EFiled: Aug 16 2018 04:53PM EDT
Filing ID 62357567
Case Number 233,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

The Estate of BRIDGET E. VERRASTRO, (deceased) and NICOLE B. VERRASTRO, as Surviving Daughter of Bridget E. Verrastro, and CHRISTOPHER GIERY as the Executor of the Estate of Bridget E. Verrastro,	)	No. 233-2018
Plaintiffs Below, Appellants,	)	Court Below: Superior Court of the State of Delaware
v.	)	C.A. No.: N14C-10-159 PRW
BAYHEALTH HOSPITALISTS, LLC d/b/a BAYHOSPITALISTS, LLC,	)	
Defendant Below, Appellee.	)	

DEFENDANT BELOW, BAYHEALTH HOSPITALISTS, LLC'S ANSWERING BRIEF

Wharton Levin Ehrmantraut & Klein, P.A.
Gregory S. McKee (Bar I.D. 5512)
Lauren C. McConnell (Bar I.D. 5035)
300 Delaware Avenue, Suite 1110;
P.O. Box 1155; Wilmington, DE 19801
Telephone: (302) 252-0090
Attorneys for Defendant Below, Appellee, Bayhealth Hospitalists, LLC

Dated: August 16, 2018

TABLE OF CONTENTS

Content **Page**

CITATIONS

Cases **Page**

Statute

Rules

Other

NATURE OF PROCEEDINGS

Plaintiff-below/Appellant, Nicole B. Verrastro (hereinafter "Ms. Verrastro") filed a medical negligence claim against multiple Defendants, including Bayhealth Hospitalists, LLC[1], claiming a failure to timely diagnose a chest mass which ultimately resulted in the patient's demise (A-103 – A-115). Plaintiffs filed their Complaint on October 17, 2014 (A-102) stemming from allegations that ultimately led to the death of Bridget E. Verrastro on August 13, 2012 (A-103). Prior to the filing of the Complaint, the individual Defendants, Rebakah Boenerjous, M.D. and Tricia Downing, M.D., were never served with any notice that litigation was being contemplated (A-188; A-192; A-197; A-200).

On August 11, 2015 Defendants Boenerjous and Downing filed a Motion to Dismiss, claiming that since the individual physicians were never put on notice prior to the expiration of the statute of limitations set forth under 18 Del. C. § 6856, the Plaintiffs' Complaint failed to state a claim upon which relief could be granted and moved for dismissal of these individuals with prejudice (A-158). On September 24, 2015[2], the Court granted Defendants' Motion to Dismiss with prejudice (A-261).

At the close of discovery, once it was determined that there were no independent allegations of negligence against the corporation, Bayhealth

[1] Bayhealth Hospitalists, LLC is incorrectly referred to as "Bayhealth Hospitalists, Inc." in Appellants' opening brief at Page 1.
[2] This date is erroneously referenced as September 25, 2014 in Plaintiffs' Table of Contents.

Hospitalists, LLC moved for summary judgment, again citing 18 Del. C. § 6856 and arguing that since the individual physicians were dismissed, the employer could not be held vicariously liable for their actions. (A-264). On March 2, 2018, after oral arguments were held, the Court granted Defendants' Motion for Summary Judgment (A-008).[3]

In granting Defendants' Motion for Summary Judgment, the trial court noted that the Plaintiffs' argued that the individual physicians were dismissed "for reasons relating only to the efficacy of the notice to investigate letters, sent pursuant to 6856(4)." (A-392). However, the court noted that the failure to properly serve the Notice of Intent letter to the individual physicians resulted in the expiration of the statute of limitations which was the basis for the initial dismissal of those two individual Defendants. (A-393). Based upon the fact that the individual physicians were dismissed under a failure to timely notify them within the statute of limitations, and the controlling decision in the *Greco v. University of Delaware*, 619 A.2d 900 (Del. 1993), the trial court found in favor of Defendant, Bayhealth Hospitalists, LLC, for the underlying Summary Judgment Motion. (A-393). This appeal followed.

[3] Appellants failed to include the Order from which the appeal follows in their initial brief to the Court. Therefore, the docket entry is cited.

SUMMARY OF THE ARGUMENT

1. Appellants requested relief should be denied. The trial court did not commit reversible error in granting summary judgment for this Defendant. Plaintiffs failed to file the instant Complaint within the applicable statute of limitations pursuant to 18 Del. C. § 6856. While the statute of limitations was tolled as to other Defendants based upon the Notice of Intent to Investigate letter properly served upon them pursuant to 18 Del. C.§ 6856(4), Defendants Boenerjous and Downing were never served with his notice.

