

COURT OF APPEALS
DIVISION II

No. 37658-0-II

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

Nathan Wood,

Appellants,

vs.

Cynthia Wolfe, et al.

Respondents

WOODS' OPENING BRIEF

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I. ASSIGNMENT OF ERROR

Assignment of Error

It was error to dismiss Nathan Wood's claims against Dr. Cynthia Wolfe based upon Dr. Wolfe's vicarious liability for the *medical negligence* of Nurse David Gibson, who was Dr. Wolfe's agent and under Dr. Wolfe's supervision, even while Nathan Wood's release of Capitol Medical Center relieved that hospital of vicarious liability for the *administrative negligence* of Nurse Gibson.

Issues Pertaining to Assignment of Error

1. Did the release of Capitol Medical Center operate to release Dr. Wolfe from any liability associated with medical services?
 - i. Did the Release, by its own terms, release Dr. Wolfe?
 - ii. Did the portion of the Release which stated that "employees" of Capitol Medical Center were released operate to release Nurse Gibson in his capacity as an agent of Dr. Wolfe in the provision of medical services?
 - iii. Was Nurse Gibson a dual agent of both Dr. Wolfe

and Capitol Medical Center, with different scopes of authority under each?

- iv. Was there evidence in the record at the summary judgment hearing that Nurse Gibson was solvent at the time the Release between Capitol Medical Center and Nathan Wood was entered?

II. STATEMENT OF ESSENTIAL FACTS

On Thursday, December 30, 1999, Nathan Wood was injured in a skateboard accident. He fell on a ten inch spike, which penetrated his abdomen, through his buttocks, to a depth of ten inches. He was taken to the emergency room at Capitol Medical Center, where he was seen first by Nurse Gibson and then by Dr. Wolfe, assisted by Nurse Gibson. CP 113.

In the emergency room, both Dr. Wolfe and Nurse Gibson were negligent in their care and treatment of Nathan Wood. They neither took an adequate history, nor conducted an adequate exam. Further, the discharge instructions given to Nathan were deficient and incorrect. Those instructions told him to see a doctor on Monday, four days later, when in fact Dr. Wolfe admitted he should have been seen by a doctor no later than Saturday. CP 113.

As a result of Dr. Wolfe's and Nurse Gibson's negligence, Nathan developed an abdominal abscess and was admitted to Mason General Hospital for emergency surgery. His abdomen was split open from his waist to his rib cage, and had to remain open for ten days to allow internal application of a topical antibiotic. CP 113.

This case presents the issue of an apparent dual agency. Nurse Gibson is an agent of Dr. Wolfe as to patient care (medicine); he is also an agent of Capitol Medical Center as to ministerial duties (administration). Dr. Wolfe's Professional Services Agreement states that she (Dr. Wolfe) would provide quality control to ER staff, including Nurse Gibson, and would be professionally responsible for the medical care provided by that staff. CP 90-92.

In Nurse Gibson's deposition, he explained the difference between patient care (medicine) and ministerial duties (administration). He confirms that the physicians are responsible for the provisions of medical care and when he, Nurse Gibson, is providing medical care, he is under the control of Dr. Wolf. However, when he is performing his administrative duties such as ordering supplies or doing paperwork for the emergency room, he is an agent of the hospital. CP 98.

The Professional Services Agreement between Dr. Wolfe and

Capitol Medical Center recognizes this parallel agency, and states that Dr. Wolfe has the duty “to direct and supervise the technical work and services” of the emergency room staff. In addition, the Agreement provides that Dr. Wolfe will “assume complete responsibility for the professional operation of the Service and shall provide all professional services which the facility is required to provide through the service.” It also states that Dr. Wolfe, as Director of Service, will “[p]rovide such supervision, management, and oversight to the Service to ensure that the professional services meet or exceed accepted standards of care.” Lastly, the Agreement states that Dr. Wolfe shall “[p]rovide physician guidance to the Nursing Director and management of the department for patient care and safety.” CP 90-92.

