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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTIANA CARE HEALTH SERVICES INC.,	§	No. 58, 2019
Defendant- Petioner Below, Appellant,	§	On Appeal From the Superior Court of the State of Delaware, C.A. No. N17C-05-353 MMJ
v.	§	
MEEGHAN CARTER Individually and as Administratrix of the Estate of MARGARET RACKERBY FLINT, Decedent,	§	
Plaintiffs-Respondents Below, Appellees.	§	

APPELLEE'S ANSWERING BRIEF

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Dated: May 6, 2019

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NATURE AND STAGE OF PROCEEDINGS

Meeghan Carter, Individually and as Administratrix of the Estate of Margaret Rackerby Flint ("Plaintiffs"), filed this medical negligence action on May 22, 2017. (B-1). Plaintiffs' Complaint alleged that during a left total hip replacement on October 1, 2015, Michael Principe, D.O. and Eric Johnson, M.D. lacerated Ms. Flint's left external iliac vein and disregarded brisk bleeding that was identified intra-operatively, culminating in her untimely passing on October 3, 2015. (B-4). Medical Negligence, willful misconduct and wrongful death were plead against Drs. Principe and Johnson. (B-8-B11). Medical negligence and willful misconduct via agency were plead as to Christiana Care Health Services, Inc. ("CCHS"). Plaintiffs sought special, general and punitive damages as remedies. (B-11-B-12). Plaintiffs amended the Complaint on May 25, 2017, pleading claims of medical negligence and wanton misconduct via agency against Dr. Principe's practice group, Delaware Orthopaedic Specialists, P.A. ("DOS"), and Dr. Johnson's practice group, First State Orthopaedics, P.A. ("FSO"). (B-14-15; B-24-25).

All aforementioned parties participated in mediation occurring on October 13, 2017 – each representing its own distinct interests. (B-75-76). The claims asserted against Dr. Principe and Delaware Orthopaedic Specialists, P.A., were resolved via Joint Tortfeasor Release ("Principe JTR") executed on October 27, 2017. (B-350-354). Thereafter, the remaining parties commenced discovery.

Prior to the close of discovery, on September 21, 2018, CCHS filed its Motion for Partial Summary Judgment seeking dismissal of the vicarious liability claim with respect to Dr. Principe and DOS, and requested punitive damages. Plaintiff's opposition was filed on November 21, 2018. (B-34-39). By the November 30, 2018 filing, Plaintiffs stipulated to the dismissal of all claims against Dr. Johnson and FSO – that stipulation was granted on December 10, 2018 prior to oral argument on CCHS' motion for partial summary judgment. (B48-50; B-51).

The Superior Court denied CCHS's motion in its entirety by Order dated January 15, 2019. (B-52-58). Responsively, on January 23, 2019, CCHS filed its Application for Certification of Interlocutory Order (B-59-64) – to be followed by Plaintiffs opposition filed February 2, 2019. (B-65-71). CCHS' application was granted by Order dated February 11, 2019. (B110-113).

On February 12, 2019, CCHS filed its Notice of Appeal. By Order dated March 4, 2019, this Court accepted the interlocutory appeal.

CCHS filed its Opening Brief in this Court on April 5, 2019, requesting reversal of the Superior Court's Order denying its Motion for Partial Summary Judgment, dismissal of all vicarious liability claims, and an entry of judgment in its favor.

This is Appellees' Answering Brief requesting that this Court affirm the Superior Court's denial of CCHS' motion for Partial Summary Judgment.

Specifically, Appellees request that this Court hold that the JTR entered into by Plaintiffs and Dr. Principe (DOS) does not extinguish vicarious liability as to CCHS and that trial against CCHS may proceed, to include the issue of punitive damages.

SUMMARY OF THE ARGUMENT

I. Denied. The parties agree that at all material times Dr. Principe was an ostensible agent of CCHS. The parties further agree that Delaware's Uniform Contribution Among Tortfeasors Act ("UCATA") governs the instant controversy. CCHS confirms that it went to mediation on October 13, 2017and was unable to resolve what CCHS states was "its portion." CCHS was aware that claims against Dr. Principe and DOS were resolved at that mediation and memorialized in the Principe JTR on October 27, 2017. CCHS confirms that it was not a party to, nor released by, the Principe JTR Plaintiffs. Thereafter, CCHS pursued litigation as if trial was imminent and without regard to notions of waste, judicial efficiency and the prospect of a windfall to Plaintiffs. It was not until September 21, 2018, that CCHS proclaimed in its Motion for Summary Judgment that it was released via the Principe JTR. Considering the factual record, the Superior Court correctly found is no basis in UCATA or Delaware common law for finding as a matter of law that the release of Dr. Principe and DOS discharged vicarious liability of CCHS who was neither a party to nor was explicitly listed in the release.

