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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,	)

REPLY BRIEF OF APPELLANTS-PLAINTIFFS BELOW, NICOLE B. VERRASTRO, AS SURVIVING DAUGHTER OF BRIDGET E. VERRASTRO, AND ADMINISTRATRIX OF THE ESTATE OF BRIDGET E. VERRASTRO

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SUMMARY OF REPLY ARGUMENT

The crux of Bayhealth's argument is that the Trial Court correctly interpreted the holding of *Greco v. University of Delaware*, 619 A.2d 900 (Del. 1993) to be that a dismissal of an employee on statute of limitations grounds constitutes a ruling "on the merits" that precludes a finding of *respondeat superior* liability against the employer. Resp. Br. at 7-8, 11-15. The language that Bayhealth relies upon, however, is mere dicta because the plaintiff in *Greco* failed to serve *any defendant* within the two-year statute of limitations. Accordingly, the *Greco* Court never meaningfully analyzed whether a dismissal based on statute of limitations grounds is a dismissal "on the merits," and a ruling in the affirmative cannot be squared with well-established Delaware law that statutes of limitations are procedural, not substantive, in nature. Such a ruling would also contravene public policy by discouraging medical negligence plaintiffs from naming individual health care providers in suits also involving the employer or principal of those providers. Other than the dicta in *Greco,* Bayhealth cites no case demonstrating that a statute of limitations dismissal is a merits-based ruling.

ARGUMENT

I. THE TRIAL COURT'S DISMISSAL ON STATUTE OF LIMITATIONS GROUNDS IS NOT A DISMISSAL "ON THE MERITS"

The facts of *Greco* demonstrate that the sentence upon which Bayhealth relies is mere dicta that is insufficient to alter well-settled Delaware law. In *Greco*, a University of Delaware student suffered a grand mal seizure and was required to undergo surgery for a mesenteric vein thrombosis after a university physician failed to realize that the student's documented symptoms were all being caused by a reaction to an oral contraceptive. 619 A.2d at 901-02.

The timing of events in *Greco* is significant. On December 8, 1987, the student was treated by a university physician who recommended she see a neurologist. *Id.* at 901. The student then saw other physicians in her home state of New Jersey, including a neurologist, but ultimately suffered her seizure on December 21, 1987, after which she underwent the extensive surgery. *Id.* The student filed her complaint on December 20, 1989, alleging medical malpractice against the physician (which all parties agreed were time-barred under the two-year medical malpractice statute of limitations) (*id.* at 902) and two theories of liability against the university – (i) vicarious liability under *respondeat superior* for the acts of the university's employee physician and (ii) "non-vicarious claims of direct and independent negligence" governed by the two-year statute of limitations for personal injury. *Id.* at 904, citing 10 *Del. C.* § 8119.

Because the university employee – *i.e.* the physician - was a medical provider, the *Greco* Court applied the 2-year medical malpractice stature of limitations (which plaintiff Greco admittedly failed to meet) to the vicarious liability claim against the university. *See Greco*, 619 A.2d at 903. The Court then applied the two-year personal injury statute of limitations to the negligence claim against the university. *Id.* at 905. Since the Court selected December 8 as the start date when plaintiff Greco "was on notice . . . that something was wrong" (*id.* at 906), her complaint, filed two years and twelve days later, ran afoul of both statutes of limitations against all defendants. *See* Op. Br. at 6 ("The [*Greco*] case was filed outside the applicable two-year statute of limitations, which the parties acknowledged.").

As to the vicarious liability claim against the university, the *Greco* Court stated that an employer is generally not liable based solely on the conduct of its employee unless "culpability on the part of the employee to the injured person has been established by litigation." *Id.* at 903, quoting *Clark v. Brooks*, 377 A.2d 365, 371 (Del. Super. 1977). But the *Greco* Court had no reason to evaluate the culpability of the university physician, because even if that physician *had* been "culpable" for plaintiff Greco's injuries, the plaintiff's complaint was nevertheless untimely because she failed to sue the employer university (or any other party) within the applicable two-year statute of limitations that the university "inherited" from the medical malpractice statute.

