COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-1224 **Cir. Ct. No. 04CV000255**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CHAD T. MONTOUR, CHRISTOPHER A. MONTOUR AND JAMES J. MONTOUR,

PLAINTIFFS-RESPONDENTS,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

PLAINTIFF,

V.

REGENT INSURANCE COMPANY, THE MCCLONE AGENCY, INC. AND ROBERT A. DILLENBURG,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Regent Insurance Company, the McClone Agency, Inc., and Robert A. Dillenburg (collectively Regent), appeal an order declaring invalid three releases of liability that, if held valid, would bar this action. The issue is whether the trial court properly resolved the issue on summary judgment in the plaintiffs' favor. We affirm.

¶2 The plaintiffs are Chad, Christopher, and James Montour. Their parents, Tom and Jane Montour, were killed when their motorcycle collided with a car driven by Dillenburg. At the time of the accident, Dillenburg was employed by the McClone Agency.

¶3 The sons retained an attorney, Daniel Aschenbrener, to pursue claims against Dillenburg and any other potentially liable parties. Aschenbrener concluded from information Dillenburg's attorney provided that Dillenburg and his personal automobile insurer, Wisconsin Mutual Insurance Corporation, were the only potentially liable parties.

¶4 The Montours, Dillenburg, and Wisconsin Mutual subsequently settled the claims, with Wisconsin Mutual agreeing to pay its policy limits. In exchange, the Montours each executed a general release of liability. Although each release differed in its wording, we assume for purposes of this opinion that each was sufficient to release all potential parties from liability for the accident.

¶5 Several weeks after settlement was concluded, Aschenbrener learned that Dillenburg may have been acting within the scope of his employment when the accident occurred, and that previously unrecognized claims against the McClone Agency and its insurance carrier might exist. This action followed. The Montours are suing the McClone Agency and Regent under a respondeat superior

theory, and are also seeking a declaration that the releases they signed were invalid because they resulted from a mutual mistake of the signing parties.

¶6 Regent moved for a summary judgment dismissing the complaint because, it contended, the releases were valid. The Montours opposed the motion, and presented evidence that neither the Montours nor Dillenburg realized the existence of other liable parties until after they settled. The trial court concluded that Regent was not entitled to summary judgment on the issue, but that the Montours were entitled to an order invalidating the releases because they resulted from a mutual mistake. With no releases in effect that barred the respondeat superior claim, the court ruled, the Montours could proceed on the claim. Regent petitioned for leave to appeal this interlocutory order and we granted leave.

¶7 Summary judgment is appropriate if there are no disputed issues of material fact, and only one reasonable inference is available from the undisputed facts. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). The party against whom the motion for summary judgment is asserted may receive summary judgment under this standard, if appropriate. WIS. STAT. § 802.08(6) (2003-04).[1] Our review of an order granting summary judgment is de novo. ***Strasser v. Transtech Mobile Fleet Serv. Inc.***, 2000 WI 87, ¶¶28-30, 236 Wis. 2d 435, 613 N.W.2d 142.

¶8 A settlement agreement may be set aside for a mutual mistake of fact. *See* ***Grand Trunk W. R.R. Co. v. Lahiff***, 218 Wis. 457, 461, 261 N.W. 11 (1935). Mutual mistake exists where both parties are unaware of a fact material to

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

their agreement. WIS JI—CIVIL 3072. The unawareness must derive from a lack of knowledge of the possibility that the fact may or may not exist. ***Id.*** Conscious doubt or uncertainty about the existence or non-existence of a fact does not establish mutual mistake. ***Id.***

¶9 Regent contends that there is a material fact dispute concerning a mutual mistake because Chad Montour testified that he knew the rule of law that extends liability to an employer for an employee's acts. In Regent's view, that knowledge triggered a duty on the Montours to investigate whether Dillenburg was acting within the scope of his employment when the accident occurred, such that his employer shared his liability. In seeking a trial on whether the Montours fulfilled that investigative duty, Regent relies on the principle of law set forth in WIS JI—CIVIL 3072 that "if the parties are conscious or aware of, or alerted to, the possibility that a fact does or does not exist, and they waive any inquiry or make no investigation with respect to it," they cannot obtain relief for a mutual mistake of fact. Regent also cites the holding in ***Conner v. Welch***, 51 Wis. 431, 440-43, 8 N.W. 260 (1881), in which the court held that a party to the contract may not invoke the doctrine of mutual mistake if the party's failure to discover the mistaken fact is attributable to negligence.

¶10 Notwithstanding Chad Montour's familiarity with the doctrine of respondeat superior, the undisputed evidence does not allow the inference that the Montours were negligent or that they failed to adequately investigate Dillenburg's employment status. It was undisputed that, before the settlement, Aschenbrener asked Dillenburg's attorney for information on all possible sources of liability coverage for Dillenburg. The latter responded that there were no other potentially liable parties besides Wisconsin Mutual. At the time, Dillenburg and his attorney knew that the Montours' damages exceeded Wisconsin Mutual's limits, giving

them motivation to discover and disclose all possible coverages. Under those circumstances, Aschenbrener reasonably relied on the assurance that only Dillenburg and Wisconsin Mutual had potential liability. In other words, his reliance on opposing counsel to discover and disclose information highly beneficial to opposing counsel's client creates no inference of negligence or of an inadequate investigation. Nor, in turn, does the Montours' reliance on Aschenbrener. A trial on the question was therefore unnecessary because the only available inference required a ruling in favor of the Montours.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.