II. Denied. UCATA's straightforward purpose is uniformity with respect to litigation involving those jointly and severally liable in tort. UCATA is clear and unambiguous, thus the plain meaning of its provisions control. UCATA does not mandate that the releasor expressly reserve the right to pursue claims against

remaining joint tortfeasors. Plaintiffs' intent requires no clarification – the JTR entered in favor of Dr. Principe and DOS released solely those parties indicated in the JTR to the exclusion of all other joint tortfeasors. Thus, claims against all others, whether direct or indirect tortfeasors, were not extinguished.

STATEMENT OF FACTS

Salient History

The salient facts are not in dispute. On September 30, 2015, Ms. Flint taught a barre class at the Hockessin Athletic Club ("HAC"). (B-2). Following class, while crossing a wooden bridge on HAC's campus, she slipped and fell sustaining a direct blow to her left hip. *Id.* Ms. Flint was transported to the Christiana Hospital Emergency Department via ambulance without incident. *Id.*

Michael Principe, D.O., the on-call orthopaedic trauma surgeon, assumed Ms. Flint's care. (B-3; B-223-226). Upon evaluation of Ms. Flint, Dr. Principe determined a left total hip arthroplasty (replacement) was appropriate as opposed to a partial replacement. *Id.*

Ms. Flint's left total hip replacement commenced on October 1, 2015. *Id.* Dr. Principe asked orthopedic surgeon Eric T. Johnson, M.D. to assist him in seating the acetabular component, meaning the "socket" of the "ball and socket" joint of the hip, because Dr. Principe was unable to identify the appropriately sized trial component. (B3-4; B-239-249; B-323-329). With the assistance of Dr. Johnson, Dr. Principe was satisfied with the fit and stability of the trial component. Dr. Johnson left the operating room at this point in the procedure. *Id.*

Dr. Principe proceeded to seat and stabilize the acetabular cup into the pelvis. (B-4; B-250-255). After seating two cancellous bone screws into the acetabulum

(concave surface of the pelvis), a fluoroscope (X-ray) was brought into the field and revealed that the screws extended well beyond the opposite wall of the pelvis. *Id.* Dr. Principe confirms that that when removing the more anterior (nearer the front) cancellous bone screw he identified what he characterized as "brisk bleeding." (B-4; B-254-255). Upon discovering the brisk bleeding, Dr. Principe removed the two long screws for replacement with two shorter screws. Dr. Principe did not call for a consultation with a vascular surgeon STAT to identify the source of the brisk bleeding intra-operatively. (B-4; B255-256). Instead, Dr. Principe chose to secure the femoral component, reduce the hip joint, ensure stability and range of motion of the hip and closed the entire wound. (B-5; B-258).

Ms. Flint was transported to the Post-Anesthesia Care Unit ("PACU") where her blood pressure was documented as a concerningly low 60/40. (B-5; B-133; B-260). By the time Ms. Flint arrived in the PACU, her abdomen was rigid, meaning that she had an abdomen full of blood. (B-5; B-129; B-260).

Trauma and critical care surgeon Mark Cipolle, M.D., performed a laparotomy on October 1, 2015. (B-5; B-144-146). According to Dr. Cipolle, "massive amounts of blood" were encountered in Ms. Flint's abdomen. (B-6; B-151). Dr. Cipolle dissected down into the left retroperitoneum (close in proximity to the inner side of the pelvis where Dr. Principe drilled the surgical screws and noted brisk bleeding) where two tears in the left external iliac vein were identified.

Id. Dr. Cipolle in consult with vascular surgeon Thomas Evans, M.D. concluded that the large lacerations in the vein were not amenable to repair, thus it was mutually decided that the vein should be suture ligated (tied off) by Dr. Evans. (B-6-7; B159-162). Dr. Cippolle then packed the wound and Ms. Flint's abdomen was left open and covered with a large VAC dressing. *Id.* Dr. Cipolle's diagnoses were complex lacerations to the left common iliac vein and abdominal compartment syndrome (organ dysfunction caused by intra-abdominal pressure). (B-7; B-163). Dr. Cipolle assessed that although Peggy could not speak, she was alert. (B-7; B-128).