The *Greco* Court concluded that: "*A fortiori*, the two-year time limitation in the medical malpractice statute, which admittedly bars Greco's claim against Dr. Talbot, accrues to the benefit of her employers." *Greco*, 619 A.2d at 904. In other words, the employee was being accused of medical malpractice, which carries a two-year statute of limitations that accrued to the employer, and the plaintiff had failed to sue the university employer within that two-year window. The Court's use of the phrase "a fortiori" demonstrates the significance of this point. The term "a fortiori" literally means "from the stronger (argument)" and "is used when drawing a conclusion that's even more obvious or convincing than the one just drawn."[1] The *Greco* Court's "a fortiori" statement immediately follows the sentence about the university physician not being liable "on the merits," which is unnecessary dicta because the Court had no reason to consider the conduct of the physician since the plaintiff failed to sue *anyone* within the two-year statute of limitations. Because it was unnecessary to determine whether or not the university physician had been liable "on the merits," the Court never meaningfully analyzed whether a ruling based on a statute of limitations is a substantive merits-based ruling.

Contrary to Bayhealth's reading of *Greco*, a statute of limitations dismissal cannot be considered a decision on the merits because under Delaware law, statutes

[1]See Merriam-Webster Online Dictionary https://www.merriam-webster.com/dictionary/a%20fortiori (last visited on Aug. 28, 2018)

of limitations are procedural in nature, not substantive. *See, e.g., Sheehan v. Oblates of St. Francis de Sales,* 15 A.3d 1247, 1258 (Del. 2011) ("a civil statute of limitations affect[s] matters of procedure and remedy") (citing *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984) (explaining that "the running of a statute of limitations will nullify a party's remedy" and that a "statute of limitations is . . . . a procedural mechanism"); *American Energy Technologies, Inc. v. Colley & McCoy Co.*, C.A. No. 98-398-MMS, 1999 WL 301648, at *2 (D. Del. Apr. 15, 1999) ("Statutes of limitations are generally considered to be procedural rather than substantive law."); *B.E. Capital Management Fund LP v. Fund.com, Inc.*, 171 A.3d 140, 147 (Del. Ch. 2017) (refusing to apply contractual choice-of law provision to statute of limitations issue because "the statute of limitations is a procedural matter"); *id.* at 147 n. 34 ("most U.S. courts have held that statutes of limitations are procedural") (quotation omitted); *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, C.A. No. 7701-VCL 2015 WL 139731, at *13 (Del. Ch. Jan. 12, 2015) ("statutes of limitations are procedural limitations on remedies").

Delaware law also distinguished between a statute of limitations ruling and a decision "on the merits" in the context of the relation-back doctrine. In explaining the purpose and effect of the relation-back doctrine, this Court stated that statutes of limitations are intended to "prevent a party from sleeping on assertable rights" and

to "avoid undue prejudice," but the extension of statutes of limitations through the relation-back doctrine is designed "to encourage the disposition of litigation on the merits." *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 6 (Del. 2001) (citations omitted). In other words, statutes of limitations are sometimes extended in order to promote adjudications on the merits because a statute of limitations dismissal and an adjudication on the merits are different from one another.

Delaware law is clear that statements of unnecessary dicta, like the statement Bayhealth relies upon from *Greco,* have no precedential value. *See Eastern Sav. Bank, FSB v. CACH LLC*, 55 A.3d 344, 349 (Del. 2012) ("[d]icta quoted from [Delaware precedent] do[es] not override this well-settled rule" that "land sold at a sheriff's sale be transferred free of all nonmortgage liens"); *Humm v. Aetna Cas. And Sur. Co.*, 656 A.2d 712, 716 (Del. 1995) ("This language is *obiter dicta* and is, therefore, not binding as legal precedent.") (citations omitted); *Stoltz Management Co., Inc. v. Consumer Affairs Bd.*, 619 A.2d 1205, 1211 (Del. 1992) (dicta in Superior Court opinion is "far from established precedent and . . . such dicta is unsupportable" in established landlord-tenant law); *State ex rel. State Highway Dept. v. 9.88 Acres of Land*, 253 A.2d 509, 511 (Del. 1969) (language from earlier Supreme Court opinion was "dictum since the record before us then was not sufficient to permit the question to be passed on"); *Opinion of the Justices*, 198 A.2d 687, 690 (Del. 1964) ("It is a well-settled rule of law that statements amounting to

mere *obiter dicta* do not become binding precedents and fall outside the rule of *stare decisis*.").

Moreover, to the extent the Court considers the underlying justifications it has previously attributed to statutes of limitations, there is no evidence in the record that Plaintiffs slept on their rights or that Bayhealth has suffered any undue prejudice. To the contrary, Plaintiffs filed their Complaint within the two-year statute of limitations (A-102) and Bayhealth was able to fully defend this lawsuit and makes no argument that it suffered any undue prejudice.

