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UNPUBLISHED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.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right the trial court's order dismissing defendants St. John Health System, d/b/a River District Hospital.[1] We reverse.

I. Factual and Procedural History

This case involves pure procedural issues. Unfortunately, the incident giving rise to plaintiffs' cause of action is of little concern to the issues on appeal. What is of most import is the procedural history and the attorneys' conduct before the trial court.

Plaintiff Joseph Stamplis suffered from a thoracic epidural abscess and eventually required a laminectomy with evacuation of the epidural abscess. Plaintiffs allege that, as a result of the delay in diagnosis of a progressive myelopathy, Mr. Stamplis was rendered a paraplegic from the thoracic line down.[2]

On the day trial was set to begin in this matter, Jane Garrett, counsel for defendant Dr. G. Phillip Douglass, indicated on the record that she was approached by plaintiffs' counsel, Jeremiah Kenney, regarding an agreement to dismiss Dr. Douglass with prejudice. Plaintiffs' counsel indicated that he intended to dismiss Dr. Douglass as a defendant and proceed against River District Hospital as Dr. Douglass' principal. The following discussion transpired with respect to this agreement:

> *Ms. Garrett*. Right. I am Jane Garrett, and I represent Doctor Phil Douglass in this case, and I would like to state my understanding of our agreement here. I had some discussions with Mr. Kenney this morning, and for the first time there was discussion of dismissal of Doctor Douglass without payment, and it is my understanding and belief we have confirmed in chambers already that we have agreed that Doctor Douglass who has come up from Texas where he now resides for this trial, he will agree to remain here until he takes the stand to testify, which Mr. Kenney has assured me will be some time before the close of business on Friday; that Plaintiff will then be dismissed with prejudice, the individual claims against Doctor Douglass as a Defendant. And that is why I will not be offering anything on his behalf.
>
> *The Court*. Okay.
>
> *Mr. Kenney*. I intend to dismiss Doctor Douglass as a Defendant and proceed against what I presumed to be his principal, the hospital. That's my agreement.
>
> *The Court*. Okay.

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[1] For purposes of this opinion, the collective term "defendants" refers only to River District Hospital and Dr. G. Phillip Douglass.

[2] Plaintiff Theodora Stamplis seeks relief based on a claim of loss of consortium.

Mr. Kenney. And the other terms he will remain until the close of business Friday so that I can put him on the stand, that's part of the agreement, as well.

Ms. Garrett. Well, I believe that it was agreed in chambers that it would be a dismissal with prejudice.

Mr. Kenney. *With prejudice, 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.*

The Court. *I understand. I understand that. I am sure they do, too. Next.*

Mr. Valitutti. Your Honor, for the record, Ralph Valitutti on behalf of River District Hospital. We've met with you in chambers. We've discussed the matter thoroughly, and on behalf of the hospital, for purposes of settlement of the case, we're willing to offer Mr. and Mrs. Stamplis $300,000.

On the same day, Ms. Garrett presented a stipulation and proposed order of dismissal to the trial court indicating that the stipulation had been executed by all counsel. The written stipulation for dismissal stated merely, "IT IS HEREBY STIPULATED by and between counsel for the above-named parties, that the above-captioned matter be dismissed as to G. PHILLIP DOUGLASS, D.O., voluntarily with prejudice and without costs to any party." The order of dismissal read

> UPON READING AND FILING of the above stipulation, and the court being fully advised in the premises;
>
> IT IS HEREBY ORDERED that this matter be dismissed as to G. PHILLIP DOUGLASS, D.O., voluntarily with prejudice and without costs to any party.

Shortly after entry of the stipulation, counsel for River District Hospital indicated to the court that he wanted to bring a motion for summary disposition; but the trial court indicated that counsel would have to wait until after the selection of the jury.

The following day, River District Hospital brought its motion for summary disposition of plaintiffs' claims of vicarious liability against the hospital with respect to the actions or omissions of Dr. Douglass. River District Hospital argued that it was entitled to summary disposition under MCR 2.116(C)(7) because the stipulation to dismiss Dr. Douglass with prejudice barred any claims brought against River District Hospital as the principal. In response, plaintiffs argued that River District's argument had no merit because plaintiffs did not intend for the dismissal of Dr. Douglass to act as a dismissal of River District Hospital. Alternatively, plaintiffs requested relief from judgment pursuant to MCR 2.612 or amendment of the order of dismissal to reflect a dismissal of Dr. Douglass without prejudice. In sum, plaintiffs argued that the dismissal was more of a covenant not to sue Dr. Douglass, as opposed to a dismissal with prejudice that would have res judicata effect.