At this stage, Ms. Flint was *in extremis* and had developed lactic acidosis, anemia from massive blood loss, thrombocytopenia, acute renal failure, coagulopathy, shock liver, and hemorrhagic shock. (B-7; B-163). For this reason, trauma and critical care surgeon Kevin M. Bradley, M.D. was summoned to perform a re-exploratory laparotomy of Ms. Flint's abdomen on October 2, 2015. (B-7-8; B-180). Upon removal of the VAC dressing and abdominal packing, Dr. Bradley found that Ms. Flint's entire colon was now gangrenous and required removal from just proximal to the cecum (pouch connected to small and large intestines) to the level of the sacral promontory. (B-7-8; B-195-197). The bowel continuity was not reestablished (hooked back up) by Dr. Bradley. *Id.* Portions of the stomach, gallbladder, and liver were also diffusely ischemic (poor blood supply) but were not removed. Id. All of this, according to Dr. Bradley, was directly related to Ms. Flint's

massive blood loss. *Id.*

Ms. Flint deteriorated to the point where her family decided on a DNR status, removed all therapeutic devices and established comfort measures only (Morphine). Ms. Flint was declared deceased at 00:04 on October 3, 2015. (B-8).

Legal Proceedings

Meeghan Carter, Individually and as Administratrix of the Estate of Margaret Rackerby Flint ("Plaintiffs"), filed this medical negligence action on May 22, 2017. (B-1). Plaintiffs' Complaint alleged that during the left total hip replacement on October 1, 2015, Michael Principe, D.O. and Eric Johnson, M.D. lacerated Ms. Flint's left external iliac vein and disregarded brisk bleeding that was identified intra-operatively, culminating in her passing on October 3, 2015. (B-4-8). Medical Negligence, willful misconduct and wrongful death were plead against Drs. Principe and Johnson. (B-8-11). Medical negligence and willful misconduct via agency were plead as to Christiana Care Health Services, Inc. ("CCHS"). (B11-12). Plaintiffs sought special, general and punitive damages as remedies. (B-12). Plaintiffs amended the Complaint on May 25, 2017, pleading claims of medical negligence and wanton misconduct via agency against Dr. Principe's practice group, Delaware Orthopaedic Specialists, P.A. ("DOS"), and Dr. Johnson's practice group, First State Orthopaedics, P.A. ("FSO"). (B-14-15; B-24-25).

Given the circumstances surrounding Ms. Flint's passing while in the CCCH's facility and under the care of its agents, there was a mutual interest in an expedient mediation. (B-76). CCHS' counsel confirmed in fact his understanding that Dr. Principe believed Plaintiffs had a strong liability case and that is why early mediation occurred. *Id.* All parties to the litigation participated in said mediation on October 13, 2017. *Id.* CCHS did not defend nor indemnify any other joint tortfeasor. (B-78). Rather, Plaintiffs negotiated directly with CCHS solely with respect to the vicarious liability claim against it; that negotiation ended without a resolution after good faith efforts were made. *Id.* CCHS' counsel confirmed for the Superior Court that CCHS "we went to mediation and we were unable to resolve the hospital's portion." *Id.* CCHS was aware on the day of the mediation that the only claims waged against it were vicarious. *Id.* However, the claims asserted against Dr. Principe and DOS were resolved in principal on the day of mediation. (B-79).

Plaintiffs, Dr. Principe and DOS memorialized their settlement agreement via the Principe JTR executed on October 27, 2017. (B-350-354). In pertinent part the release states:

> ...do hereby and for their heirs, executors, administrators, successors and release, hold harmless, acquit and forever discharge Michael Principe, D.O., Regional Orthopaedic Associates, P.A., and Delaware Orthopaedic Specialists, PA., and their respective affiliates, parents, subsidiaries, employees, agents, servants, predecessors, heirs, executors, administrators, and insurers,

> including NORCAL Mutual Insurance Company (collectively "Releasees").
>
> This Release is intended to protect the Releasees from any further exposure or future liability from any claim relating in any way to the medical care described herein and in the Complaint filed in the above referenced lawsuite. This Release is executed in conformity with the provisions of 10 Del. C. § 6301, et seq. the Uniform Contribution among Tortfeasors Act, and shall be governed by Delaware law. Accordingly, should it be determined that any person or entity not released herein is jointly or severally liable with the Releasees, to the Releasors in tort or otherwise, the claims against and damages recoverable from such other person or entity shall be reduced by the greater of Releasees' pro rata share of liability or responsibility for such damages or the sum of ... and this Release shall operate as a satisfaction of those claims against such other parties to that extent.
>
> This Release is intended to comply with 10 Del. C. 6304(b) so as to preclude any liability of the releasees to any other part for contribution, indemnity or otherwise, and any language of this Release inconsistent with that intent, or with the operation of 10 Del. C. 6304(b), shall be void and of no consequence.

