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Case Number 233,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICOLE B. VERRASTRO, as Surviving Daughter of Bridget E. Verrastro, and Administratrix of the Estate of Bridget E. Verrastro,	) No. 233,2018
Plaintiffs Below, Appellants,	)
v.	) ON APPEAL FROM SUPERIOR COURT OF THE STATE OF DELAWARE
Bayhealth Hospitalists, LLC	) C.A. No. N14C-10-159 PRW
Defendants Below, Appellees,	)

AMENDED OPENING BRIEF ON APPEAL OF PLAINTIFFS BELOW, APPELLANTS NICOLE B. VERRASTRO, AS SURVIVING DAUGHTER OF BRIDGET E. VERRASTRO, AND ADMINISTRATRIX OF THE ESTATE OF BRIDGET E. VERRASTRO

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Dated: August 7, 2018

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NATURE AND STAGE OF PROCEEDINGS

On October 17, 2014, Appellants, Plaintiffs Below (hereafter "Plaintiff" or "Nicole") filed a medical negligence complaint naming as defendants, among others, Bayhealth Hospitalists, LLC. (hereafter "Bayhealth") vicariously and as employer of two physicians, Rebakah Boenerjous and Tricia Downing. The physicians were also named individually. (A-106). The complaint was timely filed within the statute of limitations. Service was timely made on Bayhealth but not on the two physicians who had discontinued their employment and relocated, one to New York (Downing) and one to New Jersey (Boenerjous), facts not known to Plaintiffs or Plaintiffs' counsel at the time.

Service was never perfected on the two physicians within the prescribed time period. They filed a Motion To Dismiss which was granted on September 24, 2015. (A-071)

The litigation proceeded through discovery. On December 19, 2017, Defendant Bayhealth filed a Motion for Summary Judgment contending that the dismissal of the servant – employees entitled their principal to be excused from the litigation because the servants had been dismissed "on the merits", citing *Greco v. University of Delaware*, 619 A.2d 900, 905-906 (1993), (hereafter "Greco"). The question posed in this appeal is whether a dismissal for failure of service on a servant equates to a dismissal "on the merits" of a principal named vicariously as a defendant

on grounds having nothing to do with the service of process. This appeal seeks clarification of the Greco decision and a reversal of the Trial Court's decision granting summary judgment to Bayhealth Hospitalists, LLC. (Exhibit C)

SUMMARY OF ARGUMENT

A defendant principal of tortious servants is not entitled to summary judgement because the servants were dismissed from the litigation on failure of service of process. Greco is inapposite; Greco's "on the merits" terminology does not reverse settled principal-agent respondeat superior law.

STATEMENT OF FACTS

Plaintiffs allege that Bridget Verrastro, who reported to the emergency room of Defendant Bayhealth Medical Center, Inc. d/b/a Kent General Hospital, on August 13, 2012 was treated negligently by health care providers. (A-108-114) Named Defendants, Drs. Boenerjous and Downing, attended her and allegedly failed to secure the services of a thoracic surgeon, Dr. Paul A. Fedalen, M.D., for a large mass compressing the patient's left lung and heart (A-109).

Service was never accomplished on the two physician – employees of Defendant Bayhealth Hospitalists, (A-211, A-213) which now claims a right to summary judgment because the Court decided to dismiss the physicians on a procedural shortcoming. (A-251, A-264) (Exhibit C) Bayhealth argues that it is entitled to a judgment "on the merits" and relief from its otherwise vicarious liability under the doctrine of respondeat superior. (A-268, A-269)

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BECAUSE IT GRANTED SUMMARY JUDGMENT TO A TIMELY-SUED PRINCIPAL WHEN SERVICE OF PROCESS WAS NOT TIMELY ACCOMPLISHED AGAINST ITS ALSO SUED AGENTS.

A. QUESTION PRESENTED

Is a principal sued in its capacity as respondeat superior entitled to summary judgment because there was a failure of service of process on its agent?