Following oral arguments, the trial court provided its ruling on the record. The court determined that further proceedings against River District Hospital were barred by operation of law, and that the decision to dismiss Dr. Douglass with prejudice had res judicata effect on any claim for vicarious liability against River District Hospital. The court further found no credible evidence indicating that the dismissal was understood by Dr. Douglass as a covenant not to sue. The court found that plaintiffs were not entitled to relief from judgment pursuant to MCR 2.612, indicating that such relief was not justified under the facts of the case. Accordingly, the trial court granted River District Hospital's motion for summary disposition.

Plaintiffs thereafter brought a motion for reconsideration and to reverse the orders of judgment pursuant to MCR 2.614(A) and MCR 2.612(C). Plaintiffs argued that summary disposition was improper because they did not intend to dismiss their case against River District Hospital when they stipulated to dismiss Dr. Douglass. Plaintiffs further contended that they were entitled to relief from judgment on the basis of fraud, misrepresentation, misconduct, mistake, inadvertence, surprise, excusable neglect, or other equitable grounds. In all, plaintiffs requested the trial court vacate the order dismissing River District, or alternatively, revise or rescind the order dismissing Dr. Douglass to establish that the stipulation was actually a covenant not to sue rather than a release of River District Hospital. River District Hospital responded that plaintiffs' motion was in actuality a motion for rehearing and that plaintiffs failed to present any new grounds for which relief could be granted. Dr. Douglass similarly responded that plaintiffs had previously raised the issue and that plaintiffs' motion should be denied. The trial court, finding that plaintiffs had previously raised the issues, determined that plaintiffs' motion was actually one for reconsideration, and thus, the court denied plaintiffs' motion.

II. Standard of Review

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition brought under MCR 2.116(C)(7). *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). The nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor, and the motion should not be granted unless no factual development could provide a basis for recovery. *Id*. "The court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties." *Id*., quoting *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

A trial court's decision to grant relief under MCR 2.612 is reviewed for an abuse of discretion. *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997).

III. Analysis

A

We must first address plaintiffs' argument that the trial court erred in dismissing River District Hospital by failing to follow the law set forth in *Larkin v Otsego Memorial Hosp Ass'n*, 207 Mich App 391; 525 NW2d 475 (1994).

Plaintiffs' complaint alleges that River District Hospital is liable for the acts of Dr. Douglass and thus seeks relief on the basis of vicarious liability. At common law, "a valid

release of an agent for tortious conduct operates to bar recovery against the principal on the theory of vicarious liability, even though the release specifically reserves claims against the principal." *Theopolis v Lansing General Hosp*, 430 Mich 473, 480; 424 NW2d 478 (1988) (opinion of Griffin, J.), and at 493 (opinion of Boyle, J.). Plaintiff however argues that the voluntary dismissal in this case comprised "an agreement not to sue on the existing claim" rather than effecting "a present abandonment or relinquishment of the right or claim," or in other words, a release. See *id*. at 492 n 14.

In *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997), this Court held that "a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata." *Id*. Michigan courts have also long held that where a suit against an agent is unsuccessful, the plaintiff cannot maintain a suit against the agent's principal. See *DePolo v Greig*, 338 Mich 703, 709; 62 NW2d 441 (1954), quoting *Krolik v Curry*, 148 Mich 214, 221-222; 111 NW 761 (1907).