Defendants filed a Motion to Dismiss the Complaint, specifically citing the statute of limitations and arguing that since they were never served with the Notice of Intent, a tolling of these limitations did not take place and the individual Defendants should be dismissed with prejudice. The trial court properly dismissed the Defendants with prejudice, concluding that the dismissal was directly related to the statute of limitations and not on a procedural shortcoming. (Exhibit 1 at Transcript P. 33)[4]; (*See also* A-261 – 263).

Upon the filing of the Motion for Summary Judgment on behalf of the corporate Defendant, the Court allowed full briefing of the issue to take place and

[4] On September 24, 2015 the Court held oral arguments on the Motion to Dismiss filed by Drs. Boenerjous and Downing, as well as another motion unrelated to this appeal. In the interests of clarity and judicial economy, an excerpt from the hearing transcript is attached as Exhibit 1.

held oral arguments on March 2, 2018. At that time, the trial court heard the specific argument that the Appellants are now making on appeal. The trial court properly rejected the Appellants' argument that the dismissal of the individual Defendants was predicated on a procedural error, rather than the statute of limitations (A-392 – 393). The trial court properly held, pursuant to the *Greco* decision, that when the individual agent is dismissed "on the merits," liability cannot then be attached to the principal. Similar to the decision in *Greco,* the agent was dismissed since it was beyond the statute of limitations and the same benefit accrues to the employer.

STATEMENT OF FACTS

Appellants commenced the instant medical negligence and wrongful death action on October 17, 2014, claiming that the Defendants failed to timely diagnose and treat a mediastinal mass from August 12, 2012 – August 14, 2012. (A-103 – 115). Appellants further assert that this failure to timely diagnose and treat this mass resulted in the patient's demise (A-103 -115). Appellants elected to wait until after two years before filing suit in the Superior Court of the State of Delaware. Prior to that, Appellants attempted to toll the applicable statute of limitations codified under 18 Del. C. § 6856 by sending notification letters of an intent to investigate a potential claim to the Defendants.

Without investigating the matter, the Appellants assumed the individual Defendants, Boenerjous and Downing, had remained employees of Bayhealth Hospitalists, LLC over these preceding two years. However, Dr. Boenerjous' employment relationship with the corporate entity ended in October 2012 (A-179 – 180). Dr. Downing's ended in June 2014. (A-182 - 184). The Notice of Intent letters which were sent to the individual physicians, care of their prior employer (Bayhealth Hospitalists, LLC), were returned as "undeliverable." This occurred on both July 30, 2014 as well as August 13, 2014. (A-320, 323, 329).

On December 17, 2014, undersigned counsel filed an Entry of Appearance on behalf of the Defendant, Bayhealth Hospitalists, LLC, including Drs. Boenerjous

and Downing, explicitly reserving the right to raise all available jurisdictional, service and statute of limitation defenses. Defendants' counsel also began to investigate whether service was properly effectuated.

On August 11, 2015 Drs. Boenerjous and Downing filed a Motion to Dismiss the Plaintiffs' Complaint for failure to state a claim upon which relief could be granted, citing Supr. Ct. Civ. Rule 12(b)(6), (4)(j) and 18 Del. C. § 6856. (A-332). In support of their motion, the Defendants set forth facts demonstrating that neither physician was ever served with a Notice of Intent to Investigate which would toll the statute of limitations. The Plaintiffs did not dispute the factual representations made in this motion. (A-342).

The argument put forth in the individual Defendants initial Motion to Dismiss was never predicated solely upon failure of service of process. Rather, the motion is predicated on a violation of the statute of limitations. By electing to file the Complaint after the statute of limitations had expired, and knowing that the attempts to serve the individual physician Defendants with Notice of Intent to Investigate letters were returned as undeliverable, Appellants knew or should have known that the pending litigation against Drs. Boenerjous and Downing would be violative of 18 Del. C. § 6856. Defendants' Motion to Dismiss (A-332), its Reply to Plaintiffs' Opposition (A-344) and argument at oral hearing (Exhibit 1) were all predicated on the statute of limitations, not a procedural defect that could be cured. The trial court

ultimately concluded that the action against Drs. Boenerjous and Downing went beyond the two year statute of limitations under 18 Del. C. § 6856 and therefore dismissed those Defendants with prejudice. (A-261).

Discovery commenced against the corporate Defendant as well as the remaining named health care providers. During this period of time, the criticism directed toward Bayhealth Hospitalists, LLC was vicariously for the acts of either Dr. Boenerjous and/or Dr. Downing. There was no independent allegation of negligence against the corporation throughout the discovery period. Based upon this, the corporate Defendant filed a Motion For Summary Judgment on December 19, 2017. (A-264).