The Agreement also delineates certain of Dr. Wolfe’s responsibilities *from* the responsibilities of the Capitol Medical Center. Dr. Wolfe, for example, was responsible for cooperating with Capitol Medical Center “regarding administrative, operational or personnel problems in the Service and promptly inform [Capitol Medical Center] . . . of professional problems in the Service.” CP 91. Dr. Wolfe did not have responsibility for administrative problems, but was required to inform the hospital of those problems, who would then deal with them. Likewise,

Capitol Medical Center was obligated to “employ all non-physician, technical and clerical personnel it deems necessary for the proper operation of the Service. [Dr. Wolfe] shall direct and supervise the technical work and services of such Department personnel. However, [Capitol Medical Center] retains full administrative control and responsibility for all such Service personnel.” *Id.* This agreement shows that Dr. Wolfe had control over Nurse Gibson for medical services and Capitol Medical Center had control over Nurse Gibson for administrative services.

In her trial testimony, Dr. Wolfe admitted she has control over the ER nurses and that ER physicians are in charge of patient care.

- Q. And the medical care that was given to Nathan was given by you and Nurse Gibson, right?
- A. Yes.
- Q. And by the way, you’re the doctor, right.
- A. Yes
- Q. So as between you and Nurse Gibson orders run in one direction. You give orders to Nurse Gibson, don’t you.
- A. Yes.
- Q. And in fact the physicians in the ER Room are in charge of Patient care, period. They’re the ones in charge of patient care, aren’t they?
- A. It’s a team approach, but we’re the ones giving the orders, but if there’s confusion, they come and ask.

CP 67.

Dr. Wolfe states she is Nurse Gibson’s sole supervisor for the

provision of medical services. CP 289, ll. 1-9; CP 75. At trial Nurse Gibson confirmed this.

Q. Because the physician as you understand it has authority to direct you in that regard.

A. The physician is in charge of the medical care and directs the medical – how to do the medical care, even if they want something a specific way.

Q. They can.

A. They can.

CP 82.

At trial, Dr. Wolf also confirmed that she was Nurse Gibson's direct supervisor the night they treated Nathan Wood.

Q. Well, in terms at the ER that night, there's no nurse supervising Nurse Gibson, is there?

A. The only person supervising Nurse Gibson is Dr. Wolfe

Q. That night in the ER.

A. Directly that night in the ER, yes.

RP 2/05-14/07, p. 70, ll. 2-9. Nurse Gibson also confirmed this. RP 2/05-14/07, p. 58, ll. 7-8.

In his deposition, Nurse Gibson described the chain of command in the Emergency Room: the ER physicians are in charge of patient care concerns and the ER nurses are subject to physician supervision and control regarding medical services and decisions. However, as to administrative duties, the nurse is an agent of the hospital and not an agent of the doctor. CP 98.

Both Nurse Gibson and Dr. Wolfe were negligent in failing to take an adequate history and or conduct an adequate exam. These diagnostic activities are part of the medical treatment of a patient. At deposition, for example, Nurse Gibson stated that he did not develop a clear picture of how Nathan's injury happened.

- Q. So, you know, I mean, I hear you saying again, you know, that you couldn't get a clear picture-
- A. Right
- Q. -- of what had happened.
- A. Right.
- Q. And that's something you remember clearly, sitting here today, was that you didn't really ever get a clear picture of what had happened?
- A. Right.
- Q. And you don't remember trying to get information from anybody about the patient? You don't have a recollection of that?
- A. I don't have a recollection of that.

CP 101.

However, at trial, Nurse Gibson testified that he knew Nathan could have fallen on a rod of 10 to 20 inches long.

- Q. Okay. Tell us what the patient told you.
- A. What I got out of this is basically what's written down here, that there was a complaint of rectal pain. He apparently fell on to a -- I started to write "part" but crossed it out and put "metal rod on a tractor blade." He states that this went up his rectum. I don't know whether that's the specific term he used, but that's the term I used.
- * * * * *
- Q. (By Mr. Cushman) This was a pretty unusual incident, wasn't it?

- A. Yes.
- Q. You do remember this part, don't you?
- A. I remember the consequences of what is being said here. Like I said, I grew up on a small farm. I'm familiar with tractors and farm equipment, and I'm familiar with basically three-eighths, half-inch rebar welded on to the edges of tractor blades setting up for guides. So this has a very specific potential to me as a mechanism of injury that -- and this goes again to why he was sent to the emergency room promptly for evaluation.
- Q. So implicit in this statement that you write down here, thinking about what you know about tractors and metal guides on buckets, how long were you thinking in your mind that bar could have been?
- A. That bar could have been anywhere from -- depending on what the -- I've seen them anywhere from ten to twenty inches.

RP 2/05-14/07, p. 18, ll. 13-19; p. 19, ll. 5-25; CP 76-77.