This issue was preserved in the course of argument on the Bayhealth Hospitalists, LLC Motion For Summary Judgment (A-389).

B. SCOPE OF REVIEW

This case presents a question of law to be decided *de novo*.

Greco v. Univ. of Delaware, 619 A.2d 900 (Del. 1993).

C. MERITS OF ARGUMENT

While it is axiomatic that an employer is liable for the wrongful acts of its employees committed in the course of their employment, Restatement (Second) of Agency §1, §§ 219,229 (1958); *Fisher v. Townsends, Inc.*, 695 A.2d 23, 58 (Del. 1997), a different question is raised if the employee is named as a defendant but then dismissed for reasons unrelated to the wrongful conduct.

A principal sued in its respondeat superior capacity is not entitled to summary judgment simply because of the failure of service of process on the alleged servant

wrongdoers. The Defendants and Court Below relied on Greco to support summary judgment.

Greco was a medical negligence lawsuit brought against a health-care provider and her employer, The University of Delaware. The case was filed outside the applicable two-year statute of limitations, which the parties acknowledged. The plaintiff there then argued that a general three-year statute of limitations saved her claim but the Court ruled otherwise, using this language:

> In this case, Greco's claims for medical negligence against Dr. Talbot are acknowledged by Greco to be barred by the medical malpractice statute of limitations. 18 *Del. C.* § 6856. Since Dr. Talbot (the employee) is not liable to Greco on the merits, because Greco's claims are barred by medical malpractice statute of limitations, there is no vicarious liability to be imputed to Dr. Talbot's employers, the University and the Student Health Care Center. *A fortiori,* the two-year time limitation in the medical malpractice statute, which admittedly bars Greco's claims against Dr. Talbot, accrues to the benefit of her employers. The result of the time bar to Greco's claim for medical negligence against Dr. Talbot is a failure of Greco's vicarious claims on the theory of *respondeat superior* against Dr. Talbot's employers, the University and the Student Health Center.

When hospitals are named as defendants in medical negligence cases alleging only institutional liability vicariously for the negligence of unnamed individual health care providers (i.e. nurses, emergency room personnel, radiologists) they are

not entitled to be dismissed as a principal.[1] As a practical matter, if Greco becomes settled law as stated, whenever there is any question going forward about locating and serving an individual who committed the alleged negligence, practitioners will not take the risk of a procedural miscue in serving the individual. This will have implications for liability coverage; in effect the hospital will not get the benefit of separate coverage that may be available to a radiology or other group practices not named as a party in the litigation.

In *Angulo v. City Phoenix*, (Ariz. App., 2013) a Memorandum Decision (Attached as Exhibit B), the court discussed the issue presented here, whether a "procedural error" resulting in dismissal of a tortious employee should entitle the employer to summary judgment "on the merits". The court stated:

> "*** dismissal with prejudice of the claims against the employee on a procedural ground should not require dismissal of the complaint alleging respondent (SIC) superior liability against the employer" (at p.3),

and citing *Hovatter v. Shell Oil Co.*, 111 Ariz. 325, 326 529 P.2d 224, 225 (1974) "holding that dismissal without prejudice against agent after the statute of limitations had run is not a determination on the merits".

To the same effect see *Hedquist et. al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. et. al.* 272 Ga. 209, 528 S.E.2d 508 (Ga. 2000). There the court cited to

[1] See for instance, Simmons v. Bayhealth Medical Center, Inc., 950 A2d. 659 (2008) (A-382)

a lower court "where the Court of Appeals reversed the grant of summary judgment to the vicariously liable employer because the dismissal of the action against the employee for insufficient process and insufficient service thereof was not a dismissal on the merits"; *Hughes v. Jane Doe, c/o Pratt Medical Center, Ltd. et. al.* 639 S.E.2d 302 (Va. 2007).

The reliance of The Court Below on the Greco language "on the merits" to grant summary judgment to the employer sued vicariously was misplaced.

CONCLUSION

For the reasons stated here Appellants respectfully request the Court to reverse the judgment of the Court Below and remand for a new trial.

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