

STATE OF MICHIGAN
COURT OF APPEALS

TERRI KARAPETIAN,

Plaintiff/Appellant/Cross-Appellee,

v

PONTIAC OSTEOPATHIC HOSPITAL and DR.
DENNIS S. LYNCH, D.O.,

Defendants/Appellees/Cross-Appellants.

UNPUBLISHED
September 20, 1996

No. 187077
LC No. 94-469410 NH

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,* JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order granting defendants' motions for directed verdict on the ground that plaintiff's claims were barred by a release. Defendants cross appeal, requesting a new trial or remittitur. We reverse and remand for entry of judgment on the jury verdict.

In February, 1992, plaintiff was admitted to defendant Pontiac Osteopathic Hospital and defendant Lynch was assigned to be her treating physician. During her stay in the hospital, plaintiff requested an HIV test and gave her written consent to HIV testing. Shortly thereafter, plaintiff decided to leave the hospital. Plaintiff alleges that defendant Lynch told her that she had tested positive for HIV during an attempt to persuade her to remain in the hospital. Defendant Lynch denied making this statement.¹ Prior to her discharge from the hospital, plaintiff signed a document entitled "release from responsibility for discharge." The document states:

This is to certify that I _____ a patient in Pontiac Osteopathic Hospital am being discharged against the advice of the attending physician and the hospital administration. I acknowledge that I have been informed of the risk involved and hereby release the attending physician and the hospital from all responsibility for any ill effects which may result from such discharge.

After learning in the summer of 1993 that she did not have HIV, plaintiff commenced this action asserting medical malpractice claims against defendants arising out of defendant Lynch allegedly misinforming her that she had tested positive for HIV. At the close of all the evidence, defendants moved for a directed verdict and the trial court took the motions under advisement. The jury found in favor of plaintiff and awarded her \$200,000. Prior to entry of judgment on the verdict, the trial court granted defendants' motions for directed verdict.

Plaintiff contends that the trial court erred in granting a directed verdict in favor of defendants on the basis of an invalid release. We agree. We initially note that the trial court's belated decision on defendants' motions for directed verdict was actually a grant of judgment notwithstanding the verdict. This distinction, however, does not affect the outcome on appeal because our standard of review is the same for either motion. *Feaheny v Caldwell*, 175 Mich App 291, 299; 437 NW2d 358 (1989). We view the evidence and all legitimate inferences therefrom in a light most favorable to the nonmovant, and the motion should be granted only when no factual issues exist upon which reasonable minds may differ. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995).

We agree with plaintiff's assertion that the "release" is invalid because it was not supported by consideration. A release is a matter of contract which requires consideration. *Babcock v Public Bank*, 366 Mich 124, 135; 114 NW2d 159 (1962). Consideration exists where (1) a promisee suffered a legal detriment, (2) which induced the promisor's promise to release liability, and (3) the promisor's promise to release the promisee from liability induced him to suffer the detriment. *Paterek v 6600 Limited*, 186 Mich App 445, 451; 465 NW2d 342 (1990) (citing *Lawrence v Ingham Co Health Dep't Family Planning/Pre-Natal Clinic*, 160 Mich App 420, 428-429; 408 NW2d 461 (1987) (Sawyer, J. dissenting)). A legal detriment is the promise to do what one is not legally obligated to do or refrain from doing what one is privileged to do. *Lawrence, supra* at 429 (Sawyer, J. dissenting).

Contrary to the representations of defendants and the finding of the trial court, health care providers suffer no legal detriment in discharging a patient despite their desire to continue treatment because they have no legal right to force treatment upon a patient.² Rather, a competent adult patient has the right not to consent to treatment and to forgo all treatment. *In re Martin*, 450 Mich 204, 216; 538 NW2d 399 (1995), cert den ___ US ___; 116 S Ct 912; 133 L Ed 2d 843 (1996). In fact, if a doctor treats a patient without his consent, he has committed a battery and may be liable for damages. *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992). Thus, defendants were merely doing what they were obligated to do under the law when they discharged plaintiff from the hospital. Further, any expectation of pecuniary gain was contingent on the patient agreeing to treatment and likewise does not constitute a legal detriment. As such, there was no consideration to support the agreement because defendants did not suffer a legal detriment which induced plaintiff to release them from liability. *Paterek, supra* at 451.

We find no merit in defendant Lynch's argument that consideration was not necessary because the agreement merely modified a pre-existing contract. Rather than changing or modifying the physician-patient contract for services, such as settling a disputed bill, the release covered potential tort claims for malpractice committed during treatment. Although defendants' duty of care arises out of the

physician-patient relationship, *Rogers v Horvath*, 65 Mich App 644, 647; 237 NW2d 595 (1975), plaintiff's tort claims are separate and distinct from any contract claim relating to services. We therefore find that MCL 566.1; MSA 26.978(1) does not apply to the release involved in this case. Accordingly, we find the trial court erred in granting defendants' motions for directed verdict.³

With respect to issues raised in defendants' respective cross appeals, we cannot consider them until the trial court has been presented with, and ruled on, motions for new trial and remittitur. On remand, defendants may move for a new trial and remittitur after the trial court enters a judgment on the jury verdict.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.

¹ At trial, it was revealed that HIV testing was never conducted because plaintiff left the hospital prior to a blood sample being taken.

² Defendant Lynch contends that MCL 333.20201; MSA 14.15(20201) and MCL 333.20202; MSA 14.15(20202) impose upon him a duty to treat a patient and a corresponding duty upon a patient to follow recommended treatment. These statutory provisions, however, are merely guidelines for health care facilities that neither create civil liability nor expand or diminish remedies available to a patient. MCL 333.20203; MSA 14.15(20203). In any event, MCL 333.20201(2)(f); MSA 14.15(20201)(2)(f) recognizes that a patient is entitled to refuse treatment, and provides that a doctor or health care facility may terminate the doctor-patient relationship if the refusal prevents them from fulfilling their ethical and professional obligations. The statute merely reinforces the notion that a patient must consent to treatment.

³ Given our determination that the "release" is invalid because it was not supported by consideration, we do not address plaintiff's alternate arguments that the release is invalid as against public policy and the trial court erred in construing an ambiguous release as a matter of law.