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UNPUBLISHED
April 14, 1998

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

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

PER CURIAM.

Plaintiff appeals as of right from an order enforcing a release and settlement agreement as to defendant, Dr. John Boccaccio, in this medical malpractice action. Plaintiff also challenges the trial court's order granting a directed verdict in favor of defendant, St. John Hospital. We reverse.

I

Plaintiff's son, Delanso Johnson, was admitted to St. John Hospital (the hospital) for treatment of a gunshot wound. He was surgically treated by Dr. Boccaccio and Dr. Leo LaPuerta, but died while in the recovery room. Plaintiff filed this wrongful death action, naming the hospital, and Drs. Boccaccio and LaPuerta as defendants. Plaintiff's complaint alleged that Dr. LaPuerta negligently performed a "Whipple procedure" to repair damage caused by the gunshot wound, that Drs. LaPuerta and Boccaccio negligently failed to consider and perform alternative surgical procedures, and that both doctors prematurely stopped providing blood transfusions to Johnson. Plaintiff sought to hold the hospital vicariously liable for the alleged negligence of Drs. Boccaccio and LaPuerta.

Plaintiff failed to serve Dr. LaPuerta, resulting in his dismissal from the case. The case proceeded against Dr. Boccaccio and the hospital only. On the day scheduled for trial, plaintiff entered

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

into a settlement agreement with Dr. Boccaccio, the terms of which were placed on the record. Plaintiff stated on the record that she was releasing Dr. Boccaccio from any and all claims that she may have against him in exchange for a payment of $10,000, but was reserving the right to proceed with her cause of action against the hospital. Thereafter, while arguing pretrial motions, a dispute arose regarding the effect of the settlement with Dr. Boccaccio on the hospital's vicarious liability for his alleged negligence. The trial court ruled that the agreement to release Dr. Boccaccio operated to discharge the hospital from vicarious liability for any negligent acts by Dr. Boccaccio, but the hospital could still be held vicariously liable for the negligence of any of its other agents or employees, specifically, Dr. LaPuerta.

During opening statement, plaintiff's counsel advanced three theories of malpractice: (1) that Dr. LaPuerta's decision to perform a Whipple procedure, instead of simply over-sewing the bullet hole, constituted malpractice; (2) that Dr. LaPuerta negligently performed the Whipple procedure; and (3) that the decision to terminate blood transfusions was premature and, therefore, negligent.

Midway through trial, before plaintiff finished presenting her case, the hospital moved for a directed verdict. The hospital noted that plaintiff intended to call only two witnesses with regard to the issue of liability; Dr. Peter Tiernan, who participated in the surgery, through his de bene esse deposition, and plaintiff's expert, Dr. Bussey. The hospital argued that a directed verdict was appropriate because, viewed most favorably to plaintiff, Dr. Tiernan's testimony would show that both the decision to perform the Whipple procedure and the decision to stop the blood transfusions were made by Dr. Boccaccio, for whom the hospital could not be held vicariously liable. The hospital further argued that plaintiff should not be permitted to proceed under a theory that Dr. LaPuerta negligently performed the Whipple procedure because that theory was never mentioned by Dr. Bussey in his discovery deposition. The hospital also argued that plaintiff could not prevail under such a theory in any event because the undisputed evidence established that Dr. Boccaccio was the surgeon in charge and, as such, he had a non-delegable duty to see that the surgery was performed with due care. After hearing further arguments, the trial court granted defendant's motion for a directed verdict, explaining:

> It's a legal question and that's what it comes down to.
>
> I have an expert, Dr. Bussey, who specifically states the two breaches of the standard of care are the decision to do the Whipple procedure, under the circumstances of the case and the decision to stop that. Now, your own witness then goes on to make it very clear that Dr. LaPuerta did not make the decision to do the surgery, nor to stop the transfusion. In fact, his testimony is just the opposite. It was clear from everything in here that Dr. Boccaccio made the decision as to the surgery and Dr. LaPuerta proceeded to do the surgery.
>
> And I think in light of this case offered by the Defendant at 408 Mich 248, which is a Supreme Court case, that the doctor is in charge of the operation and it is a non-delegable duty to see that the operation was performed with due care. I think – I don't think that you have legally – I don't think legally you will be able to establish your proximate cause and, therefore, the motion is granted.

Following the directed verdict, plaintiff refused to consent to an order dismissing Dr. Boccaccio. Dr. Boccaccio filed a motion to enforce the terms of the release and settlement agreement. The trial court subsequently entered an order dismissing Dr. Boccaccio pursuant to the release and settlement agreement that was placed on the record on the first day of trial. This appeal followed.

