

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

ABDUL AL-SHIMMARI,

Plaintiff-Appellant,

v

SETTI S. RENGACHARY, M.D,

Defendant-Appellee.

UNPUBLISHED  
November 1, 2005

No. 259363  
Wayne Circuit Court  
LC No. 04-407162-NH

---

ABDUL AL-SHIMMARI,

Plaintiff-Appellant,

v

THE DETROIT MEDICAL CENTER, HARPER-  
HUTZEL HOSPITAL, UNIVERSITY  
NEUROSURGICAL ASSOCIATES, P.C., and  
SETTI S. RENGACHARY, M.D,

Defendants-Appellees.

No. 262655  
Wayne Circuit Court  
LC No. 04-407162-NH

---

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

**I. FACTS**

Plaintiff, who suffered from chronic back pain due to a 1999 back injury, consulted defendant in June of 2001 regarding back pain, leg pain and depression. Defendant performed surgery on plaintiff on September 17, 2001. Plaintiff claims that, after the surgery, he continued to have pain, particularly in his leg. In February of 2002, an EMG showed that plaintiff had nerve injury to his right side. In July of 2002, another doctor concluded that plaintiff had sustained nerve injury after surgery that resulted in weakness in his right leg.

Plaintiff filed his complaint with the circuit court on March 10, 2004. Plaintiff submitted a proof of service that on March 11, 2004, the process server personally served defendant.

Defendant, however, disputes that he was served on that date and instead avers that he was not served until March 18, 2004.

Defendant moved for summary disposition on the basis that the statute of limitations barred plaintiff's claim.<sup>1</sup> Defendant stated that he was not appropriately served with process "and has never been appropriately served." Plaintiff countered that his process server personally served defendant on March 11.

The court held an evidentiary hearing regarding the service of process issue; five witnesses testified: (1) Process Server Lois Wincel; (2) defendant; (3) defendant's employee Lakesha Newson; (4) plaintiff; and (5) Postmaster Roger Blackwell. Process Server Lois Wincel testified that she received information from plaintiff's counsel, including defendant's business address, a map and a photograph of defendant. She noted that defendant was to be personally served. She testified that on March 11, 2004, she went to University Neurosurgical Associates, but defendant was not there. She found defendant at the Harper Professional Office Building on the ninth floor. Her notes indicate that she served "Glen Arch" at 2:15 p.m.; her personal shorthand for defendant's name was "Glen Arch" because she kept thinking in her mind "Glen Gachary" [Rengachary].

She said she did not have a proof of service with her that day, so she did not obtain defendant's signature when she served him. She walked up to the receptionist area and saw defendant standing to one side. She motioned to the receptionist that she was looking for defendant and asked if he was Rengachary. When he said "yes," she responded that she had paperwork for him. He took the summons and complaint from her and she left. She remembered serving defendant; she believed he was wearing a white coat.

She did not sign the proof of service until a later date. Because plaintiff's counsel had a medical problem, she did not meet with him immediately. Plaintiff's counsel's firm did not employ her, so the firm was not a regular stop for her. She said she was "positive" she had made personal service on defendant.

Defendant denied ever seeing Wincel before and denied that she had served him personally on March 11, 2004, at 2:15 pm. He stated that he never wears a white coat while he is in the clinic, but prefers to wear a suit-coat. He claimed that he was served with the lawsuit on March 18, when a man "barged in" through the front door, of the clinic, left the summons on the desk and left. He believed that the man had been in court the previous Friday.<sup>2</sup>

At the conclusion of the hearing, the circuit court ruled:

---

<sup>1</sup> In the interim, plaintiff had moved for a default for the failure of all of the defendants to timely answer, but the circuit court set that aside.

<sup>2</sup> In light of the above conflicting testimony, the writer chose not to summarize the testimony of the remaining witnesses.

Based upon the testimony that I've heard, the Court is not persuaded that Ms. Wincel served, personally, Dr. Rengachary on the 11<sup>th</sup> of March. The Court is of the opinion that she perfected service on someone, in all likelihood, she perfected service on Dr. Guthikonda, who told Dr. Rengachary that there was a lawsuit and asked him about it, and he said he didn't have anything to do with the services that were rendered to Abdul Al-Shimmari, that don't worry about it.

Until . . . [March 18], that was when he was served, which was beyond the statute of limitations. And that being the situation, the motion for summary disposition, I believe that's under (C)(7) is granted.

