 1991:

FINDINGS OF FACT

Richard G. Naugle II, appellant, filed an application before the Washington Township Zoning Hearing Board seeking a variance from Article X, Section 1003 of the township's zoning ordinance. The appellant requested the variance to add a seven (7') foot by thirty (30') foot deck to the rear of an existing duplex. The proposed deck would encroach into the zoned rear setback by five (5') feet. The board conducted a hearing on September 24, 1990 and rejected the applicant's request.

On November 13, 1990, the appellant filed a notice of appeal pursuant to 53 P.S. Section 11001-A *et seq.* The appellant filed a motion for an additional evidentiary hearing which was denied by the court on February 28, 1991. Argument for the issue presented on appeal was heard on June 6, 1991.

The issue before the court is whether the Zoning Hearing Board erred by applying the unnecessary hardship standard in reviewing appellant's application for a variance from the rear yard setback to allow the addition of a seven (7') foot by thirty (30') foot open air, uncovered deck that is suspended twelve (12') feet above the ground.

DISCUSSION

Generally, the courts leave the questions of whether to grant a variance to the zoning boards. Therefore, the scope of review of a decision made by the zoning board is restricted to whether the board abused its discretion or committed an error of law. *Marlow v. Zoning Hearing Board of Haverford*, 52 Pa.Commw. 224, 231, 415 A.2d 946 (1980). This court finds that the Washington Township Zoning Hearing Board did not abuse its discretion or commit an error law when denying the appellant's variance petition.