At trial Dr. Wolfe admitted Nurse Gibson never told her anything but that the patient had an injury to his rectum.

- Q. And Nurse Gibson told you that this patient had fallen on to an object, been impaled and had to be lifted off?
- A. Whatever is on the ER sheet is what I knew that he told me. At this point in time I'm not going to ever conjecture what my memory is from seven years ago. So I'm going to be very specific.
- (A document is displayed.)
- Q. These -- this is Nurse Gibson's writing here isn't it?
- A. Correct.
- Q. And that is subjective, right?
- A. Correct.
- Q. That means what the patient says.
- A. Exactly.
- Q. And the triage time is 1950. That's ten minutes to eight isn't it?
- A. Yes.

Q. In the evening.

A. Yes.

Q. And it says, complains of rectal pain. Patient fell on to metal rod on tractor blade, states rod went up rectum.

A. Yes.

* * * * *

Q. Okay. Now, what you did not ask anybody about at any time, Nurse Gibson, any of the ER personnel, the patient, or Dr. – or the Woods, the parents, was how long an object he'd fallen on, did you?

A. I have no memory of asking that and it's not in anything that was written down at the time so I will say no.

RP 2/05-14/07, p. 3, ll. 15-25; p. 4, ll. 1-10; p. 5, l. 5-10; CP 64-66.

At trial, Dr. Harris, a defense expert, admitted the length of the impaling rod was critical information which Dr. Wolfe did not seem to care about. His testimony is damning to Dr Wolfe.

Q: Because you agree that in determining the mechanism of injury here, not only do you need to know if the patient fell and at what force, but you need to know what they fell on, don't you?

A: Yes.

Q: That's a critical part of the history to determine what they fell on, isn't it?

A: It is.

RP 2/15-14/07, p. 13, ll. 24-25, p.14, ll.1- 6; CP 307-08.

Dr. Harris admits that it is common sense that emergency medical providers should inquire about the object on which Nathan had fallen.

Q: But in her deposition she tells us– and you've read it– that she assumed he could have fallen as much as five feet, right?

A: Yes.

- Q: Okay. Now, falling as much as five feet, you will agree with me it's critical to know, that's half of the mechanism of injury, that falling part. The other part is what he hit. Did he hit a mattress, does he hit water, does he hit concrete, does he hit a penetrating object, and you want to know how long it is, don't you?
- A: At that point, yes.
- Q: It's virtually common sense, isn't it?
- A: If he fell five feet.

RP 2/05-14/07, p. 28, ll. 9-21; CP 322.

Nurse Gibson admits he did not even locate the puncture wound when he examined Nathan Wood.

- Q. How did you do the exam?
- A. He was back in the room, and I have a vague recollection of needing to examine the area. And that I would have had to spread his cheeks to directly visualize the area, and when I do this, I do not see any trauma to the anus or anything that might have penetrated into the rectum. I didn't see any scratches. You would -- again, from what we were talking about before, I would expect to see a tear, potential bleeding, things of that nature. So at this point I do not see any damage to that area. I do note an abrasion on the side of the buttocks, but I do not see any actual puncture wound at that time.
- Q. All right.
- A. And that could have been from the way I may have examined him to look at the area.
- Q. Because what did you not see?
- A. I did not see a puncture wound.
- Q. Did you later see a puncture wound?
- A. Yes, I saw -- I did see the wound indirectly when Dr. Wolfe was examining it. I remember checking several times to see if she needed any assistance -- a couple of times, to see she needed any assistance, and then I saw the wound off to the side of the area that I was concerned with in that immediate triage evaluation of him.

- Q. Okay. Now this abrasion that you saw was where relative to the puncture wound that you reported seeing later?
- A. I couldn't say at this point in time. Because I don't recall where the abrasion was other than it was on the right buttocks.
- Q. But you later came to understand there was a puncture wound you hadn't earlier seen?
- A. Yes.

RP 2/05-14/07, p. 22, ll. 12-25; p. 23, ll. 1-18; CP 78-79.

This trial and deposition testimony shows that both Dr. Wolfe and her ER nurse, Nurse Gibson, failed obtain critical triage information about the nature and cause of Nathan Wood's injury and then compounded this failure by failing to conduct an adequate exam of the wound site itself. This caused Dr. Wolfe to come to the incorrect conclusion that the wound was only a minor scratch, not a penetrating wound.