The court's order of October 22, 2004, granted defendant's motion for summary disposition and dismissed plaintiff's claims pursuant to MCR 2.116(C)(7).

On November 16, 2004, the remaining defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). They argued that, because the suit against Rengachary was barred by statute, the remaining defendants could not be held vicariously liable as principals. Thus, all claims should be dismissed except the direct claims of negligent acts of the DMC and Harper Hospital; plaintiff had not made independent claims of negligence against UNSA. In a supplemental brief, defendants added a motion for dismissal pursuant to MCR 2.116(C)(10) arguing, first, that plaintiff had not created a genuine issue of material fact regarding an agent-principal relationship between Rengachary and the DMC or Harper Hospital; rather, plaintiff and Rengachary had an independent physician-patient relationship which was primarily carried out at the UNSA office. Harper Hospital was merely the situs of the surgery and there had been no testimony regarding whether the DMC or Harper Hospital had negligently allowed plaintiff to form a reasonable belief that Rengachary was their agent. Second, the DMC and Harper Hospital argued that there was no evidence that they, or their employees, had controlled any aspect of plaintiff's surgery or had been directly involved in any negligent acts.

The court dismissed the case in its entirety with prejudice pursuant to MCR 2.116(C)(7) based on Rengachary's earlier dismissal. Plaintiff appeals the grant of summary disposition in favor of Rengachary by leave granted and appeals by right the later grant of summary disposition in favor of the remaining defendants. These appeals were consolidated by order of this Court on July 8, 2005.

## II. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(2),(3),(7),(8) and (10). This Court reviews motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The court granted summary disposition pursuant to MCR 2.116(C)(7), ruling that the statute of limitations barred plaintiff's claim. This Court considers all documentary evidence submitted and accepts as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). This Court views the uncontradicted allegations in the plaintiff's favor and ascertains whether the claim is time-barred as a matter of law. Whether a statute of limitations bars a claim is a question of law that this Court reviews de novo. *Id.*

### III. ANALYSIS

#### A. Service of Process

MCR 2.116(C)(7) allows for summary disposition where

[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

Parties advocating or opposing a motion under MCR 2.116(C)(7) may submit documentary evidence in support of their positions. MCR 2.116(G)(2). The court must consider these materials and must accept as true any uncontradicted, well-pleaded allegations of the nonmoving party. MCR 2.116(G)(5). Under proper circumstances, the court may order an immediate trial to resolve any issue of disputed fact; however, for motions pursuant to MCR 2.116(C)(7), if a jury trial has been demanded, “the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.” MCR 2.116(I)(3).

Here, plaintiff properly demanded a jury trial when he filed his complaint. Whether the factual dispute involved warrants a jury, however, has not been directly addressed by Michigan case law. The case most closely on point is *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500 (1991), which resolved a previous split among Court of Appeals panels regarding a preliminary factual issue in the context of a MCR 2.116(C)(7) motion. In *Kermizian*, the general two-year statute of limitations had already run but the plaintiff sought to take advantage of MCL 600.5838(2), which allows for medical malpractice claims to be filed within six months after a plaintiff discovers, or should have discovered, the existence of the claim. *Id.* at 691. The deposition testimony of plaintiff and two physicians “raised an issue of fact regarding when plaintiff had reason to know that the surgery was performed in an improper manner.” *Id.* at 696. Thus, the issue could not be decided as a matter of law. *Id.*

The question became whether the trial court had properly decided this preliminary factual issue rather than submitting it to the jury. The *Kermizian* Court adopted the reasoning in *Moss v Pacquing*, 183 Mich App 574; 455 NW2d 339 (1990), and concluded that MCR 2.116(I)(3) required a jury trial because there was a disputed factual issue. *Kermizian, supra* at 692. The *Moss* Court had noted the “long line of cases which held that, where there is a dispute concerning the date when a plaintiff discovered, or reasonably should have discovered, his cause of action, this factual determination is to be made by a jury.” *Id.* at 293, quoting *Moss, supra* at 580. More generally, this Court also stated that “nothing” in MCR 2.116(I)(3) “expressly repudiates the time-honored precepts that where no factual disputes exist, the question becomes one of law appropriate for the trial court to answer, but that where a factual dispute does exist, the question is to be answered by a jury.” *Kermizian, supra* at 693, quoting *Moss, supra* at 581.