(B-350-351).

CCHS' counsel confirmed for the Superior Court his understanding "the release is not between my client and the Plaintiffs. It's between the Plaintiffs and Dr. Principe." (B-79). Thereafter the parties who were not released by the above-referenced Principe JTR proceeded with litigation with a view toward an April 15, 2019 trial date. By way of stipulation filed by the parties, the discovery deadline was moved from August 17, 2018 to December 14, 2018. (B-40-41).

CCHS' Motion for Partial Summary Judgment

Prior to the close of discovery, on September 21, 2018, CCHS filed its Motion for partial summary judgment seeking dismissal of the vicarious liability claim with respect to Dr. Principe and DOS, and the requested punitive damages. (B-34-39). Therein CCHS maintained that the Principe JTR extinguished CCHS' liability because that liability was solely vicariously based on Dr. Principe's conduct; that the preceding opinion is held by the extra-jurisdictional majority; and permitting Plaintiffs to proceed against CCHS would discourage settlement and penalize CCHS by allowing Plaintiffs "two bites of the apple." (B-36-38). CCHS further asserted claims for punitive damages should be dismissed for lack of expert testimony to support any basis for reckless, intentional, willful or wanton misconduct. *Id.*

Plaintiffs, in opposition, maintained that UCATA is clear and unambiguous. (B-43). Thus, the plain meaning of its provisions governed the controversy; UCATA provides that liability is only extinguished as to released parties whether they be direct or indirect tortfeasors; in accord with UCATA and Delaware case law CCHS is a joint tortfeasor; and Plaintiffs were not mandated to reserve the right to proceed against joint tortfeasors that were not released. (B-44-45). Concerning punitive damages, Plaintiffs asserted punitive damages are a statutory creation made available to address malicious intent or willful misconduct; emphasized that the issue of the tortfeasor's state of mind is a matter for jury resolution; and the charge

of expert medical witnesses is to articulate deviations from the standard of reasonable medical care and they need not state their opinions with a high degree of legal precision nor opine on the tortfeasor's state of mind. (B-45-46).

The Superior Court held oral argument on CCHS' motion on December 10, 2018. (B-51). The proceeding commenced with the Court granting the parties Stipulation to dismiss the claims against Dr. Johnson and FSO. (B-48-50). CCHS during its presentation acknowledged agency relationship to Dr. Principe. (B-79). CCHS confirmed that it was not a signatory to the Principe JTR. *Id.* CCHS explained that all parties went to mediation and that CCHS was unable to resolve what counsel characterized as CCHS' portion. (B-76). CCHS understood that the joint tortfeasor release was not between it and Plaintiffs – it was solely between Plaintiffs and Dr. Principe. (B-79).

CCHS requested that the Superior Court determine as a matter of law that CCHS, who had not been released, be deemed not liable because the claims against it were vicarious. (B-80). CCHS basis was the settlement in favor of the agent enured to the principal where there is a single share of liability. (B-81-82). CCHS also explained that it would have the right through its cross-claim for contribution and indemnification to go after Dr. Principe and his practice. *Id.* In that same vein, CCHS advised that the Plaintiffs' duty to indemnify Dr. Principe and DOS in effect would require Plaintiffs to pay their own damages. (B-83). CCHS pointed out that

the Principe JTR does not specifically reserve claims against CCHS for Dr. Principe's negligence. (B-85-86).

With respect to Plaintiffs duty to indemnify Dr. Principe pursuant to the Principe JTR, Plaintiffs explained that was a hypothetical that was contingent upon trial outcomes with respect to apportionment and punitive damages. (B-87). Plaintiffs maintained that UCATA contemplated complex litigation with multiple litigants – the notions of satisfaction of one party's liability satisfying the liability of all others was abolished. (B-88). Under UCATA and Delaware case law a vicarious tortfeasor is a joint tortfeasor and once established the right to a contribution is the statutorily created right – not extinguishment of liability. (B-90). Plaintiffs asserted that the parties in this case that desired to resolve the claims against them did exactly that at mediation. Id. To the contrary, CCHS conducted itself at all times like a party that preferred to litigate through trial. (B-91). Plaintiff explained that permitting an indirect tortfeasor under these circumstances to control whether claims against a direct torfeasor settle will discourage rather encourage settlement in contravention of UCATA's purpose. *Id.*