In support of its motion, the corporate Defendant argued that there was no independent allegation of negligence against it. Moreover, under Delaware law, a viable cause of action for negligence against the employee is a condition precedent to imputing liability for that negligence to the employer under the doctrine of *respondeat superior*. (A-266). It was argued that since the individual tortfeasors for Bayhealth Hospitalists, LLC were dismissed as time barred under 18 Del. C. § 6856, this adjudication was considered "on the merits" and negligence could not therefore be imputed to the employer since an adjudication for the agent on statute of limitations accrues to the benefit of the employer as well. In support of its motion,

the corporate Defendant cited *Greco v. University of Delaware*, 619 A.2d 900 (Del. 1993).

Oral arguments were held on March 2, 2018. (A-373 – 393). Both on the papers and at the hearing, Appellants argued that the dismissal against the individual Defendants was procedural and not "on the merits." However, the Appellants were unable to squarely address the rationale in the *Greco* decision, or to otherwise offer any authority counter to *Greco*. (A-385 – A-392).

In deciding this case, the trial court noted that the Plaintiffs failed to provide any supporting authority for their position that any court has taken a different view than *Greco* on this particular issue. The court found that *Greco* was controlling insofar as when an individual physician is dismissed based upon the statute of limitations, it serves as an adjudication on the merits for purposes of whether liability can be imputed to the employer under the theory of *vicarious liability*. (A-391 –393). The court also rejected the Appellants' arguments that Drs. Boenerjous and Downing were dismissed "for reasons relating only to the efficacy of the Notice to Investigate letters…" (A-392). The Court noted that the failure of that Notice of Intent to toll the statute of limitations means that the distinction is unavailing and summary judgment should be granted in favor of the corporate Defendant.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT NO CAUSE OF ACTION COULD EXIST AGAINST BAYHEALTH HOSPITALISTS, LLC SINCE THE UNDERLYING INDIVIDUAL PHYSICIANS, REBAKAH BOENERJOUS, M.D. AND TRICIA DOWNING, M.D., HAD BEEN DISMISSED WITH PREJUDICE AS THEY WERE NEVER NOTIFIED OF THE POTENTIAL FOR A LAWSUIT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS SET FORTH BY 18 DEL. C. § 6856.

A. Question Presented

Whether the Court committed reversible error when it granted judgment in Defendant's favor, holding that since the employees had been dismissed for failure to file within the statute of limitations, that no liability could be imputed to the corporate employer?

Defendant preserved this issue in its Motion for Summary Judgment (A-264 –302), and at oral argument (A-373 –393).

B. Scope of Review

This Court reviews a grant of summary judgment *de novo. Cleotox Corp. v. Catrett,* 477 U.S. 317 (1986). "Viewing the facts and reasonable inferences in the light most favorable to the non-moving party, if an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find in that party's favor, then summary judgment is appropriate." *Edminsten v. Greyhound Lines,* 49 A.3d 1192, 2012 WL 3264925, at * 2 (Del. Aug. 13, 2012).

Where the Appellants fail to include all portions of the record relevant to the claims on appeal, this Court is precluded from undergoing appellant review and must affirm the lower court's ruling. *Trioche v. State*, 525 A.2d 151, 154 (Del. 1987); Super. Ct. R. 9 (e)(ii) and 14 (e).

C. Merits of Argument

1. Appellants' failure to include all relevant portions of the record necessary for appellate review warrant affirmation of the trial judge's grant of summary judgment for Defendant.

Appellants failed to include in the opening brief a copy of the order or orders of judgement being appealed pursuant to Supr. Ct. Civ. Rule 14(b)(vii). Further, Appellants failed to include "the complete docket entries in the trial court arranged chronologically in a single column" required by Supr. Ct. Civ. Rule 14(e). this includes the following:

a. Relevant excerpts from oral argument on Motion to Dismiss dated September 24, 2015; and,

b. Order of the Trial Court dated April 6, 2018 by which the Appellants seek an appeal.

These materials are necessary for appellate review to determine whether (1) the claimed error was preserved on the record which includes any exhibits attached to the pretrial motions and statements made at oral argument; (2) because Appellants' appeal is premised on the arguments raised in the papers as well as at oral argument; and, (3) to properly evaluate whether the record supported the court's

determination that the original dismissal of the individual Defendants was based upon failure to comply with the statute of limitations as opposed to some procedural defect of properly effectuating service.