II

Plaintiff argues that the trial court erred in ruling that there was a valid release of Dr. Boccaccio and settlement of plaintiff's claims against him, and that the hospital's vicarious liability through Dr. Boccaccio was thereby extinguished. Plaintiff alternatively argues that if this Court does not set aside the release, it should reform it to constitute a covenant not to sue.

Although we agree that the trial court properly declined to enforce the settlement agreement as a covenant not to sue, we conclude that under the circumstances presented here, the settlement agreement should not have been enforced as a release. There was sufficient uncertainty regarding the intended terms of the oral settlement, as placed on the record,[1] to require that the trial court, when questions arose regarding the intended meaning of the agreement shortly after it was placed on the record,[2] declare that the purported agreement failed for lack of a meeting of the minds, and leave the parties to further negotiations or trial.[3] This is especially so where the same attorney was representing the doctor and the hospital.

Accordingly, we vacate the trial court's order enforcing the release and settlement agreement.

III

Plaintiff also argues that the trial court erred in granting a directed verdict in favor of the hospital. We agree.

A trial court's decision to grant a directed verdict is reviewed de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). This Court must view the testimony and all legitimate inferences drawn therefrom in a light most favorable to the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds could differ. If reasonable minds could differ, a directed verdict is inappropriate. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

The trial court directed a verdict on plaintiff's theory that the decision to perform a Whipple procedure, rather than over-sew the bullet hole, constituted malpractice on the basis of the court's factual determination, upon review of Dr. Tiernan's de bene esse deposition, that Dr. LaPuerta did not make the decision to do the surgery and that Dr. Boccaccio made the decision. However, reasonable minds could differ with regard to whether Dr. LaPuerta made the decision to perform the Whipple procedure.

Dr. Tiernan testified at deposition in pertinent part:

Q. After opening the abdominal cavity what was done next in the operative procedure that you can recall, Doctor?

A. Well, they moved the greater omentum and did a gingerly search around the small bowel, check the colon, and palpate the stomach to see that the nasogastric tube was in place. But these were not done as thoroughly as I have seen before because Leo [LaPuerta] was sort of like a kid and he squealed, "Oh, boy, a Whipple." And so Leo really, as fast as he could, proceeded to try to perform a Whipple.

* * *

Q. And the, I believe, you said – what did he do next after that?

A. I think –see, [Dr. LaPuerta] didn't do a real thorough job, that I recall, of inspecting the small bowel. But you would have checked the small bowel to see if there was any injury there and there really wasn't any reason to believe there was. And it, basically, was a halfhearted attempt. I do believe that he checked the stomach to see that there was a nasogastric tube in the right place, maybe checked the colon quickly, but really, I think, he was in a rush to do his Whipple.

Q. You believe he just – a cursory examination of these organs and then proceeded to a Whipple.

A. Yeah. I would say halfhearted.

Q. You say it was halfhearted because he didn't take the time that he normally would do?

A. I say that because he exclaimed, "Oh, boy, a Whipple. Let's do a Whipple."

* * *

Q. Okay, I understand. At that point in time did you know the reason why he thought a Whipple would be done, medical reason why?

A. At the time I really couldn't understand it and I did propose, "Well, you know, you could just over sew the bullet holes and just check for injuries." And [Dr. LaPuerta] said, "No. We are doing a Whipple. We've got duodenal trauma, we're doing a Whipple."

Q. It's your understanding he was doing a Whipple because of the trauma to the duodenum in the second and third portions?

A. Yeah. That's what he said.

* * *

Q. As a third year resident at the time did you think there was a massive injury – third or fourth year, however you classified yourself, did you think there was a massive injury to the duodenum.

A. No. In fact, I explained to him – I suggested that he just over sew the bullet holes. Actually, I just recalled something a little bit later. There was another possible motive for Leo to do the Whipple and that was it was just it was a person to practice on, it was somebody to practice.

* * *

Q. Did Dr. Boccaccio say anything in response to Dr. LaPuerta's statement that he would do a Whipple?

A. Well, he hesitated and then said, "Yeah, go ahead."

* * *

Q. So at that point in time two people agreed to do it; Boccaccio and LaPuerta, and your suggestion was that they just over sew?

A. Right

* * *

Q. At that point in time had Dr. Boccaccio said anything else other than merely saying, "Go ahead with the Whipple" and later on saying, "Keep going. This is just practice." Did he say anything else?

A. I think at that point he started taking more interest in the case and started looking and trying to be more active, but he didn't really say much more.