The Superior Court's Memorandum Opinion

The Superior Court's held in its January 15, 2019, Memorandum Opinion held that there is no basis in UCATA or Delaware common law for finding as a matter of

law that the release of a joint tortfeasor discharges the vicarious liability of a joint tortfeasor who was neither a part nor explicitly listed in the release. (Super. Ct. Mem. Op., D.I. 117, attached hereto as Exhibit A). The Superior Court adhered to the interpretation of UCATA employed by the United States District Court for the District of Delaware in *ING Bank, FSB v. American Reporting Company,* 859 F.Supp.2d 700 (D. Del. 2012). (Super. Ct. Mem. Op., D.I. 117 at pg. 2). The Superior Court similarly reasoned that CCHS is a joint tortfeasor as so defined in the UCATA and that definition does not exempt those whose liability is only direct, as opposed to vicarious. *Id.* at pg. 4-5. With respect to punitive damages, the Superior Court concluded that Plaintiffs' experts provided sufficient opinions to establish a prima facie case for the jury to assess whether the state of mind exists for punitive damages. *Id.* at 5-6. The Superior Court's rationale was that the question of punitive damages is ordinarily for the trier of fact and that an expert opinion as to a defendant's state of mind is not only unnecessary, but inadmissible. *Id.*

CCHS' Appeal

Responsively, on January 23, 2019, CCHS filed its application for interlocutory appeal of the Superior Court's Order (B-59-64) – to be followed by Plaintiffs opposition filed February 2, 2019. (B-65-71). CCHS' application was granted by Superior Court Order dated February 11, 2019. (B110-113). The instant appeal followed.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND, ON THIS FACTUAL RECORD, THERE IS NO BASIS IN UCATA OR COMMON LAW FOR FINDING THAT THE PRINCIPE JTR DISCHARGED CCHS' VICARIOUS LIABILITY

A. QUESTION PRESENTED

Whether the Superior Court erred in holding that there is no basis in the Delaware UCATA or Delaware common law for finding as a matter of law that the release of Dr. Principe and DOS discharged the vicarious liability of CCHS, who was neither a party to nor was explicitly listed in the release.

B. STANDARD AND SCOPE OF REVIEW

This Court reviews *de novo* the Superior Court's grant or denial of summary judgment 'to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.'" *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del.2010) (quoting *Estate of Rae v. Murphy,* 956 A.2d 1266, 1269–70 (Del.2008)). Moreover, this Court reviews *de novo* questions of statutory interpretation. *Freeman v. X–Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del.2010) (citing *Dambro v. Meyer,* 974 A.2d 121, 129 (Del.2009)).

C. MERITS

CCHS in its Opening Brief asserts that in denying CCHS' Motion for Partial Summary Judgment the Superior Court misapplied UCATA to "vicarious liability situations." (CCHS' Op. Br. at 15). CCHS' position is that "the plain language of the statute does not address whether the master and servant, in the vicarious liability context, are joint tortfeasors when the plaintiff has released the agent." *Id.* at 16-17. In support, CCHS expends a great deal of energy citing cases from other jurisdictions for the proposition that CCHS is an "innocent principal" – not a "joint tortfeasor," thus Dr. Principe and CCHS have a "single share" of liability.[1] Plaintiffs disagree. *Id.* at 17-23.

Intending to construct a uniform definition, UCATA unambiguously instructs that joint tortfeasor means "2 or more persons *jointly or severally liable in*

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[1] Concerning the "single share" theory CCHS cites *Estate of Williams ex rel. Williams v. Vandeberg*, (620 N. W. 2d 187 (S.D. 2000); and *Horejsi by Anton v. Anderson*, 353 N.W. 2d 316 (N.D. 1984); and *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795 (Iowa 1994). With respect to the notion that agent-principal are not joint tortfeasors CCHS cites *Mamalis v. Atlas Van Lines, Inc.*, 560 A.2d 1380 (Pa 1989); *Anne Arundel Med. Ctr, Inc. v. Condon*, 649 A.2d 1189 (Md. Ct. Spec. App. 1994); *DelSanto v. Hyundai Motor Fin. Co.*, 882 A.2d 561 (R.I. 2005); *Kinetics, Inc. v. El Paso Products Co.*, 653 P.2d 5222 (N.M. C.t App. 1982). Advancing that the release of the agent inures to the principal CCHS cites *Copeland v. Humana of Kentucky Inc.*, 769 S.W.2d 67 (Ky. Ct. App. 1989); *Craven v. Lawson*, 534. S.W.2d 653 (Tenn. 1976); *Dickey v. Meier's Estate*, 197 N.W.2d 385 (Neb. 1972); *Max v. Spaeth*, 349 S.W.2d 1(Mo. 1961).

tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." 10 *Del. C.* § 6301. (emphasis added).