Both *Kermizian* and *Moss* explicitly addressed preliminary factual issues involving a plaintiff’s discovery of his claim; the cases did not purport to address all preliminary issues related to motions for dismissal based on the statute of limitations. However, we find that the jury trial requirement of MCR 2.116(I)(3) should apply to issues of fact regarding service of

process when they bear on motions under MCR 2.116(C)(7). For instance, we note *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004), in which our Supreme Court recently examined the scope of the right to trial by jury. There, the Court addressed the constitutionality of a statutory cap on damages for which vehicle lessors may be liable in certain negligence suits. MCL 257.401; *Id.* at 423. In concluding that the cap was constitutional, the Court distinguished between the role of the jury as factfinder and of the courts and legislature in determining sentences, fees and the limits of a cause of action. *Id.* at 429-430. Specifically, the Court stated that, although the amount of damages which are recoverable from a particular defendant may be limited by law, it is still the jury's purview to determine the amount of damages incurred. *Id.* at 428, 430. The Court emphasized the ongoing role of the jury in determining the underlying facts, stating that the legal import of the facts should be determined by the court, but "[i]t is for the jury to assimilate the facts presented at trial, draw inferences from those facts, and determine what happened in the case at issue." *Id.* at 428.

With regard to the specific facts in the case at hand, facts relating to the act of service are less central to the underlying claim than are facts concerning the discovery of the substance of a claim, *Kermizian, supra* at 692, or the actual damages incurred, *Phillips, supra* at 328. However, MCR 2.116(C)(3) provides a separate basis for dismissal based merely on the insufficiency of service of process and, notably, MCR 2.116(I)(3) does not require a trial by jury if the court determines that an immediate trial is necessary to resolve facts related to a motion under MCR 2.116(C)(3). Thus, the court rules themselves distinguish between threshold factual questions related only to service and questions raised under MCR 2.116(C)(7) regarding whether the statute of limitations has expired.

Moreover, the *Kermizian* Court explicitly rejected language in *Blana v Spezia*, 155 Mich App 348, 354; 399 NW2d 511 (1986), which suggested a broader factfinding role for the court in determining factual issues concerning the statute of limitations. *Kermizian, supra* at 692. *Blana* was the opposition case which was overruled when the *Kermizian* Court adopted the *Moss* approach. *Blana* suggested that the new 1985 Michigan Court Rules "may indicate a broader role for the trial judge in deciding factual issues concerning the application of the statute of limitations." *Blana, supra* at 354. As authority for this proposition, the *Blana* Court referred to MCR 2.116(G)(5), which requires courts to consider the evidence submitted by parties in conjunction with motions for dismissal under MCR 2.116(C)(1)-(7) and (10). *Id.* The *Moss* and *Kermizian* Courts held that this was an incorrect inference to draw from MCR 2.116(G)(5). Instead, that rule merely mandates that "the trial judge take advantage of as broad a base of evidentiary material as possible before determining whether a material factual dispute exists." *Kermizian, supra* at 693, quoting *Moss, supra* at 581.

The factual issues in the instant case are akin to the claim-discovery issue in *Kermizian, Moss* and *Blana*. Despite the sometimes broad language of these cases, they deal specifically with the issue of claim discovery; their broad reasoning is merely dicta when extended to all factual issues involved in motions under MCR 2.116(C)(7) based on the expiration of the statute of limitations. However, summary disposition for insufficient process is a separate basis for dismissal, MCR 2.116(C)(3), which may involve fact finding by the trial court. MCR 2.116(I)(3). Whereas, dismissal due to the expiration of the statute of limitations, MCR 2.116(C)(7), has more extensive and substantive effects given that it likely permanently bars a cause of action. Thus, facts related to service of process warrant consideration by a jury when

they bear on the expiration of the statute of limitations. Accordingly, under *Kermizian*, a trial court may not decide a motion under MCR 2.116(C)(7) as a matter of law if there is an underlying factual dispute concerning service when it bears on the expiration of the statute of limitations. *Kermizian*, *supra* at 694.

With regard to determining whether there *is* a factual dispute in conjunction with a motion under MCR 2.116(C)(7), the *Kermizian* Court used language somewhat similar to the standard for determining whether summary disposition is proper under MCR 2.116(C)(10) because of the absence of a genuine issue of material fact. *Kermizian*, *supra* at 694, 696 (“[h]ere, a fact question exists”; the depositions “raise an issue of fact”).