Viewed most favorably to plaintiff, reasonable jurors could conclude that Dr. LaPuerta made the decision to perform the Whipple procedure and that Dr. Boccaccio acquiesced in that decision. Accordingly, the trial court erred in granting a directed verdict on the basis of its factual determination that the decision to perform the Whipple procedure was made solely by Dr. Boccaccio.

The trial court also held, relying on *Orozco v Henry Ford Hospital*, 408 Mich 248; 290 NW2d 363 (1980), that Dr. Boccaccio, as the doctor in charge of the operation, had a non-delegable duty to see that the operation was performed with due care and, therefore, as a matter of law Dr. LaPuerta's conduct could not be a proximate cause of damages.

In *Orozco*, the plaintiff presented evidence that one of the doctors performing his operation made the statement, "Oops, I cut in the wrong place." The trial court granted a directed verdict for the defendant, Dr. Ponka, because the plaintiff could not identify which doctor made the admission. The Supreme Court reversed, stating:

> Dr. Ponka was in charge of the operation. Even assuming another doctor made the admission, it would not relieve Ponka of responsibility. See *Barnes v Mitchell*, 341 Mich 7; 67 NW2d 208 (1954). He had a non-delegable duty to see that the operation was performed with due care.

While *Orozco* recognizes that a supervisory physician is responsible for the conduct of his or her subordinates, it does not hold that those subordinates are thereby relieved of liability for their own negligence, or that a hospital is relieved of vicarious liability for the negligence of its subordinate agents or employees. Moreover, that a subordinate agent or employee is personally liable for torts in which he actively participates, and conversely, that a principal is vicariously liable for the acts of its employees or agents committed within the scope of the employment or agency relationship, is consistent with general agency principles. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996); *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986); *Trail Clinic, PC v Bloch*, 114 Mich App 700, 709; 319 NW2d 638 (1982).

Accordingly, we conclude that the trial court erred in dismissing plaintiff's claims that Dr. LaPuerta was negligent and the hospital was vicariously liable on the basis of *Orozco*.

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

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White

[1] On March 4, 1996, the date set for trial, plaintiff and Dr. Boccaccio reached a settlement agreement:

> THE COURT: This is the time and date set for trial in this case and I understand the parties have reached an agreement as to one of the Defendants, a Dr. Poccaccio [sic]?
>
> [PLAINTIFF'S COUNSEL]: That is correct, your Honor.
>
> THE COURT: And are you ready to place that settlement on the record?
>
> [DEFENSE COUNSEL]: Yes, your Honor.

[Plaintiff's personal representative identified, and oath administered]

THE COURT: Counsel, do you want to place the terms of settlement on the record, please?

[PLAINTIFF'S COUNSEL]: Sure.

EXAMINATION

BY [PLAINTIFF'S COUNSEL]

Q. Ms. Vickers, you have brought a claim on behalf of the Estate of Delanso Johnson against St. John Hospital and a Dr. John Poccaccio [sic]. Is that correct?

A. That's correct.

Q. And have you now reached a settlement as to Defendant Dr. John Poccaccio [sic], only?

A. Yes, I guess.

Q. And are the terms of the settlement that, in exchange for compensation of $10,000.00 to the Estate, you will dismiss Dr. John Poccaccio [sic] as a Defendant in this case, only?

A. Yes.

Q. And you still have the right to proceed with your cause of action against the hospital?

A. Right, yes.

THE COURT: [Defense counsel] do you have any questions?

[DEFENSE COUNSEL]: Yes.

EXAMINATION

Q. [DEFENSE COUNSEL]: Ms. Vickers, as the Personal Representative of the Estate, you understand that by releasing -- by settling with Dr. Poccaccio [sic] 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. Poccaccio [sic]?

A. Yes.

Q. And do you believe that, that releasing Dr. Poccaccio [sic] is in the best interest of the Estate at this time, for the $10,000.00 ?

A. Yes.

Q. Do you understand that this, once and for all, ends any claims that you may have against Dr. Poccaccio [sic] for the claims of the death of Delanso Johnson?

A. Yes.

[DEFENSE COUNSEL]: I have no further questions.

THE COURT: Do you understand that today is the time and date set for trial and the jury may have awarded you more, less, the same amount, or nothing at all? Do you understand that?

THE WITNESS: M'hm. (AFFIRMATIVE)

THE COURT: You also understand that – well, I want to rephrase that.

[DEFENSE COUNSEL]: Your Honor, I do have one other question.

THE COURT: Go ahead.