2. The trial court properly concluded that when the individual employees were dismissed for failure to comply with the applicable statute of limitations, the dismissal was appropriately considered to be "on the merits" and thus vicarious liability cannot be imputed to the corporate entity.

Under Delaware law, a viable cause of action for negligence against the employee is a condition precedent to imputing liability for the negligence or wrongdoing to the employer pursuant to the doctrine of *respondeat superior*. *Greco v. University of Delaware,* 619 A.2d 900, 903 (Del. 1993)(citing 2 Mechem on Agency § 2012, pp. 1581 – 82 (1914); *See also* RESTATEMENT (SECOND) AGENCY § 217B(2)(1958). Therefore, if an employee, who is a licensed healthcare provider, is not liable to the plaintiff for medical negligence, neither is the employer. *Reyes v. Kent General Hospital, Inc*., 487 A.2d 1142, 1144 (Del. 1984).

A case analogous to the instant litigation is *Greco v. University of Delaware*, 619 A.2d 900 (Del. 1993). In *Greco*, the plaintiff attempted to bring a cause of action against the employer (the University of Delaware) for actions of a treating physician, Dr. Talbot. However, it was agreed by all the parties that suit had been brought against Dr. Talbot beyond the expiration of the statue of limitations. Therefore, judgment was entered in favor of Dr. Talbot since the statute of

limitations had expired. Plaintiff then attempted to proceed against the employer under the Doctrine of *respondeat superior*.

In addressing the same issue presented by this appeal, the Supreme Court held:

> … [T]he alleged negligence of an employee, who is a healthcare provider, must be the focus of any inquiry into the various liability of the employer of the healthcare provider under the doctrine of *respondeat superior* [citation omitted]. If an employee, who is a licensed healthcare provider, is not liable to the plaintiff for medical negligence, neither is the employer. [citation omitted]

Greco, 619 A.2d at 903.

Since the claims against Dr. Talbot had been adjudicated in her favor, the Supreme Court affirmed the decision of the trial court, granting summary judgment in favor of the employer. In doing so, this court reasoned:

> 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 the 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.

Id. at 904.

This Court has made clear in the *Greco* decision that a time bar against the individual employee accrues to the benefit of the employer. In both *Greco* and the instant case, the physicians were dismissed because of a failure of the Plaintiffs/Appellants to comply with the statute of limitations. In both cases, the trial court granted summary judgment in favor of the employer premised on the fact that if the employee cannot be held liable because it is outside the statute of limitations, the employer can likewise not be held liable for that employee's actions.

3. The cases cited by Appellants are inapplicable and/or inapposite to the issue before the Court.

First, Appellants cite *Simmons v. Bayhealth Medical Center, Inc*., 950 A.2d 659 (Del. 2008) to support the proposition that when hospitals are named as defendants in medical negligence cases for the vicarious acts of its employees, dismissal as a principal is not appropriate. First, the *Simmons* case does not deal with the issue on appeal before this court. That case dealt with the sufficiency of expert testimony on the level of duty required by nurses to monitor a patient in order to prevent a fall. Second, nothing in that opinion deals with the scenario that we have in this case insofar as the underlying employee agents were dismissed and whether that serves as adjudication on the merits.

While it is true that Plaintiffs were under no obligation to sue the individual employees, they chose to do so. By initiating suit against the individual employees, they afforded those individuals the same rights and defenses as any other defendant to the litigation. Further, by initiating suit against the employer solely under the theory of vicarious liability, the principal gains the same benefits and defenses of the agents/employees based on the doctrine of *respondeat superior*. See e.g. *Clark v. Brooks*, 377 A.2d 365, 371 (Del. 1977); *Reyes v. Kent General Hospital, Inc.*, 487 A.2d 1142, 1144 (Del. 1984)

Next, Appellants cite *Angulo v. City of Phoenix* 2013 WL 3828778 (Ariz. Ct. App. July 16, 2013) (attached as Exhibit B to Appellants' Opening Brief) (not reported in P. 3d). Appellants indicate that this is a memorandum decision supporting their contention that dismissal with prejudice on the claims against the employee should not require dismissal of the complaint against the employer under the theory of *respondeat superior*. However, there are several fatal flaws with this citation.

First, the decision clearly states in its caption that it "does not create legal precedent and may not be cited except as authorized by applicable rules." (Exhibit B to Appellants' opening brief at p. 1).

Second, Appellants cite a portion of the opinion that they purport to be consistent with her position in this case. However, this is misleading insofar as the

citation cited by Appellants is dicta in a concurring opinion and not the majority opinion.