On its face, the standard under MCR 2.116(C)(7) appears slightly different than that of MCR 2.116(C)(10). Under MCR 2.116(C)(10), a genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court must consider the evidence submitted by the parties in the light most favorable to the nonmoving party. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). Whereas, in motions under MCR 2.116(C)(7), a court is to “consider all documentary evidence submitted by the parties and accept as true the plaintiff’s well-pleaded allegations, *except those contradicted by documentary evidence*. We view the *uncontradicted* allegations in the plaintiff’s favor.” *McKinney*, *supra*, 237 Mich App 201 (emphasis added). Thus, the MCR 2.116(C)(7) standard is arguably less favorable to the nonmovant, who appears not to benefit from having *all* evidence viewed in his favor as under MCR 2.116(C)(10).

Regardless, any difference between the two standards would be so slight that it would be difficult to meaningfully apply. Second, even if MCR 2.116(C)(7) requires a plaintiff to meet a slightly higher evidentiary burden to avoid dismissal, here plaintiff has met that burden. That is, the parties’ stories regarding service amount to a balanced contest of credibility; the evidence need not be viewed in plaintiff’s favor to warrant submitting the issue to a jury. Wincel testified, consistent with her affidavit of service, that she served Rengachary on March 11, 2004, in a clinic where he regularly worked. She attested that she asked him if he was Rengachary, that he said “yes,” and that she handed him the paperwork. She was positive that the man she served was the same man identified as Rengachary at the evidentiary hearing. Despite the word “Glenarch” in Wincel’s notes, she also noted the full name “Dr. Rengachary” as well as the time he was served; this time was consistent with the time listed on the affidavit of service.

Moreover, the alternative version of events based on the testimony of Rengachary and Newton does not render Wincel’s version so implausible that a reasonable jury would be precluded from believing Wincel. That is, beyond Rengachary’s assertion that he was never served, defendants’ remaining evidence does not necessarily contradict Wincel’s version of events, regardless that it challenges the likelihood of her version. Wincel “believe[d]” Rengachary was wearing a white coat when she served him, but she did not say she was certain, nor was there direct evidence that Rengachary was not wearing a white coat on March 11, 2004. Rather, he and Newton attested to his habit of wearing a suit in the clinic. Further, plaintiff attested that Rengachary sometimes wore a white coat, although plaintiff was not sure at which location. In addition, although Rengachary’s normal clinic hours were from 8:00 a.m. to 12:00 p.m., a jury could reasonably find that the evidence did not prove that he never altered his hours or never had reason to be in suites 925 or 930 at other times. Finally, despite Newton’s

testimony that she had not seen Wincel serve Rengachary and that Newton would have been with Rengachary if he was working on March 11, 2004, a jury could reasonably conclude that Newton was not with Rengachary during every moment of his work day. Notably, defendants did not provide explicit evidence that Rengachary was somewhere else on March 11, 2004, at 2:15 p.m.

Further, the evidence that Wincel served Guthikonda, rather than Rengachary, is not overwhelming. Rengachary testified that Guthikonda called him and asked, among other things, “why am I served?” Rengachary did not say what day he received this call. Moreover, this statement would likely be inadmissible hearsay if offered to prove that Guthikonda was served; and “evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.” MCR 2.116(G)(6). Moreover, even despite that the trial court did not admit Guthikonda’s e-mail to defense counsel, the e-mail merely states that Guthikonda has “some papers” about the case. Guthikonda did not say that he was served; there was no evidence that he was working in suite 925 or 930 of the office building on March 11, 2004; and, significantly, the March 17, 2004, date of his e-mail does not directly imply that he received the papers nearly a week before on March 11<sup>th</sup>. We also note that Guthikonda is connected to defendant UNSA – in fact he is listed as its agent on the printout referenced,– and, therefore, a jury could infer that there are other explanations for why Guthikonda may have had papers related to the suit in his possession.

Plaintiff also provided an alternative explanation to rebut defendants’ claim that the letter mailed to Rengachary on March 15, 2004, was proof that plaintiff doubted the effectiveness of the March 11, 2004, personal service. Plaintiff’s counsel explained that using both avenues of service was his practice to “cover all basis [sic]”; each defendant in the case had been served both personally and by mail. Finally, the evidence that Rengachary was served by a man on March 18, 2004 will not be considered by this panel given that the trial court did not allow plaintiff to fully rebut this claim. After Rengachary misidentified the process server, plaintiff also wanted to call as a witness the man Newton identified as the server; plaintiff’s counsel claimed the man was an attorney unrelated to the case who was present in the courtroom for other reasons. The court did not allow his testimony, finding it “peripheral” to the issue whether Rengachary was actually served on March 11, 2004.

