# STATE OF MICHIGAN

# COURT OF APPEALS

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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UNPUBLISHED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

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

MURRAY, P.J., (*dissenting*).

The well-written majority opinion makes many good points and its conclusion is, from an equity standpoint, difficult to resist. Nonetheless, as detailed below, I believe the law and facts

of record require that the learned trial court judge, who was intimately familiar with the attorneys and proceedings occurring before it, be affirmed. I, therefore, respectfully dissent.

## Analysis[1]

### A. Effect of Stipulation to Voluntarily Dismiss Dr. Douglass With Prejudice

The majority concludes that the language of the stipulation and order, coupled with the unilateral statements of plaintiffs' counsel and the trial court, require reversal. I disagree because well-settled law provides that, in the absence of an *agreement* to the contrary, the voluntary dismissal with prejudice of an agent requires dismissal of the principal.

Plaintiffs' complaint alleges that River District is liable for the acts of Dr. Douglass, i.e., plaintiffs are seeking relief on the basis of vicarious liability. Our Supreme Court has stated that "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." *Theophelis v Lansing Gen Hosp,* 430 Mich 473, 480; 424 NW2d 478 (1988) (opinion of Griffin, J.), and *id.* at 493 (opinion of Boyle, J.). See, also, *Felsner v McDonald Rent-A-Car, Inc,* 193 Mich App 565, 569; 484 NW2d 408 (1992). The question, then, is whether the voluntary dismissal with prejudice effected "a present abandonment or relinquishment of the right or claim" (and thus a release), or whether it simply comprised "an agreement not to sue on an existing claim." *Theophelis, supra* at 492 n 14. The answer to this question is found in two well-established rules.

First, in *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997), this Court set forth the requirements necessary for res judicata to apply: "(1) the prior action must have been decided on its merits, (2) the issues raised in the second case must have been resolved in the first, and (3) both actions must have involved the same parties or their privies." Importantly for purposes of this case, the *Limbach* Court further held that "a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata." *Id*. See, also, *Mitchell v Dahlberg,* 215 Mich App 718, 724; 547 NW2d 74 (1996); *In re Koernke Estate,* 169 Mich App 397, 400; 425 NW2d 795 (1988); *Brownridge v Michigan Mut Ins Co,* 115 Mich App 745, 748; 321 NW2d 798 (1982).

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[1] Plaintiffs have failed to include a "Statement of Questions Presented" in their brief on appeal in accordance with MCR 7.212(C)(5). Ordinarily, the failure to include a "Statement of Questions Presented" waives appellate review. See *Caldwell v Chapman,* 240 Mich App 124, 132; 610 NW2d 264 (2000); *Grand Rapids Employees Independent Union v Grand Rapids,* 235 Mich App 398, 409-410; 597 NW2d 284 (1999). However, this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient, *McKelvie v Auto Club Ins Ass'n,* 203 Mich App 331, 337; 512 NW2d 74 (1994), or where it is in the interest of justice to resolve the issue, *Frericks v Highland Twp,* 228 Mich App 575, 586; 579 NW2d 441 (1998). Both situations are involved in this case, so it is appropriate to address the issues raised.

Second, Michigan courts have long held that when a suit against an agent has been unsuccessful, the plaintiff cannot maintain a suit against the agent's principal. *DePolo v Greig,* 338 Mich 703, 709; 62 NW2d 441 (1954), quoting *Krolik v Curry,* 148 Mich 214, 221-222; 111 NW 761 (1907). Accord *Friedman v Farmington Twp School District,* 40 Mich App 197, 209-210; 198 NW2d 785 (1972).