Finally, Nurse Gibson or Dr. Wolfe, or both, were negligent in giving discharge instructions. Nathan Wood was misinstructed, causing him to not seek out medical help as soon as he should. At trial Nurse Gibson testified that discharge instructions, including follow-up instructions, are orders that are given by the ER physician and not by the nurse and that it is the responsibility of the physicians to provide discharge codes. RP 2/05-14/07, p. 64, ll. 10-16; CP 81. At trial Dr. Wolfe confirmed she has the power to give the discharge instructions and that subordinate personal in the ER, such as Nurse Gibson, have to obey her

orders. RP 2/05-14/07, p. 51, ll. 5-25; CP 70.

In Nurse Gibson's deposition, he testified that under the Discharge Rx section of the Emergency Admission Record, it states "Return 1st to MD for wound check" which is in the handwriting of Dr. Wolfe. He testified that under "Referral Physician" in the Discharge Instructions it states "Dr. A Busser or return to ER Monday" which is in his own handwriting. Nurse Gibson admitted the statement in the Discharge Rx section is clearly ambiguous and he was not clear what Dr. Wolfe meant by this statement. Nurse Gibson also testified he was unsure whether the statement under the Discharge Rx section of the Emergency Admission Record was consistent or inconsistent with the Referral Physician section. RP 2/05-14/07, p.77-81; CP 99-100.

At trial, Dr. Wolfe testified that Nurse Gibson was negligent in the provision of medical care, at least as to the discharge instructions. Arguably, on these facts Nurse Gibson was also negligent, along with Dr. Wolfe, in taking the history, since Nurse Gibson admitted he assumed the penetrating object might have been 10" to 20" long, but never told that to Dr. Wolfe, who, at least at trial admitted that was critical information. Dr. Harris testified it was common sense to need to know how long the spike was. Likewise, on these facts, Nurse Gibson was negligent along with Dr.

Wolfe in doing the exam. Nurse Gibson did not even locate the penetrating wound and Dr. Wolfe admittedly used incorrect techniques in determining the depth of penetration. These are facts from which a jury could find that Nurse Gibson was negligent.

At trial, Dr. Wolfe elaborated on Nurse Gibson's negligence in issuing defective and incorrect discharge instructions.

- Q. In what regard did Dave Gibson not do his job?
- A. He didn't put down my – what I wrote on the order on the discharge instructions.
(A document is displayed)
- Q. And in fact on this emergency admission record he wrote down to return to their own doctor or the Emergency Department on Monday. He wrote it down in two places, didn't he?
- A. Yes.
- Q. Okay, And as I – is it correct that a nurse does not make referral instructions but the doctor make them and the nurse communicates them?
- A. It depends on the situation. In general, yes, it's – I'm – it works both ways. Sometimes the doctor doesn't put down specific instructions. I tend to be one of the more obsessive compulsive ones and I do. So in my case I write the orders. Sometimes doctors don't write the orders and the nurse chooses.
- Q. Well, in this blank here, "referral physician," that's – that was empty until Nurse Gibson wrote it there.
- A. Yes.
- Q. Okay. And so is that where you would write your referral physician instructions?
- A. No. No. That's – that last part is filled out by the discharge nurse.
- Q. So, are you saying that Mr. Gibson made that up instead of getting those instructions from you?
(Objection overruled.)

- Q. Ok, it's Exhibit 4 in the book there. You don't have the book, do you? No, no, no. Not that book, Ma'am, this book.
- A. All right. What are you asking?
- Q. I'm saying are you assuming that Mr. Gibson came up with that referral instruction himself rather than got it from you?
- A. Yes, because that wasn't the – my orders or my plan.
- Q. Okay. That's all I have.

RP 2/05-14/07, p. 77, ll. 7-25, p. 78, ll. 1-22; CP 287-88.

On November 12, 2002, Dr. Wolfe and Capitol Medical Center mediated this matter with Nathan Wood. Capitol Medical Center settled with Nathan for \$25,000.00 and he agreed to release Capitol Medical Center and its heirs, executors, successors, administrators, agents, employees, and assigns. However, the Release explicitly stated that it does not “release Dr. Cynthia Wolfe, from any and all claims, demands, actions, causes of action, suits, costs or expenses, upon or by reason of any damage, loss, injury, or suffering, known or unknown, on account of or in any way arising from, or related to, or which may have resulted or in the future may develop from medical care and treatment rendered to me at Capital Medical Center on or about December 30, 1999.” Further, the Release states that “the parties hereto agree that *nothing in this release is intended to release or benefit in any way Dr. Cynthia Wolfe.*” CP 94-95.