In conclusion, plaintiff presented an issue of fact concerning which he had a right to trial by jury. Thus, the trial court erred in dismissing the case pursuant to the court’s own findings of fact, and the decision should be reversed and remanded for this reason.<sup>3</sup>

---

<sup>3</sup> We note that plaintiff argues that Rengachary waived his right to claim lack of service by failing to object before participating in the suit and that through his attorneys, he entered a general appearance in the trial court by negotiating for a filing extension and for a stipulation regarding evidence. Defendants’ attorneys’ actions were not sufficient to constitute a general appearance on Rengachary’s behalf. A party may still waive his right to object to service if he submits to the court’s jurisdiction by entering a general appearance and contesting a suit on the

(continued...)

## B. Other Issues

Given our dispositive decision that the trial court erred in granting the motion for summary disposition, we decline to address the issues of equitable estoppel and whether the return of service was inaccurate. Further, our conclusion that the trial court erred in granting summary disposition precludes our review of whether the trial court should have granted the motion for reconsideration.

## C. Summary Disposition for Remaining Parties

Plaintiff argues that even if Rengachary had been properly dismissed from suit, it was error for the court to grant summary disposition in favor of the remaining defendants merely because their agent was dismissed; a plaintiff may sue a negligent agent's principals, alone, as long as suit is brought within the statute of limitations. We agree.

The remaining defendants were dismissed in error given that Rengachary was improperly dismissed as discussed, *supra*. However, analysis of the remaining defendants' claim is necessary because it will be dispositive if Rengachary is properly dismissed on remand.

Case law supports plaintiff's argument. We first look to *Kambas v St Joseph's Mercy Hospital of Detroit*, 33 Mich App 127; 189 NW2d 879 (1971), which was later reversed on grounds relating to the application of the malpractice statute of limitations to registered nurses. *Kambas v St Joseph's Mercy Hospital of Detroit*, 389 Mich 249; 205 NW2d 431 (1973). The latter *Kambas* case was then superseded by statute with regard to that issue. See *Whitney v Day*, 100 Mich App 707, 712; 300 NW2d 380 (1980). Similarly, the second case, *Dyke v Richard*, 40 Mich App 115; 198 NW2d 797 (1972), was reversed because this Court erred in determining the start date of the statute of limitations under the "last treatment" rule. *Dyke v Richard*, 390 Mich 739, 747; 213 NW2d 185 (1973). *Dyke*, too, was superseded by statute on the issue of the treatment rule. *Morgan v Taylor*, 434 Mich 180, 187 n 13; 451 NW2d 852 (1990). However, in each instance, the Michigan Supreme Court's reversals of this Court's decisions do not call into question the basic proposition that a malpractice statute of limitations which bars suit against an agent also bars suit against his principals. Both cases quote the following passage: "A statute that bars a claim against an agent equally protects those in [sic] whose behalf he acted as agent, where there are no circumstances of equity to prevent the operation of the statute in their favor." 34 Am Jur, Limitation of Actions, § 386, p 299; *Dyke, supra*, 40 Mich App 119-120; *Kambas, supra* at 132.

Nonetheless, in those cases, the principal hospitals which were dismissed from suit had been sued *after* the statutes of limitations applying to the agents had expired. *Dyke, supra* at 117, 120; *Kambas, supra* at 129, 132. The cases did not consider whether the rule would apply where a principal had been properly sued before the limitations period ended. Plaintiff therefore raises an interesting line of cases which shed doubt on whether the *Dyke-Kambas* rule should be

---

(...continued)

merits. *Penny v ABA Pharmaceutical Company (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993).

applied blindly to the facts of the instant case. A hospital may be held vicariously liable for the acts of its agents even when the hospital is the only named defendant in a suit. *Nippa v Botsford General Hospital (On Remand)*, 257 Mich App 387, 390; 668 NW2d 628 (2003), citing *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 14-15; 651 NW2d 356 (2002). In part, this is because there is a “practical identity” created by law between a principal and its agents. *Nippa, supra* at 391, quoting *Cox, supra* at 11 (internal citation omitted). “The principal is held to have done what the agent has done. The law contemplates that the agent’s acts are the principal’s acts and that the principal “is constructively present at them all.”” *Id.* Given that a principal may be the sole defendant in a malpractice suit premised on vicarious liability, plaintiff argues that it would be nonsensical to dismiss a timely served principal merely because the agent was not timely served. Plaintiff aptly notes a potential absurd result; a timely served principal who is the sole defendant in a suit could, as a matter of course, wait for the statute of limitations to run and then file for dismissal under MCR 2.116(C)(7) because the agent had not been served within the limitations period. Such a result would effectively nullify a plaintiff’s traditional right to bring the principal as a sole defendant.