In light of these two legal principles, it is clear that the voluntary dismissal with prejudice constituted an adjudication on the merits of plaintiffs' claims against Dr. Douglass. *Limbach, supra*. Additionally, because it is an adverse adjudication on the merits of plaintiffs' cause of action against Dr. Douglass, the agent, plaintiffs cannot now proceed against the principal, River District. *DePolo, supra.*

In support of their contention that the dismissal of Dr. Douglass did not constitute an adjudication on the merits of the claims against River District, but instead constituted a covenant not to sue, plaintiffs rely heavily on *Larkin v Otsego Mem Hosp Ass'n,* 207 Mich App 391; 525 NW2d 475 (1994), which addressed an issue similar to this case; namely, whether agency principles permitted a stipulation and order of dismissal of a doctor (agent) to act as a release or a consent judgment against the defendant hospital (principal). *Larkin, supra*. The *Larkin* Court first recognized the common-law doctrine noted above, that release of an agent discharges the principal from vicarious liability, and that this principle has not been changed by the statute governing rights of contribution. *Id*. at 393, citing *Felsner, supra* at 565, 569; *Theophelis, supra* at 490-491 (opinion of Griffin, J.). The *Larkin* Court then held that the stipulation and order to dismiss in that case was actually a covenant not to sue the doctor, and that the dismissal did not relinquish the plaintiffs' claim and did not operate as a release of the defendant hospital or as a consent judgment. *Larkin, supra* at 394, 396.[2] Quoting *Boucher v Thomsen*, 328 Mich 312; 43 NW2d 866 (1950), the *Larkin* Court relied on the following principles in reaching its decision:

> The suggestion that the covenant not to sue, if sustained, results in a legal injustice to defendant [owner] is without merit. Neither may it be said, in view of the language of the covenant that the parties thereto contemplated that [the driver and garage keeper] would necessarily be released from further liability with respect to the subject matter. The instrument did not provide for such a release. It clearly appears that it is merely an undertaking that plaintiff will not sue the covenantees. She did not, either directly or indirectly, covenant against their possible liability to defendant [owner] if judgment is obtained and enforced against him. *The undertaking is not ambiguous and must be construed in accordance with the plain intent of the language used by the parties*. [*Larkin, supra* at 395 (emphasis added).]

The *Larkin* Court, noting that the stipulation to dismiss did not expressly reserve the plaintiffs' claims against the hospital, was able to derive the parties' intent from the language

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[2] The legal difference between a release and a covenant not to sue is significant. A release operates to extinguish a cause of action, whereas a covenant not to sue does not extinguish the claim but merely represents a promise not to sue an individual on the claim. *Id.* at 393.

utilized in the stipulation. The stipulation between the parties in *Larkin* specifically stated that the hospital was *legally responsible* for the actions of the doctor while also indicating that the doctor's dismissal was based upon the hospital's acknowledgment that the doctor was the hospital's agent for the purposes of the case. *Id*. at 396. The *Larkin* Court found that such language implied that the plaintiffs recognized that the co-defendant hospital was the principal that could be held responsible for the negligent actions of its agent and that the plaintiffs would proceed against the hospital on that basis following the dismissal of the doctor. *Id*.

The *Larkin* Court relied in large part upon the Supreme Court's decision in *Boucher, supra*. Similar to the written stipulation between the parties in *Larkin*, the parties in *Boucher* 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]." *Boucher, supra* at 315. Hence, in both *Larkin* and *Boucher* the plaintiffs obtained *in writing* the parties' explicit (as in *Boucher*) or implicit (as in *Larkin*) agreement that they could maintain a claim against the principal.

In the instant case, one cannot discern such an intent from the express and unambiguous language of the stipulation. Here, the stipulation simply reads, "IT IS HEREBY STIPULATED by and between counsel for the above-named parties, that the above-captioned matter by dismissed as to G. PHILLIP DOUGLASS, D.O., *voluntarily with prejudice* and without costs to any party." This stipulation was signed by plaintiffs' attorney as well as the attorneys for Douglass, River District, and Henry Ford Hospital. On the same document, the trial judge signed an order of dismissal in accordance with the stipulation. Contrary to the written agreements in *Larkin* and *Boucher*, there is nothing in the written documents indicating that the intent of the parties in agreeing to the dismissal of Dr. Douglass was to preserve plaintiffs' claims against River District. Although there was no explicit reservation in the written stipulation at issue in *Larkin*, there was enough within the parties' written agreement to allow the court to find the parties' implicit agreement to do so. Therefore, neither *Larkin* nor *Boucher* remove this case from the well-established principles outlined in *Limbach* and *DePolo*.