The Release released the Hospital from the claims to which it was then exposed. Further, Nurse Gibson, as an employee, was released, but

only in his capacity as the hospital's agent for administrative duties (Nurse Gibson was never a party to the lawsuit). Nurse Gibson, as an agent of Dr. Wolfe in the provision of medical services, was not released. The Release did not release Dr. Wolfe, as principal in her own right, for her own error or omissions, nor did it release Nurse Gibson, Dr. Wolfe's agent in the provision of medical services, relating to patient care and medical treatment, nor did it release Dr. Wolfe from vicarious liability for the negligence of Nurse Gibson in providing those medical services. Dr. Wolfe is still accountable for the negligence of Nurse Gibson in the provision of medical services both under the doctrine of *respondeat superior* and under contract for patient care.

At trial before the Honorable Judge Hicks, the Trial Court, after hearing all the testimony, included jury instructions for the jury to decide the scope of agency between Nurse Gibson and Capitol Medical Center, and between Nurse Gibson and Dr. Wolfe. After trial, the result of which was vacated for jury misconduct, Dr. Wolfe filed a Motion for Summary Judgment again raising the legal argument that the release of Capitol Medical Center, and its employees, operated as a release of Dr. Wolfe for her vicarious liability for the negligence of Nurse Gibson in the provision of medical services. For the purposes of this second Motion for Summary

Judgment, and thus for this appeal, the negligence of Nurse Gibson was presumed (while the negligence of Dr. Wolfe was not). In fact, as is shown by Nurse Gibson's and Dr. Wolfe's testimony, *supra*, both Dr. Wolfe and Nurse Gibson admitted to Nurse Gibson's negligence. The only issue before the Trial Court was whether Nathan's release of the hospital served as a release of Dr. Wolfe for Nurse Gibson's negligence.

The new Trial Judge, now Judge Pomeroy, agreed that the Release did in fact release Dr. Wolfe for Nurse Gibson's negligence, and granted the motion, despite the previous jury instructions issued by Judge Hicks (CP 22-50) and despite the clear distinction between the scopes of Nurse Gibson's parallel and simultaneous, but mutually independent and distinct, agency relationships with Dr. Wolfe and Capitol Medical Center.

III. SUMMARY OF ARGUMENT

Nurse Gibson was an agent of two principals, Capitol Medical Center and Dr. Wolfe, under two separate and distinct scopes of authority (administrative authority and medical authority). Nathan Wood settled and released his claims for negligent administration of his case against Capitol Medical Center. However, he continued to pursue his medical negligence case against Dr. Wolfe. Dr. Wolfe asserted that, because Nurse

Gibson was her agent as well as the agent of Capitol Medical Center, and because Nurse Gibson was released from administrative negligence claims when Capitol Medical Center was released, that Dr. Wolfe, as a vicariously liable principal, is released from claims against her on account of Nurse Gibson's medical negligence. The Trial Court erroneously agreed.

When an agent has two simultaneous but independent scopes of agency, each principal is separately liable based on his or her respective responsibility for the agent. While release of an agent can release a vicariously liable principal, release of the agent does not release parties except to the extent of their vicarious liability on the released claims. Joint principals (principals that form a single source of authority) are each and all released when a joint agent is released. Here, however, in the case of lent or simultaneous but independent agency, each principal is separately liable for harm conducted under that principal's separate and distinct authority, and is thus not released when a party settles its claims against the other principal.

Here, Nurse Gibson committed negligent acts within both his separate and parallel scopes of agency. Nathan Wood settled with Capitol Medical Center with regard to those negligent administrative acts, which

occurred within the scope of administrative agency Nurse Gibson had from Capitol Medical Center. Nathan Wood did not settle with Dr. Wolfe. The settlement document specifically preserves medical negligence claims against Dr. Wolfe, including claims for medical negligence by Nurse Gibson acting within his medical scope of authority.

