STATE OF MICHIGAN

COURT OF APPEALS

ANNIE BEATRICE VICKERS, Personal
Representative of the Estate of DELANSO
JOHNSON, Deceased,

      Plaintiff-Appellant,

v

ST. JOHN HOSPITAL and
JOHN E. BOCCACCIO, M.D.,

      Defendants-Appellees.

UNPUBLISHED

No. 196365
Wayne Circuit
LC No. 94-409926 NH

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

DANHOF, J. (concurring in part and dissenting in part).

I concur with part III of the majority's opinion, but respectfully dissent from part II because I do not believe that the trial court erred in ruling that there was a valid release of Dr. Boccaccio and that the release operated to discharge the hospital from vicarious liability for any negligent acts by Dr. Boccaccio.

In *Theophelis v Lansing General Hospital,* 430 Mich 473, 480; 424 NW2d 478 (1988), our Supreme Court stated:

> At common law a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal.

This common law doctrine is still recognized in Michigan and has not been changed by the statute governing rights of contribution. *Id*.; *Larkin v Otsego Memorial Hospital Ass'n,* 207 Mich App 391, 393; 525 NW2d 475 (1995). Thus, any release by plaintiff of Dr. Boccaccio would have the legal effect of discharging the hospital from vicarious liability for his negligent acts.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that the settlement agreement with Dr. Boccaccio constituted a covenant not to sue, not a release. Unlike a release, a covenant not to sue with an agent does not discharge the principal. *Theophelis*, *supra* at 492. The difference between a release and a covenant not to sue was discussed in *Theophelis*, *supra* at 492, n 14:

> A covenant not to sue is to be distinguished from a release in that it is not a present abandonment or relinquishment of the right or claim. It does not extinguish the cause of action. As between the parties to the agreement, the final result is the same in both cases. The difference is primarily in the effect as to third parties, and is based mainly on the fact that in the case of a release there is an immediate release or discharge, whereas in the other case there is merely an agreement not to prosecute a suit.

In the present case, plaintiff gave the following testimony when placing the terms of her settlement with Dr. Boccaccio on the record:

> *Mr. Demczuk [Plaintiff's attorney]*: And are the terms of the settlement that, in exchange for compensation of $10,000 to the Estate, you will dismiss Dr. John Boccaccio as a defendant in this case, only?
>
> *Plaintiff*: Yes.
>
> *Mr. Demczuk*: And you still have the right to proceed with your cause of action against the hospital?
>
> *Plaintiff*: Right, yes.
>
> *The Court*: Mr. Kenney, do you have any questions?
>
> *Mr. Kenney [Defense counsel]*: Yes. Ms. Vickers, as the Personal Representative of the Estate, you understand that by releasing – by settling with Dr. Boccaccio you are releasing him from any and all liability, or of any and all claims that you or the Estate may or may have had against Dr. Boccaccio?
>
> *Plaintiff*: Yes.
>
> *Mr. Kenney*: And do you believe that, that releasing Dr. Boccaccio is in the best interest of the Estate, at this time, for the $10,000?
>
> *Plaintiff*: Yes.
>
> *Mr. Kenney*: Do you understand that this, once and for all, ends any claim that you may have against Dr. Boccaccio for the claims of the death of Delanso Johnson?
>
> *Plaintiff*: Yes.

The foregoing testimony does not indicate that plaintiff simply agreed to forego suing on an existing claim. On the contrary, the testimony reflects "a present abandonment or relinquishment" of plaintiff's rights and claims against Dr. Boccaccio. Plaintiff expressly acknowledged that she was "releasing" Dr. Boccaccio of "any and all claims." Thus, plaintiff's settlement with Dr. Boccaccio is in the nature of a release rather than a covenant not to sue.

The majority concludes that the settlement agreement should be declared unenforceable for "lack of a meeting of the minds." However, the record unambiguously reflects that the parties mutually understood, and intended, that plaintiff was "releasing" Dr. Boccaccio from "any and all liability" and "any and all claims." The alleged misunderstanding in this case does not involve the intended *terms* of the agreement, but rather the *legal effect* of the agreement to release Dr. Boccaccio from liability. Any unilateral misunderstanding of the legal effect of the release does not abrogate the release. *Theophelis*, *supra* at 493; *Schmalzriedt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943); *Wiersma v Nordella*, 260 Mich 574, 576; 245 NW 520 (1932); *Malone v SCM Corp*, 63 Mich App 11, 14; 233 NW2d 872 (1975).

Finally, I would decline plaintiff's request to reform the release as a covenant not to sue. The burden of proof is upon the party seeking reformation of a written instrument. *River Rouge Bank v Fisher*, 372 Mich 558, 562; 127 NW2d 426 (1964). Absent a mutual mistake or a unilateral mistake coupled with fraud, shown by clear and convincing evidence, reformation is not warranted. *Theophelis*, *supra* at 492-493. Because plaintiff failed to show that the parties mutually intended to effectuate a covenant not to sue rather than a release, and because plaintiff has not made any showing of fraud, I would not reform the settlement agreement as a covenant not to sue.

In sum, I would affirm the trial court's dismissal of Dr. Boccaccio pursuant to the release and settlement agreement, together with the trial court's determination that the release of Dr. Boccaccio operated to discharge the hospital from vicarious liability for any negligent acts by Dr. Boccaccio. However, because there was evidence that other physicians may have committed malpractice, specifically Dr. LaPuerta, for which the hospital could be vicariously liable, I would reverse the trial court's order granting a directed verdict for the hospital and remand for further proceedings.

/s/ Robert J. Danhof