In light of these principles, defendants argue that it is clear that the voluntary dismissal with prejudice constituted an adjudication on the merits of plaintiffs' claims against Dr. Douglass, and that because it is an adverse adjudication on the merits of plaintiffs' cause of action against Dr. Douglass, plaintiffs cannot now proceed against River District Hospital as the principal. However, plaintiffs argue that the dismissal of Dr. Douglass did not constitute an adjudication of the merits of the claims against River District Hospital, but instead constituted a covenant not to sue. In support of their argument, plaintiffs rely heavily on *Larkin.*

In *Larkin*, the Court held that a stipulation and order to dismiss the defendant doctor was actually a covenant not to sue the doctor and, thus, the dismissal did not relinquish the plaintiffs' claim and did not operate as a release of the hospital or as a consent judgment. While the stipulation to dismiss did not expressly reserve the plaintiffs' claims against the hospital, the stipulation specifically stated that the hospital was legally responsible for the actions of the defendant doctor and that the doctor's dismissal was based on the hospital's acknowledgment that the doctor was the hospital's agent for purposes of the case. *Id*. at 396. The Court concluded that nothing in the stipulation suggested that by dismissing the doctor, the plaintiffs intended to dismiss the hospital; instead, the Court concluded that "the implication is that the plaintiffs recognized that the codefendant hospital was the principal that could be held responsible for the negligent acts of the agent and they would proceed against the hospital on that basis after the dismissal of [the doctor]." *Id*.

In arriving at its conclusion, the *Larkin* Court relied heavily on the Supreme Court's decision in *Boucher v Thomsen*, 328 Mich 312; 43 NW2d 866 (1950). In *Boucher*, the parties agreed in a written stipulation that the plaintiff, "notwithstanding this covenant not to sue . . ., reserves wholly and unimpaired her cause of action against [the principal]." *Id*. at 315.

Had the parties in the instant case put their full verbal agreement into the written stipulation, there would likely be no question that this case would fall under the ambit of *Larkin*. But the parties did not put their full oral agreement in writing; instead, in the written stipulation, plaintiffs dismissed Dr. Douglass with prejudice and nothing was explicitly stated concerning the hospital. Further, the parties did not explicitly agree that Dr. Douglass was the agent of the hospital. Again, had the parties explicitly made such an agreement, this case would likely fall under *Larkin*.

Under a narrow reading of *Larkin* as defendants propose, only the written stipulation can be looked at to discern the intent of the parties. In this case, plaintiffs' actual intent cannot be discerned from only the written language in the stipulation and order. However, the transcript of the parties' oral agreement clearly reflects the parties' intentions and understandings. From the transcript, it is clear that by stipulating to dismiss Dr. Douglass, plaintiffs did not intend to dismiss their claims against River District Hospital. Thus, while we are reluctant to broaden the scope of *Larkin* to include the situation in this case, we find that *Larkin* would be applicable but for the conduct of the parties' attorneys before the trial court. Regardless of the applicability of *Larkin*, in the interest of averting a serious injustice, we find plaintiffs are entitled to relief from judgment based on the conduct of the parties before the trial court.

B

Plaintiffs argue they are entitled to relief from judgment pursuant to MCR 2.612(C)(1)(a),(c),(d), on the basis of mistake, fraud, and grounds of equity. We agree that plaintiffs are entitled to relief from judgment.

It is a longstanding rule that parties are bound by their stipulations. See *Thompson v Continental Motors Corp*, 320 Mich 219, 224-225; 30 NW2d 844 (1948). However, this does not mean that a party to a stipulation is forever without a defense. Because a stipulation is a type of contract, a party seeking to avoid a stipulation may use contract defenses. *Limbach*, *supra* at 394. Accordingly, a stipulation may be set aside where there is evidence of mistake, fraud, or unconscionable advantage. *Id*.

Ordinarily, a party cannot successfully seek affirmative relief on the ground that he was either ignorant of the law or mistaken as to what the law prescribed. *Carpenter v Detroit Forging Co*, 191 Mich 45, 53; 157 NW 374 (1916). But this is not always the case. "In many cases where injustice would be done by its enforcement, this has been avoided by declaring that a mistake as to the existence of a particular right, though caused by an erroneous idea as to the legal effect of an instrument . . . was really a mistake of fact, and not strictly one of law, and so did not constitute an insuperable bar to relief." *Id*., citing *Reggio v Warren*, 207 Mass 525; 93 NE805 (1911). For example, in the context of the rescission of a release, the Court in *Carpenter* stated that "[w]hether placed upon the ground of constructive fraud, or mistake of fact as well as of law, the law forbids that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the doctrine that a mere mistake of law affords no ground for relief." *Carpenter*, *supra* at 54. Further, in the context of reformation, the law is established that an instrument can be reformed to reflect the parties' actual intent if there is clear evidence that both parties reached an agreement but that, as a result of mutual mistake or mistake on the part of one and fraud on the part of the other, the instrument does not express the true intent of the parties. See *Mate v Wolverine Mut Ins Co*, 233 Mich App 14; 592 NW2d 379 (2000).