Finally, even if Nurse Gibson's agency were an overlapping dual agency such that release of Nurse Gibson (in his capacity as employee and administrative agent of the hospital, Nurse Gibson himself not being a party to the lawsuit) could release Dr. Wolfe, release of an agent only operates to release the principal if the principal proves that the agent was solvent at the time of release, and Dr. Wolfe has failed to present such proof. Moreover, such caselaw holding that release of an agent can – under certain circumstances – operate to release the principal is inapplicable where, as here, the agent is not a party to the case and not a source of compensation for the injured party.

IV. ARGUMENT

A. The Court of Appeals Reviews Summary Judgments De Novo, as a Pure Question of Law, Without Deference to Any Element of the Decision Below.

When reviewing an order granting summary judgment, the Court

of Appeals engages in the same inquiry as the Trial Court. Failor's Pharmacy v. DSHS, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Id.* All facts and all reasonable inferences from those facts are considered in the light most favorable to the party resisting summary judgment. *Id.* The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact. Morris v. McNicol, 83 Wn.2d 491 at 494, 519 P.2d 7 (1974).

Summary judgment is appropriate only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. Failor's Pharmacy, 125 Wn.2d at 493. Here, it was unreasonable for the Trial Court to conclude that the release of Capitol Medical Center also released Dr. Wolfe of her vicarious liability for Nurse Gibson's medical negligence. This Court should overrule and remand the matter back to the Trial Court.

B. By Its Own Terms, the Release Preserved, Rather than Released, Claims Against Dr. Wolfe

There are some very basic contract law principles applicable here.

“A contract is formed when parties exchange promises to act or refrain from acting in a certain manner. *See generally* Restatement (Second) of Contracts § 1 (1981).” Washington Fed. of State Employees, AFL-CIO, Council 28, AFSCME v. State, 101 Wn.2d 536, 549, 682 P.2d 869 (1984).

“Generally, a promise is a manifestation of the promisor's intent to act in a certain way so made as to justify the person receiving the promise in understanding that a commitment has been made. Restatement (Second) of Contracts § 2 (1981).” *Id.* “Releases are contracts and their construction is governed by the legal principles applicable to contracts and they are subject to judicial interpretation, in light of the language used.”

Vanderpool v. Grange Ins. Assoc., 110 Wn.2d 483, 488, 756 P.2d 111 (1988). This Court should interpret the Release just as it would any other contract.

When interpreting a release, and trying to decide whether the release of a principal also released an agent, the “pivotal inquiry is whether the parties to the release intended to release both the principal and the agent. If such intent is clear from the language of the release, then both parties are released. However, absent such evidence of intent to release both parties, [RCW 4.22.060(2)] provides that no other person liable on the same claim is released.” *Id.* The case is even stronger here: not only is

Nathan Woods' claim against Dr. Wolfe based on her vicarious liability for the medical negligence of Nurse Gibson a *different claim* than the claim for administrative negligence against Capitol Medical Center, but the plain language of the Release preserved all Nathan's claims against Dr. Wolfe. There is no "intent clear from the language of the release" that even begins to suggest that either party intended to release Dr. Wolfe from vicarious liability for Nurse Gibson's medical negligence.

The Trial Court interpreted and *misinterpreted* a clear and unambiguous Release, which specifically reserved and preserved the very claims the Trial Court dismissed. The release of Capitol Medical Center explicitly did not release Dr. Wolfe and explicitly stated Dr. Wolfe could not "benefit in any way" from that release. A release of Dr. Wolfe for the misdeeds of her own sub-agents, such as Nurse Gibson, over whom she has control, and who are her agents, not the hospital's agents, when it comes to the provision of medical services, would benefit Dr. Wolfe. Therefore, the Capitol Medical Center Release could not release a subagent of Dr. Wolfe, acting under the control of Dr. Wolfe, since to do so would release Dr. Wolfe from that liability, and benefit her. Applying the principles of Vanderpool, this Court should hold that the Trial Court erred in granting summary judgment on this issue.

In the present case, Nathan Wood entered into a settlement agreement with Capitol Medical Center and its agents. Dr. Wolfe would be considered an agent of Capitol Medical Center for the provision of medical care, but she was explicitly excluded from being released, or “benefitted in any way,” by the terms of the settlement. Nurse Gibson, who was a sub-agent of Dr. Wolfe for medical care, would be part of the medical care element for which Dr. Wolfe remained responsible. The Release only released Capitol Medical Center for the negligence of Nurse Gibson when he was serving in his capacity as the *hospital's* agent: to wit, with regard to administrative duties.