EXAMINATION

BY [DEFENSE COUNSEL]:

Q. Do you understand that, as I understood it, the terms of the payment of the $10,000.00 on behalf of Dr. Poccaccio [sic] was included as part of the release agreement, a confidentiality clause ? Do you understand that?

THE COURT: You have no objection to that Counsel, or your client ?

[PLAINTIFF'S COUNSEL]: We're reserving our rights against the hospital, so it's certainly any matters that relate to the claim against the hospital we would not give any –

THE COURT: We're not asking about the hospital, we're just talking about the one defendant.

[DEFENSE COUNSEL]: I'm just talking about just as to the terms of the settlement.

[PLAINTIFF'S COUNSEL]: Right, that's fine.

EXAMINATION BY THE COURT

THE COURT: With the doctor, all right. Do you enter this agreement or settlement freely and voluntarily? No one has coerced you or pushed you into this?

THE WITNESS: No.

THE COURT: All right. I will make a finding that it is in the best interest of the Estate to settle with the one Defendant for the amount of $10,000.00. Let me place on the record, particularly in view of the fact that there was a $7,500.00 mediation in this matter.

Before we continue here, I want you to be well aware, as Personal Representative of the Estate, that the hospital has made an offer to resolve the case against them in the amount of $25,000.00, in addition to the ten, and that I have communicated that offer to your attorneys and that they have told me that you have declined that amount. Is that correct?

THE WITNESS: That is correct.

[2] Following the placement of the settlement on the record, the court addressed the motions in limine. During these discussions, plaintiff's counsel requested certain portions of Dr. Boccaccio's personnel file. The following discussion ensued:

THE COURT: Well, my problem is, I don't know how you're going to get anything from this doctor's file now that he's not a party. I mean, how are you going to get a foundation to even use it?

[PLAINTIFF'S COUNSEL]: Well, respondeat superior. Under – if they're, you know, ostensible agent –

THE COURT: No.

[DEFENSE COUNSEL]: No, they just released the hospital for any actions of Dr. Poccaccio [sic], your Honor.

[PLAINTIFF'S COUNSEL]: No, I thought we reserved that rights [sic] against the hospital.

[DEFENSE COUNSEL]: They reserved their case against the hospital, but they just put on the record that they released Dr. Poccaccio [sic] and, as I understand it, your Honor, a release [as] to the agent releases the master.

[PLAINTIFF'S COUNSEL]: That's exactly why Counsel made the statement that he was reserving the rights against the hospital.

[DEFENSEL COUNSEL]: They have a case against the – they plead a case against the hospital, but they've also plead a case for the hospital as the master of Dr. Poccaccio [sic], and I specifically asked the Personal Representative [] whether or not she released Dr. Poccaccio [sic] and she did, and so I don't think that there's any claim now by the Estate against the hospital for the actions of Dr. Poccaccio [sic], nor against Dr. Tiernan since he was never sued. Not Dr. Tiernan, excuse me – Dr. Lapuerta.

[PLAINTIFF'S COUNSEL]: We specifically reserved that, you Honor. Mention was made that we were, as to his acts, on behalf of the hospital, we were not releasing him as related to the hospital. I specifically stated that on the record.

[DEFENSE COUNSEL]: That was not made. They said they were reserving – the only time that came up, Judge, was when I asked about the confidentiality and they said that they wanted to bring up – they weren't releasing any – weren't maintaining confidentiality about the actions of the hospital which I, obviously, had no objection to. I specifically asked the Personal Representative whether or not she released Dr. Poccaccio [sic]. There was no objection at that time and Mrs. Vickers candidly admitted that she did. I don't think there's any debate about this, whatsoever.

THE COURT: I don't think there is either. Your request is denied.

[3] We do not disagree with the dissent's discussion of the law pertaining to releases and covenents not to sue. We also acknowledge that the word "release" was used in placing the settlement on record. However, we do not agree that the misunderstanding related only to the legal effect, and not the terms, of the agreement. As set forth in footnote 1, plaintiff was examined by her own attorney regarding the settlement. The word "release" was not mentioned, and the questioning made clear that the doctor, but not the hospital, would be dismissed. The word "release" was injected by defense counsel. To be sure, plaintiff's counsel should have been more alert to the use of the term. However, counsel was not reviewing a written document, and the colloquy took place in the context that the hospital was expressly retained in the suit. Plaintiff's counsel made this clear again when the confidentiality issue was raised. Plaintiff's failure to object to the use of the word "release" by defense counsel when plaintiff was questioned does not, in this context, mean that there was agreement as to the term.