Although a plaintiff may sue a principal, alone, it is axiomatic that a defendant may not be vicariously liable where its agent was not negligent. *Ravenis v Detroit General Hospital*, 63 Mich App 79, 83-84; 234 NW2d 411 (1975). Moreover, the explicit release of an agent from a suit precludes a finding of vicarious liability on the part of the principal. *Larkin v Otsego Memorial Hospital*, 207 Mich App 391, 393; 525 NW2d 475 (1994). However, the dismissal of an agent does not shield the principal under all circumstances. For instance, in *Larkin, supra* at 393, this Court distinguished between a release and a covenant not to sue. There, the parties stipulated to the dismissal of the agent doctor with prejudice. *Id.* The principal hospital subsequently moved for dismissal under MCR 2.116(C)(7) (based on barring the suit because of release). *Id.* at 392. This Court ruled that summary disposition in favor of the hospital was improper because the stipulation had operated as a covenant not to sue rather than as a release. *Id.* at 396. Most significant to the instant case, in distinguishing a covenant from a release, this Court stated that the

difference is primarily in the effect relative to third parties and is based mainly on the fact that in the case of a release there is an immediate release or discharge extinguishing the cause of action, whereas in the case of a covenant not to sue there is merely an agreement not to prosecute a suit. [*Id.* at 395-396.]

This Court also noted that the covenant was not based on the merits of the claim. *Id.* at 394. Further, the fact that the dismissal was “with prejudice” on its face appears to have been irrelevant to the analysis. *Id.* at 392. Rather, the substance and effect of the stipulation was at issue. This Court concluded that, as a result of the dismissal: “[a]lthough the issues are res judicata as between [the plaintiff] and [the doctor], the dismissal did not relinquish [the plaintiff’s] claim and extinguish the malpractice action. It did not operate as a release of the defendant hospital.” *Id.* at 396.

Likewise, the fact that the dismissal in the instant case was with prejudice should not control the analysis. Rather, this Court must examine the effect of Rengachary’s dismissal on plaintiff’s underlying claim. On one hand, as was the case with the stipulation in *Larkin*, a dismissal based on the statute of limitations is not a dismissal on the merits, at least for purposes of res judicata. *Ozark v Kais*, 184 Mich App 302, 308; 457 NW2d 145 (1990). Thus,

Rengachary's dismissal reflects no determination on his underlying negligence, regardless that he may now be immune from suit. On the other hand, the expiration of the statute of limitations may be said to have extinguished plaintiff's claim against Rengachary; plaintiff lost the right to ever bring the claim against Rengachary.

Rengachary was not dismissed on the merits; thus, the reasoning in *Larkin*, when combined with the holdings in *Cox, supra* at 14-15, and *Nippa, supra* at 390, suggests that Rengachary's dismissal did not operate to extinguish plaintiff's underlying malpractice claim against the remaining defendants. Instead, the cause of action against the remaining defendants survived given that plaintiff had properly served them and plaintiff could have chosen to bring suit against them, alone. Even if plaintiff's right to sue Rengachary was procedurally extinguished, there was no release or adjudication extinguishing the substance of plaintiff's underlying claim of malpractice. Therefore, since Rengachary's dismissal did not address the merits of his acts, his acts may remain a basis for suit against the properly served remaining defendants.

We decline to review the issue of whether Rengachary was the actual agent of the hospital because the issue was not included in plaintiff's statement of questions involved and, furthermore, it was not decided in the trial court. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *Brown, supra* at 599. Rather, defendants raised this issue in a supplemental brief in the trial court. However, at the hearing, after plaintiff noted the lack of discovery on the issue and defendants stated that they were "really encouraging th[e] court on the (C)(7) issue," the court granted summary disposition based on MCR 2.116(C)(7) and did not address the motion under MCR 2.116(C)(10). Moreover, neither party actually advocates consideration of the issue on appeal.

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

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Bill Schuette