The Release did not release Dr. Wolfe, or her agents, from liability for negligently provided patient care (medicine), whether rendered directly by Dr. Wolfe or by her agent, Nurse Gibson. Dr. Wolfe is still accountable for the negligent provision of medical services by herself or those she controls, like Nurse Gibson, by her contract with Capitol Medical Center and the doctrine of *respondeat superior*. The Trial Court erred in holding otherwise, and this Court should reverse.

Even if the Trial Court were correct (as we shall see that it is not) that the scope of Nurse Gibson’s agency as agent for Dr. Wolfe is not distinct and severable from his scope of agency as agent for Capitol

Medical Center, the proper result on Summary Judgment is not to dismiss claims against Dr. Wolfe, but to reinstate claims against Capitol Medical Center. Reinstatement of the claims and rescission of the Release would be based on mutual mistake of the parties (that Capitol Medical Center could be released without releasing Dr. Wolfe) and that performing under the contract would involve an impossibility (Nathan Wood's release of Capitol Medical Center without releasing Dr. Wolfe). In either case, the remedy is not to apply the contract to defeat the fundamental purpose of Nathan Wood in entering into the Release; the remedy is rather to equitably rescind the contract, allowing Nathan Wood's claims to proceed.

A court can rescind a contract where both parties are mistaken about a basic assumption underlying the agreement. Matter of Marriage of Schweitzer, 132 Wn.2d 318, 328, 937 P.2d 1062 (1997). Here, both Nathan Wood and Capitol Medical Center assumed that Capitol Medical Center could be released without releasing Dr. Wolfe. If this assumption, as Dr. Wolfe argued, was erroneous, and since both parties to the Release (Nathan Wood and Capitol Medical Center) made the same assumption, the Trial Court, rather than dismissing the claims, should have rescinded the Release.

Alternatively, performing under the contract as Dr. Wolfe would

have Nathan do would involve an impossibility: it is impossible to release Capitol Medical Center without releasing Dr. Wolfe, which neither party intended to do when they entered into the Release. “The doctrine of impossibility excuses a party from performing a contract where performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss.” Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wash.2d 425, 439, 723 P.2d 1093 (1986). If Dr. Wolfe’s position is correct, then it is impossible to release Capitol Medical Center without releasing Dr. Wolfe. If so, the intended performance of the Release is impossible, and the Trial Court, rather than dismissing the claims, should have rescinded the Release for impossibility.

C. The Laws of Agency, Dual Agency, and Parallel but Independent Dual Agency Provide that Nurse Gibson was a Dual Agent with Authority from the Hospital to Undertake Administrative Duties and from the Doctor to Undertake Medical Services

Human life is complicated. The same person can be different things to different people in different contexts. A married lawyer with civic spirit can be: 1) the agent of his clients while acting as a lawyer; 2) the agent of his wife while acting as a husband; 3) the agent of his daughter’s elementary school when acting as a school chaperone; 4) the agent of a social club when acting as a club volunteer or officer; and 5) the

agent of a corporation when acting as a corporate board member.

However, if that same married lawyer acts negligently while doing an action that involves multitasking between scopes of agency, a settlement with one principal should not and does not operate to excuse the other liable principal or principals. To hold otherwise would undermine the possibility of partial settlements (which benefits the administration of justice by simplifying litigation) in cases of complex and compound agency, such as the present case.

This Court, following the Second Restatement of Agency, has defined “agent.” “An agent is one who is to act on behalf of and subject to the control of another, a principal, when both agent and principal consent to entering into the relationship. Restatement (Second) of Agency § 1 (1958).” Thola v. Henschell, 140 Wn. App. 70, 87, 164 P.3d 524 (2007). Agents act on behalf and in the stead of their principals insofar as they have authority, which is defined as “the power of the agent to do an act or to conduct a transaction on account of the principal.” Restatement (Second) of Agency § 7 Authority, comment a (1958). Nurse Gibson, an agent for both Dr. Wolfe and Capitol Medical Center, had the authority to act administratively for Capitol Medical Center and the authority to provide medical services under Dr. Wolfe.