Plaintiffs' argument, that the transcript reflects their counsel's intent in agreeing to the order, just as the written stipulations did in *Limbach* and *DePolo*, does not compel a different result. First, one cannot rely upon the oral statement by plaintiffs' counsel, regarding *his unilateral* understanding of the intent of the order, to establish an agreement. As the trial court aptly stated, River District's counsel's "silence in the face of plaintiff counsel's declaration of intent does not amount to an agreement." We must enforce the language contained in the order, and not speculate on what the parties may have unilaterally intended in agreeing to the order. See *Boucher, supra* at 318, 322. Although plaintiffs' counsel certainly was concerned about the impact the order may have, he failed to obtain in writing an agreement that plaintiffs were not intending to relinquish the hospital from its liability as the principal of Dr. Douglass, as the parties had done in both *Limbach* and *Boucher*. Moreover, the trial court's statement that it understood what plaintiffs' counsel was stating regarding his intent of the order does not control over what the court order actually states. *Kadri v Ford Motor Co*, 134 Mich App 138, 141; 350 NW2d 763 (1984); *Larkin, supra* at 397 (Taylor, J., dissenting). Here, there was no oral stipulation between the parties on the record regarding the intent of the order. A stipulation requires some agreement or concession by a party, *Eaton Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 378; 521 NW2d 847 (1994), and there was no agreement or concession made by

counsel for River District on the record. Similarly, MCR 2.507(H) only binds parties to oral agreements or consents made on the record.

The majority opinion seems swayed by what was *not said* by counsel for River District regarding the potential legal impact of the order. However, there is nothing within the Michigan Rules of Professional Conduct that required counsel for the hospital to disclose to the court at that time case law that is favorable to his client. Compare MRPC 3.3(a)(3). Similarly, "[a]n attorney's duty is to zealously represent the interests of his own client, and not to advise his adversary on the law." *Podolsky v Narnoc Corp*, 196 AD2d 593, 596; 601 NYS2d 320 (1993). As such, there was simply no duty for counsel for River District to lend her advice to plaintiffs' counsel regarding the possible ramifications of the order.[3] And, because all negotiations for the order were between plaintiffs' counsel and counsel for Dr. Douglass, River District's silence during the hearing could not be utilized as evidence for the intent of the order. Accordingly, I conclude that the trial court properly granted River District's motion for summary disposition pursuant to MCR 2.116(C)(7).

B. Fraud

Alternatively, plaintiffs argue that they are entitled to relief from judgment pursuant to MCR 2.612(C)(1)(c) on the basis of fraud.[4] However, the trial court did not abuse its discretion in denying plaintiffs' motion under MCR 2.612(C).

Plaintiffs allege that defendants committed a fraud upon the court by their failure to inform the trial court or plaintiffs of the scope and effect of the agreement entered into between plaintiffs and Dr. Douglass. "'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). Here, plaintiffs fail to demonstrate that defendants withheld a *material fact* from the trial court. The *potential* legal consequences of a stipulation do not constitute a *material fact* that parties must disclose to the trial court. Indeed, the *potential* legal consequences of a stipulation are not capable of being proved false.