It is important to note that the *Angulo* case dealt with a claim against an individual and the city after a pedestrian was struck in a crosswalk by a city vehicle. Only the city was served. Because the plaintiff had failed to serve the individual employee with a notice of claim or other summons or complaint, that individual was dismissed with prejudice. After the individual employee was dismissed, the city filed a successful motion for summary judgment, asserting that the employee's dismissal extinguished its potential liability (citing *DeGraff v. Smith*, 62 Ariz. 261, 157 P.2d 342 (1945). The intermediate appellate court and its majority decision upheld the dismissal of the city. In doing so, the court relied upon the same rationale that the Defendant/Appellee is arguing in the instant case, consistent with *Greco*. This intermediate court also noted that the Supreme Court's ruling in *DeGraff* was dispositive on this issue and that since it has not revisited its decision in more than 50 years, the intermediate court has no authority in which to ignore the binding precedent from the state's highest court.

In short, Appellants are citing dicta of a concurring opinion from a jurisdiction with no binding relevance on this Court. In doing so, the Appellants are not only ignoring the majority decision in *Angulo* (which fundamentally supports the Appellee's position in this case) but also ignores the Arizona Supreme Court's

position set forth in *DeGraff* which is entirely consistent with this court's decision in *Greco* and has stood as the governing law in that jurisdiction since 1945 (73 years).

Finally, Appellants cite the cases of *Hedquist, et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al.*, 272 Ga. 209, 528 S.E.2d 508 (Ga. 2000) and *Hughes v. Jane Doe c/o Pratt Medical Center, Ltd., et al.*, 639 S.E.2d 302 (Va. 2007) to support the proposition that insufficient service of process was not a dismissal on the merits. In doing so, Appellants miss the point that the dismissal of the individual employees was not based upon a procedural insufficiency, but on a fundamental violation of the statute of limitations (Exhibit 1 at Transcript p. 33)("the motion to dismiss as to those two individual doctors will be granted for the failure to file the complaint within the statute of limitations that was required.")(*See* also A-393)("where the notice is insufficient to toll the statute of limitations and the action is brought after the two year period, that statute of limitations has expired. And the court found that as to the two employee doctors.") Therefore, it is axiomatic that the court's ruling did not hinge on a technical aspect regarding the sufficiency of the process but rather the substantive right that the defendants have to be put on notice of a potential medical negligence claim within the two-year statute of limitations prescribed under the Delaware Code.

CONCLUSION

Appellants elected to wait until the eve of the expiration of the statute of limitations in order to file a notice of Intent to Investigate to the Defendants, thereby tolling the statute of limitations for a period of 90 days. Prior to the expiration of the statute of limitations the Appellants knew that two of the individual physicians (Drs. Boenerjous and Downing) were not on notice since service was returned. Nevertheless, no attempt to ascertain the current place of regular business or residence for these two individual physicians was ever undertaken. As a result, the statute of limitations had expired against these two Defendants and they were never placed on notice of an impending or contemplated lawsuit prior to the expiration of two years. As such, an appropriate motion to dismiss was made and ultimately granted by the court on September 24, 2015.

Discovery was undertaken with regard to the remaining corporate Defendant. This was done in order to determine whether any independent allegation of negligence existed as to this remaining Defendant or whether all of the allegations were under the theory of *respondeat superior* for either Dr. Boenerjous or Dr. Downing. At the close of discovery and with no independent allegation of negligence against this corporate entity, Bayhealth Hospitalists, LLC filed the appropriate Motion for Summary Judgment. The Defendant relied, in part, on the *Greco* decision in arguing that when the employee is dismissed based upon a

violation of the statute of limitations and the only ground against the employer is for the actions of the employee, the two-year time limitation in the medical negligence statute accrues to the benefit of the employer.

It is respectfully submitted that the trial court properly applied the rationale set forth in the *Greco* decision in dismissing Bayhealth Hospitalists, LLC. Appellants have failed to offer any compelling ground for which this Court should set aside the trial court's decision or to otherwise revisit the basic concepts of vicariously liability that are well established in this state.

Wharton Levin Ehrmantraut & Klein, P.A

/s/ *Gregory S. McKee*
Gregory S. McKee (Bar I.D. 5512)
Lauren C. McConnell (Bar I.D. 5035)
300 Delaware Avenue, Suite 1110
P.O. Box 1155; Wilmington, DE 19801
Telephone: (302) 252-0090
lcm@wlekn.com; gsm@wlekn.com
Attorneys for Defendant Below, Appellee, Bayhealth Hospitalists, LLC

Dated: August 16, 2018