Over four decades ago, the Superior Court instructed:

> Under the definition of the Uniform Act the only requirement for eligibility under the [UCATA] is that the persons *jointly or severally (be) liable in tort* for the same injury to the same person or property. Under this definition the relationship among themselves of those liable to the injured party or a common basis of liability is not a factor....There can be no contention that a tort committed by an employee for which the employer is liable by reason of the employment falls within the definition of section 1 of the Act. The employee and employer are both liable in tort for the same injury to plaintiff.

Clark v. Brooks, 377 A.2d 365, 370 (Del. Super. Ct. 1977) (citing 2 Mechem on Agency, p. 1580, s 2010-11). (emphasis added). *Clark* likewise involved a medical negligence action where Plaintiff pursued claims against the physician (agent) and medical center (principal). There is factual divergence from the instant matter whereas it was the principal in *Clark* that was released and the agent who sought to inure the benefits of the release. The Superior Court held that Plaintiff's execution of the releasee in favor of the principal did not bar plaintiff from seeking recovery from the agent.

This Court affirmed the Superior Court's decision stating in part:

> In our opinion, the language of this statute clearly covers both the Doctor and the Center in this case; Dr. Blackshear would be liable as the tortfeasor and the Center would be liable as the employer. Thus, these '2 . . . persons . . . (are) *severally liable in tort* for the same injury.' *The basis of liability is not relevant, nor is the relationship among those liable for the tort.* In short, it makes no

> difference whether the Center's liability is based upon the doctrine of respondeat superior or any other legal concept. The point is that both it and the Doctor are (at least) *'severally' liable for the same injury to plaintiff.*

Blackshear v. Clark, 391 A.2d 747, 748 (Del. 1978). (emphasis added).

Adhering to this logic, in *ING Bank, FSB v. Am. Reporting Co., LLC*, the United States District Court for the District of Delaware held that the alleged negligent agent and vicarious principal fit within the joint tortfeasor definition. 859 F. Supp. 2d 700, 704–05 (D. Del. 2012).

Most recently, this Court in *Verrastro v. Bayhospitalists* held that "in a negligence action against a principal based on the doctrine of *respondeat superior*, the dismissal of the agent on defenses personal to the agent does not automatically eliminate the principal's vicarious liability. 2019 WL 1510458, at *6 (Del.Supr. 2019).[2] This Court advised that its holding was "consistent with the rationale underlying the doctrine of *respondeat superior*" which is that it is the "negligence of the employee that is imputed to the employer, not the employee's liability" and the "negligence of [the] employee … must be the focus of any inquiry into the

[2] The application of UCATA's provisions was under scrutiny in *Verrastro*, however the logic concerning whether defenses inure to the benefit of both agent and principal was at issue and is relevant here.

vicarious liability of the employer … under the doctrine of *respondeat superior*. *Id.*[3]

In Delaware, UCATA applies to CCHS under the circumstances of this case irrespective of whether it was a direct or indirect tortfeasor. Stated differently, it is the culpability that imputes to the principal, not the liability. Contrary to CCHS' assertions, the recurrent theme in our case law is that it is joint and several liability for the same injury that, once established, triggers the application of UCATA's framework of provisions. It is worth noting here with respect to joint and several liability that the Chancery Court instructs:

> [U]nder this liability standard, 'the injured person is entitled to recover his damages from [any] of the tortfeasors, without distinction, subject to the limitation that his total recovery may not exceed the full amount of his damage.' A defendant has no right to require the injured party to pursue another tortfeasor first.

In re Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 220–21 (Del. Ch. 2014).

It is undisputed that all parties to the instant litigation participated in an early mediation prior to the commencement of discovery. (B-76). This demonstrates that the parties were interested in avoiding wasteful litigation particularly where liability

[3] This Court's decision in *Verrastro* in effect overruled *Greco v. University of Delaware*, 619 A.2d 900 (Del. 1993) and *determined Fields v. Synthetic Ropes Inc.*, 215 A.2d 427 (Del. 1965) was the appropriate line of reasoning to follow .

was practically indefensible.[4] At mediation CCHS did not express an intent to defend nor indemnify Drs. Principe and Johnson, or their respective practices. *Id.* To the contrary, Plaintiffs negotiated directly with CCHS solely with respect to the vicarious liability claim against it without any reference to the state of negotiations with the other litigants. (B-88). CCHS in fact confirmed at oral argument before the Superior Court that "we went to mediation and we were unable to resolve the hospital's portion." (B-86). CCHS' statement serves to indicate that it understood its liability to Plaintiffs was joint and several notwithstanding the fact that its liability was solely vicarious and it now argues otherwise. Moreover, CCHS was aware at mediation that the claims against Dr. Principe and DOS were resolved in principal. (B-79).