Further, plaintiffs failed to demonstrate that defendants committed a silent fraud upon the court. In demonstrating a silent fraud, mere nondisclosure is insufficient. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000). Additionally, plaintiffs have failed to demonstrate or even allege that defendants owed them a

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[3] Of course, plaintiffs' counsel was aware of the ramifications of the order, but did not secure an agreement on the record or in writing as to the intent of the impact of the order. Moreover, if there were off-the-record discussions about this issue, the trial court was in the best position to determine if River District was somehow engaging in "gamesmanship," but the trial court obviously had no such concerns.

[4] Although plaintiffs have stated as one of their subissues that River District and Dr. Douglass engaged in a conspiracy, plaintiffs failed to present any argument, case law, or factual support for their conspiracy argument. "Insufficiently briefed issues are deemed abandoned on appeal." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

legal duty to make a disclosure, which is a necessary requirement in proving a "silent fraud." MRPC 3.3(a)(3); *Id.*; *Podolsky, supra*. Accordingly, defendants had no duty to inform the trial court of the potential legal consequences of plaintiffs' stipulation, and plaintiffs failed to establish that defendants committed a fraud upon the court.

Plaintiffs also argue that defendants committed extrinsic fraud for their acts of inducing plaintiffs to agree to the dismissal of Dr. Douglass in order for River District to benefit from this dismissal on agency principles. This argument should also fail. Plaintiffs have not presented any evidence to demonstrate that they were induced by statements of defendants into executing the stipulation. In fact, the record indicates that plaintiffs approached Dr. Douglass regarding the stipulation to dismiss Dr. Douglass, and that counsel for River District was not a part of these discussions. Thus, in my view, plaintiffs have failed to demonstrate that they are entitled to relief based on defendants' alleged inducement of them.

C. Mistake

Plaintiffs also erroneously argue that they are entitled to relief from judgment pursuant to MCR 2.612(C)(1)(a) because of mistake.

Plaintiffs alternatively argue that, assuming their interpretation of *Larkin* is incorrect, this case presents a situation involving a mistake of law that courts are bound to correct. In *Limbach, supra*, addressing the issue of whether the plaintiff's agreement to dismiss a cross-claim "with prejudice" was a mistake, this Court found that while that "type of mistake might be sufficient to allow a trial court to grant relief from judgment . . . it is not the type of mistake warranting reversal of a trial court's denial of relief." *Limbach, supra* at 393. Indeed, as the Court stated, "MCR 2.612(C)(1)(a) was not 'designed to relieve counsel of ill-advised or careless decisions.'" *Id*. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion for relief from judgment pursuant to MCR 2.612(C)(1)(a).

Additionally, plaintiffs are not entitled to relief for their alleged mistake. As stated in *Limbach*, plaintiffs' alleged mistake "was unilateral and would not justify setting aside or modifying the stipulation." *Limbach, supra* at 394. Therefore, I would conclude that the trial court did not abuse its discretion in determining that plaintiffs were not entitled to relief from the judgment.

D. Equity

Finally, I would reject plaintiffs' argument that they are entitled to relief from the order dismissing River District on equitable grounds pursuant to MCR 2.612(C)(1)(f).

In *Limbach, supra*, this Court held that the plaintiff was not entitled to relief pursuant to MCR 2.116(C)(1)(f), finding that there were no extraordinary circumstances that would mandate setting aside the judgment. The Court found that the plaintiff created her own predicament, and indicated that, while her counsel's tactical error prejudiced her rights, such conduct did not warrant relief from the order. *Id*. at 393. Similarly, plaintiffs in this case have not demonstrated that any extraordinary circumstances exist that would compel the trial court to set aside the judgment. Plaintiffs merely reiterate their position that River District and Dr. Douglass allegedly engaged in improper conduct that resulted in an "excusable default" by plaintiffs. As stated in

*Limbach*, plaintiffs' counsel's tactical error does not warrant relief from the order dismissing River District. Accordingly, the trial court did not abuse its discretion in denying equitable relief pursuant to MCR 2.612(C)(1)(f).

For all these reasons, I would affirm the trial court's decision.

/s/ Christopher M. Murray