STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellants,

v

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL and G. PHILLIP DOUGLASS,

Defendants-Appellees,

and

HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL, PORT HURON MERCY HOSPITAL, SHAWN T. JENKINS, D.O., DANIEL P. MAKANDE, M.D., JAMES F GERRITTS, M.D., HURON FAMILY PRACTICE CENTER, RICHARD KOVAR, M.D., PAUL A. BUDNICK, M.D., JERROLD R. FISHER, M.D., K. BATOOL SHAIKH, M.D., PETER J. CLIVE, M.D., JON L. KONZEN, JAY GORELL, M.D., ROBERT HYZY, M.D., and H. MICHAEL MARSH, M.D.,

Defendants.

UNPUBLISHED
June 1, 2004

No. 241801
St. Clair Circuit Court
LC No. 01-001051-NH

Before: Murray, P.J., and Gage and Kelly, JJ.

KELLY, J. (*concurring).*

I concur in Judge Gage's opinion, but for a different reason.

On this record, I would conclude that the trial court abused its discretion in denying plaintiffs' request for relief from judgment under MCR 2.612(A)(1), on the basis of a clerical mistake in the order dismissing Dr. Douglass. *Detroit Free Press, Inc, v State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999). An abuse of discretion occurs when the result is "so

palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion and bias." *Dep't of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000), quoting *Alken-Ziegler v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999).

According to MCR 2.612(A)(1):

> Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice if the court orders it.

The purpose of this rule is "to make the lower court record and judgment accurately reflect what was done and decided at the trial level." *McDonald's Corp v Canton Township*, 177 Mich App 153, 159; 441 NW2d 37 (1989), quoting *Stokus v Walled Lake Bd of Ed*, 101 Mich App 431, 433; 300 NW2d 586 (1980).[1]

The order entered by the trial court did not accurately reflect what occurred on the record. The record is clear that the parties agreed to dismiss the claim of medical malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury nor the claim that defendant River District Hospital was vicariously liable for Dr. Douglass' actions. It is evident from the hearing transcript that the parties and the trial court first engaged in a discussion off the record in which the parties made an agreement with respect to the claim against Dr. Douglass. Later, on the record, plaintiffs' counsel expressed his intent and the terms of the stipulation. He stated: "I intend to dismiss Doctor Douglass as a Defendant and proceed against what I presumed to be his principal, the hospital." The defendants did not object. Further, plaintiffs' counsel stated: " . . . but what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Doctor Douglass. I'm not doing that. He was the actor." Again, the defendants did not object. This is not, as the dissent opines, plaintiffs counsel's "*unilateral* understanding of the intent of the order." Rather, these statements were overt and unambiguous statements of plaintiffs' counsel's intent and the substance of the parties agreement. The trial court deemed plaintiffs' counsel's statements "understood" and agreed to by the other parties when it stated: "I understand. I understand that. I am sure they do, too. Next."

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[1] Plaintiffs also rely on MCR 2.612(C)(1)(a), which provides:

> (1) On a motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.

But resort to this catchall is unnecessary in light of the more specific applicability of MCR 2.612(A)(1).

But the subsequently drafted order did not accurately memorialize the parties' intent or the agreed upon stipulation placed on the record. The trial court, obviously well aware of what occurred, should have recognized this clerical error and granted plaintiffs' motion to correct the order to accurately reflect the parties' agreement. The trial court's denial of plaintiffs' motion despite the previous day's discourse on the record was an abuse of discretion. For this reason alone I would reverse.

/s/ Kirsten Frank Kelly