Thereafter, Plaintiffs, Dr. Principe and DOS memorialized their settlement agreement via the Principe JTR on October 27, 2017. (B-350-354). It must be emphasized that CCHS confirmed for the Superior Court its understanding that "the release is not between [CCHS] and the plaintiffs. It's between the plaintiffs and Dr. Principe." (B-79). This serves as indicia of CCHS' understanding as of October 27, 2017, when the Principe JTR was executed by the parties. CCHS moved forward in

[4] CCHS maintains that if the benefits of the Principe JTR do no inure to it then "circuitous and wasteful" litigation would be the result. Plaintiffs submit that the parties have at all times shared the mutual opportunity to resolve the claims amicably, thus responsibility for not arriving at a resolution is also mutual.

a litigation posture and did not raise the specter that the benefits of the Principe JTR inured to it until the filing of its motion on September 21, 2018.

UCATA unambiguously instructs:

> A release by the injured person of 1 joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasor unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid. 10 *Del. C.* § 6304(a).

The Principe JTR expressly states that it shall operate as a satisfaction of claims against other parties to the extent of the sum advanced by Dr. Principe. (B-351). This is consistent with UCATA's mandates and does inure to CCHS as a matter of law , though CCHS' liability is not extinguished in total. Plaintiffs' emphasize that contribution as prescribed by UCATA and the Principe JTR prevents a windfall in the form of a dual recovery in favor of Plaintiffs, contra to CCHS' suggestion otherwise.

CCHS also maintains that where Plaintiffs did not exhaust the coverage limits of Dr. Principe and DOS the benefits of the Principe JTR should inure to CCHS because that is consistent with the practice of medical negligence cases in Delaware. (CCHS' Op. Br. At pg. 30). In the spirit of clarity, this Court should be aware that Dr. Principe and DOS had separate liability coverage policies. And Dr. Principe did in fact tender his entire policy limit at mediation. Plaintiffs reassert

here that the only necessary consideration is whether Dr. Principe's culpability is imputed to CCHS. That consideration is satisfied whereas CCHS employed Dr. Principe as the on-call orthopaedic trauma surgeon and the unfortunate demise of Ms. Flint occurred in CCHS' facility at the hands of Dr. Principe. Again, CCHS is jointly and severally liable on the basis of these facts irrespective of the status of claims against DOS.

II. THE SUPERIOR COURT APPROPRIATELY ENFORCED THE PRINCIPE JTR WHERE ITS LANGUAGE WAS DESIGNED TO ACCOMPLISH A PRO RATA REDUCTION OF ANY FURTHER RECOVERY AND NOT TO DISTINGUISH CLAIMS AS TO ANY OTHER PARTY

A. QUESTION PRESENTED

Whether the language of the Principe JTR as written releases CCHS' vicarious liability where CCHS expressly confirmed it was not a party to the release and CCHS' right of contribution is preserved?

B. STANDARD AND SCOPE OF REVIEW

Plaintiffs incorporate here the standard and scope of review stated above.

C. MERITS

The Principe JTR provides in relevant part:

> ...[D]o hereby and for their heirs, executors, administrators, successors and release, hold harmless, acquit and forever discharge *Michael Principe, D.O., Regional Orthopaedic Associates, P.A., and Delaware Orthopaedic Specialists, PA., and their respective affiliates, parents, subsidiaries, employees, agents, servants, predecessors, heirs, executors, administrators, and insurers, including NORCAL Mutual Insurance Company (collectively "Releasees").*
>
> This Release is intended to protect the Releasees from any further exposure or future liability from any claim relating in any way to the medical care described herein and in the Complaint filed in the above referenced lawsuit. This Release is executed in conformity with the provisions of 10 *Del. C.* § 6301, et seq. the Uniform Contribution among Tortfeasors Act, and shall be governed by Delaware law. Accordingly, should it be determined that any person or entity not

> released herein is jointly or severally liable with the Releasees, to the Releasors in tort or otherwise, the claims against and damages recoverable from such other person or entity shall be reduced by the greater of Releasees' pro rata share of liability or responsibility for such damages or the sum of ... *and this Release shall operate as a satisfaction of those claims against such other parties to that extent.*

(B-350-351) (emphasis added).