There is no question that the case before us would result in a serious injustice if there was strict adherence to the stipulation. The most crucial part of this case is that the written stipulation did not conform to the oral stipulation made on the record in front of all the parties. Parties should be able to rely on their oral stipulations made on the record in open court. Here, plaintiffs' counsel was not mistaken as to the effect of the law. Plaintiffs' counsel was fully

aware of the state of the law, but he was mistaken with respect to the effect of the written stipulation. But counsel's mistake was not completely the result of his own ignorance, defendants contributed to it. The most likely scenario, as we see it, is that the trial court hurried counsel along during the oral stipulation when plaintiffs' counsel attempted to make sure that his position was completely clear, and then plaintiffs' counsel trusted that counsel for defendants would accurately prepare the written stipulation and order. While plaintiffs' counsel should have put his full intentions in the written stipulation, under the circumstances, the fact that he did not, should not bar recovery all together.

This is a case of mistake or misconception on the part of plaintiffs' counsel that was wholly contributed to and encouraged by defendants' counsel. "'A fraud is perpetrated on the court when some material fact is concealed from the court or some material misrepresentation is made to the court.'" *Matley v Matley (On Remand)*, 242 Mich App 100, 101; 617 NW2d 718 (2000)(citations omitted). With respect to a silent fraud, "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000).

Plaintiffs' counsel and Dr. Douglass' counsel made their oral stipulation on the record in front of the court and counsel for River District Hospital. Plaintiffs' counsel specifically 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." After this statement by plaintiffs' counsel, the trial court stated, "I understand" and "*I am sure they do, too*." At this point in time, in response, if defendants did not understand or agree with the court, they had an obligation to say so. Instead, counsel for River District Hospital, as well as counsel for Dr. Douglass, sat mute and said nothing, thereby encouraging plaintiffs' counsel to agree to the stipulation. Plaintiffs' counsel was then presented with a written stipulation, drafted by defendants' counsel, that omitted the entire oral agreement. Under these circumstances, defendants' counsel had a duty of disclosure in light of the remarks made by plaintiffs' counsel and the trial court. Counsel for River District Hospital and counsel for Dr. Douglass both knew what plaintiffs' intentions were and by not responding to the trial court, they led plaintiffs' counsel to believe that in stipulating to dismiss Dr. Douglass with prejudice plaintiffs were not forfeiting their legal rights against the hospital. But defendants nonetheless turned right around and moved for summary disposition.[3]

The record clearly reflects that all parties were aware that Dr. Douglass would be staying after his dismissal to testify in the case. The trial court was fully aware of this, as well as of the entire goings on throughout this case. It was fully aware of plaintiffs' counsel's intentions, as it stated so on the record. The order signed by the court stated that the court was "*fully advised in*

[3] In addition, while we hesitate to suggest a conspiracy, it is worthy to note that after River District Hospital moved for summary disposition, counsel for Dr. Douglass made an appearance as co-counsel for River District Hospital.

the premises." This lends further support to the focus of the spirit of the agreement that was placed on the record.

In sum, the record is clear that while plaintiffs' counsel was mistaken as to the effect of the written stipulation and order, counsel's mistake, whether viewed as a mistake of law or of fact, was contributed to by defendants' counsel's actions. Even though counsel for River District Hospital did not verbally take part in the stipulation on the record, we cannot wholly omit their actions from our discussion. The written stipulation did not reflect what was agreed to by plaintiffs or Dr. Douglass. While we strongly believe in adherence to the rule of law, at the end of the day, those rules, as well as the spirit of the law, must be applied in such a manner as to keep justice alive. To deny plaintiffs a trial under this scenario would be an injustice. Plaintiffs are entitled to relief from judgment and the stipulation and order should be vacated.

We reverse the trial court's order granting summary disposition. We remand to the trial court for entry of an order vacating the stipulation and order dismissing Dr. Douglass with prejudice.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage