[J-16-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MAX C. MALONEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF LINDA E. MALONEY, v. VALLEY MEDICAL FACILITIES, INC., D/B/A THE MEDICAL CENTER, BEAVER HERITAGE VALLEY HEALTH SYSTEM, INC., BEAVER INTERNAL MEDICINE ASSOCIATION, TRI-STATE MEDICAL GROUP, INC., BRIGHTON RADIOLOGY ASSOCIATES, P.C., MAURICE PRENDERGAST, M.D., AND RICHARD E. BRENNAN, M.D. APPEAL OF: MAURICE PRENDERGAST, M.D., BEAVER INTERNAL MEDICINE ASSOCIATION, AND TRI-STATE MEDICAL GROUP, INC.	:	No. 58 WAP 2008 Appeal from the Order of the Superior Court entered March 7, 2008 at No. 346 WDA 2007, vacating the judgment of the Court of Common Pleas of Beaver County entered January 18, 2007 at No. 10369-2004 and remanding. ARGUED: March 4, 2009

<u>CONCURRING AND DISSENTING OPINION</u>

MADAME JUSTICE GREENSPAN **DECIDED: NOVEMBER 24, 2009**

The majority has, in effect, created an exception contrary to the rules of vicarious liability set forth in <u>Mamalis v. Atlas Van Lines, Inc.</u>, 560 A.2d 1380 (Pa. 1989) and its progeny, including <u>Pallante v. Harcourt Brace Jovanovich, Inc.</u>, 629 A.2d 146 (Pa. Super. 1993). Although I support the majority's pragmatic fashioning of a remedy for the present parties, I cannot join wholesale the majority's reasoning. Unlike the majority, I would expressly limit this new, court-created exception to releases containing an express reservation of rights in the context of medical malpractice litigation.

In Mamalis, this Court applied the principles of vicarious liability and held that the termination of a claim against an agent discharges any derivative claim against the principal. Id. at 1383.[1] Vicarious liability is a policy rule designed to allocate risk and ensure compensation to a tort victim. As this Court explained in Crowell v. City of Phila.,

> Vicarious liability, sometimes referred to as imputed negligence, means in its simplest form that, by reason of some relation existing between A and B, the negligence of A is to be charged against B although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it . . . Joint tortfeasor liability, on the other hand, arises when two or more persons acting together injure another. It is distinguished from vicarious liability in that liability attaches by virtue of the actions of each person as opposed to by operation of law.

613 A.2d 1178, 1181 (Pa. 1992).

A claim of vicarious liability against a principal is indivisible and inseparable from the claim against the agent because the claim is based on one indivisible act of wrongdoing for which both the principal and agent are liable.[2] Mamalis, 560 A.2d at 1383; see also Milton S. Hershey Med. Ctr. v. Pa. Med. Prof'l Liab. Catastrophe Loss Fund, 821 A.2d 1205, 1212 (Pa. 2003) ("The rules of vicarious liability respond to a specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor.") As a result, a release given to an agent will generally preclude a

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[1] This Court has never decided whether the reverse is also true. However, that situation has been addressed by the Superior Court. In Pallante, the Superior Court held that the release of a vicariously liable principal released an agent. 629 A.2d at 149. In the 16 years since Pallante was decided, this Court has not overruled the Pallante holding.

[2] Unlike the liability of a vicariously liable principal, the liability of a joint tortfeasor is both direct and divisible because the tortfeasor actually contributed to the injury and the conduct of at least one other person also contributed to the injury. Crowell, 613 A.2d at 1182.

subsequent action against the agent's vicariously liable principal. As this Court noted in Mamalis:

> The rules of vicarious liability respond to a specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor. Upon a showing of agency, **vicarious liability increases the likelihood that an injury will be compensated, by providing two funds from which a plaintiff may recover**. If the ultimately responsible agent is unavailable or lacks the ability to pay, the innocent victim has recourse against the principal. **If the agent is available or has means to pay, invocation of the doctrine is unnecessary because the injured party has a fund from which to recover**.

560 A.2d at 1383 (emphasis added).

The facts of this case demonstrate that Max C. Maloney, Individually and as Administrator of the Estate of Linda E. Maloney, attempted to draft a release such that claims against Maurice Prendergast, M.D. were carved out and reserved. Notwithstanding this attempt, the language of the release, interpreted pursuant to principles of Pennsylvania law, did not preserve those claims. To the contrary, the release in fact discharged all claims asserted by Mr. Maloney against Dr. Prendergast, Valley Medical Facilities, Inc., d/b/a The Medical Center ("Valley"), Beaver Heritage Valley Health System, Inc. ("Heritage"), Beaver Internal Medicine Association ("BIMA"), Tri-State Medical Group, Inc. ("Tri-State"), Brighton Radiology Associates, P.C. ("Brighton"), and Richard E. Brennan, M.D. ("Dr. Brennan") (collectively referred to as the "Health Care Providers").[3]

As this case demonstrates, there can be significant tension between, on one hand, interpreting a release as the parties intended and, on the other hand, applying

[3] Valley, Heritage, BIMA, Tri-State and Brighton are collectively referred to as the "Hospitals." Valley, Heritage, BIMA, and Tri-State are collectively referred to as the "Beaver Hospitals."

Pennsylvania's law on vicarious liability as it would otherwise govern the parties' relationship. Other Pennsylvania courts have faced this tension. See, e.g., Tindall v. Friedman, 970 A.2d 1159, 1179 (Pa. Super. 2009) (noting in concurring/dissenting opinion that "as a matter of law, plaintiffs and agents/health care providers cannot unilaterally contract around the protections provided principals under Mamalis.") (Shogan, J.).

Here, the majority favors the parties' intentions rather than adopting what it characterizes as an "inflexible common-law rule."[4] Maj. Slip Op. 11. Such a finding seems especially inapt here where the parties to the release were represented by attorneys who should have been well aware of the implications of releasing the Hospitals and the resultant discharge of Dr. Prendergast. The majority posits that, at the time the release was drafted, Pennsylvania law was not settled on the issue of

[4]The majority also states that "[w]ooden enforcement of the idea that vicarious liability cannot result in a division of any kind for any purposes and under any circumstances, even pursuant to a voluntary agreement of the parties, would mean that judicial approval could never be lent to a three-way settlement between a plaintiff, an agent-defendant, and his employer relative a claim entailing vicarious liability, where both defendants contribute directly to the settlement." Maj. Slip Op. 17. Respectfully, those facts are not presented in the instant case. Here, Dr. Prendergast was not a party to the settlement. If, as the majority aptly observes, the holding of a decision should be read against its facts, then clearly this Court's decision in the instant case will not apply to a factual scenario where both the agent and principal settle. Moreover, once the plaintiff has agreed to settle with both liable tortfeasors, and both tortfeasors have executed a settlement agreement, there would be nothing left to reserve. The complications arising from a reservation of rights would not occur in a case where both liable defendants agree to settle. As is noted in the Restatement (Third) of Torts, Apportionment of Liability (the "Restatement"), "[w]hen a settlement is reached between the plaintiff and all potentially liable tortfeasors, there will normally be no occasion for further judicial proceedings." RESTATEMENT (THIRD) OF TORTS § 24 cmt. a.

whether the release of a principal discharged the agent.[5] Maj. Slip Op. 14. I cannot agree. Although the Mamalis decision was not directly controlling because it involved the release of an agent, the Superior Court's decision in Pallante involved the release of a principal and was the prevailing case law at the time the release was drafted.

The majority also argues that various passages of Mamalis are "directed expressly to the agent release scenario." Maj. Slip Op. 15. Respectfully, the language of the Mamalis opinion has been applied broadly by the lower courts since the Mamalis decision was issued twenty years ago. For example, in Pallante, the Superior Court extended the rules of discharge set forth in Mamalis to a case where the injured party released the principal and then sought recovery from an agent:

> The central legal question is whether the holding of Mamalis is applicable to the circumstance where the injured party releases the principal rather than the agent. **Given the supreme court's decision that principal and agent are not joint tortfeasors, we conclude that the release of the principal acts as a release of the agent**.

Pallante, 629 A.2d at 149 (emphasis added). For the past sixteen years, Pennsylvania courts have enforced the Pallante holding that the rule set forth in Mamalis applies equally in the context of the release of a principal and the resulting discharge of the agent. See Willard v. Interpool, Ltd., 758 A.2d 684, 688-89 (Pa. Super. 2000) (citing Mamalis and Pallante and holding that the release of a vicariously liable principal *via* settlement discharged the agent). In my view, it cannot now be argued that Mamalis should be read against its facts and that the Mamalis decision is narrowly limited. Perhaps that was the Court's intention when Mamalis was decided, but the proverbial

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[5]The majority correctly notes that the facts here are not analogous to those in Mamalis. In Mamalis, the parties agreed to release the agent and this Court held that the release discharged the principal. Here, Mr. Maloney attempted to release the principal Hospitals while preserving claims against agent Dr. Prendergast.

cat has been out of the bag for two decades since that time.[6] The Superior Court's decision in Pallante does not estop or otherwise prevent this Court from now adopting a contrary rule, but it would not be correct to state that Pennsylvania law had been unsettled regarding the release of a principal and the resulting discharge of the agent.[7]

The majority attempts to distinguish joint and several liability on one hand and vicarious liability on the other. Maj. Slip Op. 15-16. The majority also argues that the Pennsylvania Legislature has "shifted the tide away from the common-law rule" through

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[6]This Court has had the prior opportunity to limit the application of the Mamalis decision and has not done so. For example, in Milton S. Hershey Med. Center, this Court broadly reiterated the concept that vicarious liability is a means by which an injured party has two sources of potential compensation for a single injury. 821 A.2d at 1212-13. In that case, the injured party asserted medical malpractice claims based on vicarious liability and agreed to settle with both the principal hospital and agent physician. Id. at 1206-07. Although the insurance coverage for the agent physician was sufficient to pay the settlement, the physician's carrier balked at financing the entire settlement and demanded that partial coverage be provided by the hospital's carrier. Id. In holding that the agent's carrier should wholly finance the settlement, this Court reinforced the application of Mamalis and declined to expressly provide an exception to the doctrine of vicarious liability. The majority correctly notes that the Milton S. Hershey Med. Center case did not involve a reservation of rights. I reference the case only to note that the Court did not utilize the case as an opportunity to limit the application of the Mamalis decision.

[7] I do not deny that the holding of a decision must be read against its facts. Maj. Slip Op. 20. I simply point out that this proposition cannot be used to ignore controlling case law that developed in the lower courts following Mamalis. Similarly, I do not advocate a "cat-out-of-the-bag" estoppel doctrine that limits this Court's review. Maj. Slip Op. 20. I merely note that this Court should not ignore the existence of Pallante, which was the controlling law on the release of a vicariously liable principal and discharge of the agent prior to the issuance of this decision in the instant case. I would acknowledge that Pallante stated the controlling rule and that this Court has now stated a contrary rule as a result of the public policy considerations discussed herein and in the majority opinion. Contrary to the majority's contention, there is no facial discordance in my position. Maj. Slip Op. 20.

the passage of the Uniform Contribution Among Tortfeasors Act (the "UCATA"). Maj. Slip. Op. 18, fn. 18. The UCATA does not apply here because this case involves vicarious liability, not joint tortfeasers. Although Mamalis is based on an older common law principle of vicarious liability, that principle is hardly a legal anachronism. The Restatement, an authority cited by the majority, states that a release of either an agent or a vicariously liable principal acts to release both, because only one measure of responsibility is assigned to both.[8] RESTATEMENT (THIRD) OF TORTS § 16 rep. note cmt. d. As is clarified in the reporter's note to Comment d of Section 16 of the Restatement:

> **Release of both the agent and the vicariously liable party upon a settlement with one of those parties is logically required** by this Section and the provision of § 7, Comment j. Only one measure of responsibility will be assigned to all such parties. The nonsettling defendants will receive a credit for the share of responsibility that the factfinder assigns to the agent and vicariously liable party. Thus, there is no responsibility remaining to be assigned to any nonsettling agent or vicariously liable party. This effect is demonstrated in Illustration 2, in which the plaintiff settled with the primarily liable manufacturer. The nonsettling vicariously liable retailer would receive a credit against the judgment that would reflect the responsibility assigned to the manufacturer and retailer as a single entity. With that credit, there would be nothing left of the judgment for the retailer to pay.

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[8] The majority notes that comments f and g to Section 24 of the Restatement urge that a release be interpreted pursuant to contract law. Maj. Slip Op. 17. Respectfully, Section 24 of the Restatement refers generally to settlement agreements. In contrast, Section 16, which I reference, states the more specific rule applicable in the case of a partial release. The facts of the instant case involve a partial release of the agent. Notwithstanding the general rule set forth in Section 24 of the Restatement, the specific Rule in Section 16 relating to the release of an agent and the discharge of the principal applies in this case. Although the comparison of Restatement sections does not involve true statutory construction, it is not unreasonable to conclude, as is the rule in statutory construction, that a specific section ought to apply in lieu of a more general section. See 1 Pa.C.S. § 1933 (in statutory construction, where there is a conflict, specific provisions prevail over general provisions); LaFarge Corp. v. Ins. Dep't, 735 A.2d 74, 76 (Pa. 1999) (citing 1 Pa.C.S. § 1933).

Id. The passage of the UCATA, which applies only in the case of joint tortfeasers, did not modify this general principle.

The majority distinguishes Pallante based on the fact that the release of the principal in Pallante did not contain an express reservation of rights preserving the injured party's right to sue the agent. Maj. Slip Op. 7. Although the majority's observation is correct regarding the facts of the case as reported in the Pallante opinion, the reasoning of the Pallante court reveals why this distinction is not relevant.[9] In Pallante, the Superior Court broadly held that, due to the nature of vicarious liability, the release of the principal wholly satisfies the injured party, discharging the agent:

> Because the law seeks to protect an injured party's right to payment for a single injurious act from either a vicariously liable principal or an independently liable agent, the party's decision to settle with and release one acts as a release of the other, given their non-joint tortfeasor status. **We hold that where a principal who is vicariously liable for the negligent act of its agent is released by the injured party after settlement of the claim, the release is a release of the agent as well and no suit may be maintained against the agent** for its independent act of negligence.

Pallante, 629 A.2d at 150 (emphasis added). Based on this reasoning, which flows from this Court's opinion in Mamalis, any reservation of rights would be ineffective. Because there is only one injury, satisfied completely by settlement with the vicariously liable principal, there are no rights left to reserve.

In rejecting the general rules of vicarious liability, the majority relies heavily upon the assertion that Mamalis is inapplicable or distinguishable because that case involved

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[9]Although the Pallante opinion did not describe the terms of the release involved in that case, logic would suggest that the injured party did not intend the release of the principal to release the agent. The injured party sued both the agent and principal and then attempted to continue her case against the agent after releasing the principal. See Pallante, 629 A.2d at 147. This would suggest that the injured party did intend, in some way, to reserve her rights against the agent.

a single tort and the instant case involves "multiple separate acts of negligence and multiple tortfeasors." Maj. Slip Op. 7. The majority concludes that the Mamalis court "simply did not consider the extension of the rule to complex factual scenarios such as the present one." Maj. Slip Op. 11. The majority repeatedly admonishes that the Mamalis decision must be "read against its facts" and that portions of the Mamalis decision were "directed expressly to the agent-release scenario." Maj. Slip Op. 15.

The reasoning in Mamalis, as discussed herein, has less to do with the facts of that case and more to do with the reality of vicarious liability and the ways it differs from joint liability. In its reasoning the majority conflates joint liability on the one hand and vicarious liability on the other. The fact that there may have been multiple acts of negligence by Dr. Prendergast for which the Hospitals are vicariously liable is of no moment. Each time Dr. Prendergast is released for an act, the rules of vicarious liability direct that the Hospitals also be released for that act. The reverse is also true. If the Hospitals settle and are released, then Dr. Prendergast is similarly discharged in equal part to the release of his principals.

The number of negligent acts is wholly irrelevant. The rules of vicarious liability direct that the agent is released to the extent of the principal, no more and no less. If Dr. Prendergast is released for the first three acts of negligence he allegedly committed, then the Hospitals would similarly be discharged for any liability for those three acts. If Mr. Maloney and the Hospitals agree to a settlement for three acts of negligence, then those three acts are fully compensated and no recovery ought to be available from Dr. Prendergast. The existence of other acts of negligence is irrelevant. If the vicariously liable principal Hospitals settled with Mr. Maloney for those three acts, then Dr. Prendergast is released for those three acts because the wrongful acts have been fully compensated. Whether there is one negligent act or many, what matters is not the

number of acts but whether the Hospitals are liable as a joint tortfeasors or as vicariously liable principals. Here, the Hospitals, as vicariously liable principals, were broadly released for any and all liability, so Dr. Prendergast was discharged in equal part. The majority's holding to the contrary conflates vicarious liability with joint liability.

Moreover, even if the existence of multiple acts of negligence was significant, the release here was not tailored to reflect that only some wrongful acts were released. Mr. Maloney's argument, adopted by the majority in its opinion, might have merit if the release was narrowly tailored so as to apply only to claims arising from specific acts of malpractice. The release was not so tailored. The language of the release was drafted so broadly that it discharges all claims, including those asserted against Dr. Prendergast. The release clearly states that Dr. Brennan, Brighton, Valley, Beaver, Heritage, Tri-State, and the Medical Care Availability and Reduction of Error Fund (the "MCARE Fund") were released "**from any or all causes of action . . . arising from, or in any way connected with all** medical, professional health *services* rendered by the above named Health Care Providers." Release, ¶ 1 (emphasis added). If Mr. Maloney wanted to preserve claims against Dr. Prendergast, this language should have been drafted more narrowly.[10]

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[10] For example, rather then refer to "any or all causes of action . . . arising from, or in any way connected with all medical, professional health services," the release could have referenced "all claims arising from the services provided by Dr. Brennan and all negligence committed directly and solely by Brighton, Valley, Beaver, Heritage, and Tri-State." This narrower language would have effectuated Mr. Maloney's intent to release certain defendants while allowing the matter to proceed against Dr. Prendergast (and against Dr. Prendergast's principals insofar as these principals were vicariously liable). Or, in the alternative, Mr. Maloney could have chosen not to settle and release the Hospitals, but rather to execute what is known as a "covenant not to sue" in exchange for a lump sum payment. Such a covenant would not release the Hospitals, but it would limit any additional damages they might be obligated to pay if an award was entered at trial. Then Mr. Maloney could have proceeded to trial against Dr. Prendergast (and the (continued…)

Here, as in Mamalis, for each negligent act there is one injury and one measure of damage for which multiple parties may be held liable. Mr. Maloney has asserted claims based on direct liability against Dr. Prendergast and Dr. Brennan, claims based on vicarious liability against the Hospitals and the Beaver Hospitals, and claims based on direct liability against the Hospitals and the Beaver Hospitals. Therefore pursuant to Mamalis, Dr. Prendergast and his employers, the Hospitals, are vicariously liable for any malpractice by Dr. Prendergast. These parties stand in each other's shoes and together are liable for the wrongdoing. There is a single measure of damages assigned to these parties. Pursuant to the release, the Hospitals have paid for the single measure of damages.

The majority ultimately concludes that an exception to the general rules of vicarious liability must be created because otherwise there is "substantial likelihood" that settlements will be impeded, "undermining the strong public policy favoring the voluntary compromise of claims." Maj. Slip Op. 12. In this respect, I concur with the majority. There is significant value in encouraging settlement in medical malpractice litigation. This is especially true where there is a solvent payment fund, such as the MCARE Fund, available to pay reasonable settlements. For this reason, I would join the majority's decision to depart from the general rules of vicarious liability and adopt a new exception in the limited context of cases like the instant one, where the parties to a medical malpractice lawsuit draft a clear, express reservation of rights against one

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(…continued)
Hospitals, albeit in a limited capacity given that they had already agreed to a set measure of damages regardless of the verdict). As yet another alternative, Mr. Maloney could have initiated suit only against Dr. Prendergast and against the Hospitals based on direct liability. Had Mr. Maloney avoided alleging vicarious liability claims against the Hospitals, Mr. Maloney could have settled with the Hospitals for any direct liability claims while still preserving the direct liability claim against Dr. Prendergast.

physician while releasing the vicariously liable employer Hospitals. I would decline, however, to extend the exception generally to other circumstances and I would acknowledge that the adoption of this exception is a new court-made rule contrary to the general principles of vicarious liability.