CCHS contends that the Principe JTR's language is evidence of Plaintiffs intent to resolve all claims. (CCHS' Op. Br. at 33). Plaintiffs again disagree. The two above-referenced paragraphs when read in conjunction serve only to confirm that Plaintiffs intended to release the "Releasees" which are expressly identified. And with respect to all other persons or entities the intent was to reduce their liability by the greater of Releasees' pro rata share or the sum of the amount tendered by Releasees provide a reduction of damages. See *Clark*, 377 A.2d at 373, (citing *Raughley v. Delaware Coach Co.*, 91 A.2d 245 (Del. Super. Ct. 1952) (finding that the language was merely designed to accomplish a *pro rata* reduction and did not release tortfeasors not specifically named). See also *Blackshear*, 391 A.2d at 748 (finding that only the parties expressly identified in the release were in fact released).

CCHS next maintains that the Principe JTR should extend to CCHS because Plaintiffs did not preserve any vicarious liability claims, citing *Clark* in support. . (CCHS' Op. Br. at 34). Put succinctly, neither the Delaware UCATA nor the case law mandates such affirmative action on Plaintiff's part. CCHS confirms that the Superior Court in *Clark* believed under certain circumstances that a release in favor

of an agent *may* release the principal. *Clark*, 377 A.2d at 374. That is not a mandate however – no affirmative duty was created. Again, the Principe JTR language only runs in favor of those released. *Id.*

CCHS further asserts that its liability is identical with that of Dr. Principe thus Plaintiffs cannot recover from CCHS. Meaning Dr. Principe's pro rata share is 100% of Plaintiffs' claim, leaving no unreleased portion. CCHS also advises that it would seek indemnification were there to be a verdict at trial in excess of that sum tendered by Dr. Principe, citing the "crossclaim and indemnification" provision of its Answer to the Amended Complaint. Given that the Principe JTR has an indemnity provision in favor of the Releasees, CCHS suggests that Plaintiffs, in essence, would pay their own damages in the end. (CCHS' Op. Br. at 35). Plaintiffs again emphasize that this assertion is in tension with CCHS' statement directed to the Superior Court at oral argument where CCHS acknowledged it attended mediation but was unable to resolve "its portion." CCHS statement can only be interpreted as an acknowledgment that CCHS understood it was not one with Dr. Principe where claims against them could be pursued by Plaintiffs separately, consecutively or jointly. *Id.* See also *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d at 220–221 and *Verrastr*o, 2019 WL 1510458, at *7 (noting the parties' acknowledgment that Verrasrtro need not have sued the agents). Plaintiffs also reassert, that in this same vein, CCHS stated directly to the Superior Court its

understanding that it was not a party to the Principe JTR, meaning in concrete terms CCHS was not expressly released.

It is also important to note the language employed by CCHS with respect to "contribution and indemnity" in its Answer to the Amended Complaint:

> 86. The answering defendant crossclaims against its co-defendants *solely for the purpose of permitting the finder of fault to apportion fault if any fault is found, Ikeda v. Molock*, Del. Supr., 603 A.2d 785(1991) and, in the applicable case, to permit the answering defendant to *seek contribution, reduction, etc. pursuant to the provision of any joint tortfeasor release*, which in the future, may be executed by plaintiffs.

(B-32).

CCHS advised the Superior Court below and now represents to this Court that it will seek indemnity as to Dr. Principe if ultimately CCHS has any financial exposure in this case. That representation is in conflict with the language and presumed intent of the above-referenced paragraph – the word "indemnity" is not used in any form. The only plausible interpretation of this paragraph is that CCHS did not intend to litigate against those it confirms were its "ostensible agents." Rather, CCHS intended, consistent with UCATA, to see contribution or a reduction pursuant to the provision of any joint tortfeasor release. In sum, Plaintiffs agree CCHS documented understanding and intent – the claim against it should proceed to trial and the contribution right should inure to CCHS pursuant to UCATA and the Principe JTR.

CONCLUSION

Considering the factual record, the Superior Court correctly found there is no basis in UCATA or Delaware common law for finding as a matter of law that the release of Dr. Principe and DOS discharged vicarious liability of CCHS who was neither a party to nor was explicitly listed in the release. Delaware law dictates that CCHS is a joint tortfeasor under UCAT by definition. This is also consistent with CCHS' statements of record concerning its distinct portion of culpability. Moreover, UCATA does not mandate that the releasor expressly reserve the right to pursue claims against remaining joint tortfeasors. Plaintiffs' intent requires no clarification – the Principe JTR released solely those parties indicated to the exclusion of all other joint tortfeasors. Thus, claims against all others, whether direct or indirect tortfeasors, were not extinguished and must by law proceed to trial.

CERTIFICATE OF SERVICE

I, Leroy A. Tice, Esquire, certify that on this 6th day of April 2019, I have caused Appellees' Opening Brief and Appendix to Appellees' Opening Brief to be served electronically on the following:

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