This result is consistent with other jurisdictions that permit vicarious liability claims against a timely-sued principal to proceed even though claims against its agent are time-barred. *See, e.g., Krekelberg v. City of Minneapolis*, C.A. No. 13-3562, 2018 WL 3621031, at *3 (D. Minn. July 30, 2018) ("the Court is persuaded that there is a meaningful distinction between a dismissal that actually confronts the merits of the agent's liability and a dismissal for some other purely procedural or tactical reason"); *id.* ("Where an agent has been dismissed for reasons that do not address the actual merits of the plaintiff's claim, the agent's liability may still be established in the agent's absence."); *Cohen v. Alliant Enterprises, Inc.*, 60 S.W. 3d 536, 539 (Ky. 2001) ("[A] plaintiff may bring suit under a vicarious liability theory without first filing suit and getting a judgment against the agent. The negligence of Dr. Ewing can be established at trial in Appellant's suit against Alliant."); *Leow v.*

A&B Freight Line, Inc., 676 N.E. 2d 1284, 1285 (Ill. 1997) (involuntary dismissal of employee on statute of limitations grounds is not a decision "on the merits" that would bar timely *respondeat superior* claim against employer).

Accordingly, the *Greco* Court never meaningfully addresses whether a statute of limitations dismissal is a merits-based ruling, and the Court's dicta suggesting otherwise is inconsistent with established Delaware law and should be afforded no precedential deference.

II. THE TRIAL COURT'S RULING WILL DISCOURAGE CLAIMS AGAINST INDIVIDUAL CULPABLE EMPLOYEES

Bayhealth admits in its response brief that "Plaintiffs were under no obligation to sue the individual employees." Resp. Br. at 14. Indeed, there is no requirement that an agent be named as a defendant in order to satisfy the language of *Greco* that "culpability" of that agent be "established by litigation." *Greco*, 619 A.2d at 903. Bayhealth's admission is telling for reasons of both law and public policy. As a matter of law, and as the Supreme Court of Illinois explained in *Leow*, "[c]onsidering that the employee is not even a necessary party to the litigation against the employer . . . dismissal of [the employer] based on plaintiff's delay in adding [the employee] makes no sense at all." *Leow*, 676 N.E. 2d at 1288.

In terms of public policy, barring a claim against the employer under these circumstances will discourage plaintiffs from suing individual defendants, and will result in less information and notice to employers as to the nature of the plaintiff's claims. If the Trial Court's dismissal of Bayhealth is permitted to stand, no reasonable plaintiff will name presumed individual hospital employees as medical malpractice defendants. Instead, a medical malpractice plaintiff will name only the hospital employer, knowing that demonstrating "culpability" – *i.e.* negligence – by any employee will be sufficient to hold the institution liable under principles of *respondeat superior*. No reasonable plaintiff will risk dismissal of *all* claims against

all defendants simply because the plaintiff might be required to timely track down a transient hospital employee that is no longer employed by the defendant entity. This unfortunate result will make the pleading stage less precise and more cumbersome because the hospital employer will be forced to ferret out the claims of alleged wrongdoing and allocate blame among the relevant employees.

III. PLAINTIFFS' ALLEGED FILING ERRORS DO NOT JUSTIFY AFFIRMATION OF TRIAL COURT ERROR

Bayhealth alleges that Plaintiffs have failed to include in their Supreme Court opening brief a copy of the Trial Court's order and a complete copy of the Trial Court docket, and that this error "warrant[s] affirmation of the trial judge's grant of summary judgment." Resp. Br. at 10.[2] Plaintiffs' Amended Opening Brief contains a version of the Trial Court's Order that was entered by the Trial Court later that same day. *See* Op. Br. at Ex. C. The Trial Court's Order referenced a hearing of March 2, 2018, the relevant excerpts of which are also included in Plaintiffs' Amended Opening Brief. *See* Op. Br. at Ex. A. Plaintiffs included a complete copy of the Trial Court docket in their Appendix to Amended Opening Brief filed on July 31, 2018. The Trial Court docket is therefore part of the record and is labeled "A. 001-102." To the extent Plaintiffs committed any uncorrected procedural or filing error, Bayhealth cites no case demonstrating that an erroneous Trial Court ruling should be upheld as a result. Additionally, Bayhealth cannot claim to have suffered any prejudice because it could have included, and in fact did include, additional materials as an exhibit to its response brief.

[2] This clerical error was corrected on the record before Defendant Bayhealth filed its Answering Brief.

CONCLUSION

For all the aforementioned reasons, as well as those stated in Plaintiffs' opening brief, Plaintiffs respectfully request that the ruling of the Trial Court be reversed and this matter be remanded for further proceedings.

Dated: August 29, 2018

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