Generally, under *respondeat superior*, a principal “is subject to liability for physical harm caused by the negligent conduct of servants within the scope of their agency. Restatement (Second) of Agency § 243 (1958).” Cameron v. Downs, 32 Wn. App. 875, 881, 650 P.2d 260 (1982). “To be within the scope of one’s agency, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized. Restatement (Second) of Agency § 229(1) (1958).” *Id.* Capitol Medical Center authorized Nurse Gibson to perform administrative tasks. In contrast, Dr. Wolfe authorized Nurse Gibson to perform medical services under her direction and control. (Moreover, Dr. Wolfe’s contract with Capital Medical Center specifically made her responsible for the performance of medical services by ER personnel, including Nurse Gibson). Therefore, Capitol Medical Center – had it not already been released by Nathan Wood – would have been liable for the harm caused by Nurse Gibson’s administrative negligence. Dr. Wolfe is liable for the physical harm caused by Nurse Gibson’s medical negligence.

This derivative liability applies even if the principal did not intend the harm or specifically authorize the conduct that resulted in the harm. “A master or other principal who unintentionally authorizes conduct of a servant or other agent which constitutes a tort to a third person is subject

to liability to such person.” Restatement (Second) of Agency § 215 (1958). Further, if an agent is authorized to determine the scope of action – as Dr. Wolfe authorized Nurse Gibson to do in triage – and makes mistakes regarding the conditions, and harm results from these mistakes, the principal is liable. Restatement (Second) of Agency § 258 (1958). “Inaction may be conduct within the scope of an agent's employment. Restatement (Second) of Agency § 232 (1957).” Brown v. MacPherson's Inc., 85 Wash.2d 17, 26, 530 P.2d 27 (1975) (Utter, J., dissenting). Therefore, Nurse Gibson’s failure to ascertain the length of the spike upon which Nathan had been impaled and failure to give correct discharge instructions was within the scope of his employment.

This case involves compound or complex agency, in which the same man, Nurse Gibson, was simultaneously serving two principals under two distinct, but parallel, scopes of agency (as a medical agent of Dr. Wolfe and as an administrative agent of Capitol Medical Center). “A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.” Restatement (Second) of Agency § 226 (1958) (section adopted by Nyman v. MacRae Bros. Const. Co., 69 Wash.2d 285, 287, 418 P.2d 253 (1966)).

Comments to this Restatement section explain further how an agent may serve two masters:

Independent service for two masters. Since one can perform two acts at the same time, it is possible for each act to be performed in the service of a different master.... Likewise, a single act may be done to effect the purposes of two independent employers.... A person, however, may cause both employers to be responsible for an act which is a breach of duty to one or both of them. He may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both....

Restatement (Second) of Agency § 226. Servant Acting For Two Masters, comment a (1958). Nurse Gibson was thus able to serve both Capitol Medical Center, performing administrative services, and Dr. Wolfe, performing medical services under her control and direction.

Where two masters share services. Two persons may agree to employ a servant together or to share the services of a servant. If there is one agreement with both of them, the actor is the servant of both at such times as the servant is subject to joint control. If, however, it is agreed that control shall alternate, the actor is the servant only of the one for whom he is acting at the moment.

Restatement (Second) of Agency § 226. Servant Acting For Two Masters, comment b (1958). The agreement between Dr. Wolfe and Capitol Medical Center, where Dr. Wolfe agreed that she would be responsible for the acts and services of ER personnel acting under her direction and control, was just such an agreement where both masters agreed that a particular servant – Nurse Gibson in this case – would be the servant only

of Dr. Wolfe when he performed medical services under her direction and control.

As a corollary of these rules, a principal is only liable for actions of shared agents to the extent the harm resulted from the scope of authority the agent owed that particular principal. Likewise, if a principal is discharged from liability for the wrongful conduct of an agent acting under that principal's authority (such as the discharge of the hospital for any *administrative* failure of Nurse Gibson), that discharge does not operate to excuse a different principal for harm caused by the agent acting under a separate and distinct scope of authority (such as the improper triage, diagnosis, and treatment of Nathan Wood, as well as the failure to issue proper and complete discharge instructions – which are medical, not administrative, failures).

In cases of lent agents or simultaneous but independent agency, each principal is separately liable based on his or her respective authorizations of the agent. This is unlike the circumstance when two persons serve as joint or co-principals, jointly authorizing the agent to perform under a single and unified scope of authority, and subjecting themselves to joint and unified liability for any negligence of the agent within that single scope of authority, as in the case on which Dr. Wolfe

relied, Perkins v. Children's Orthopedic Hospital, 72 Wn. App. 149, 864 P.2d 398 (1994) (*see infra* for a thorough analysis).

Here, Nurse Gibson committed multiple negligent acts within two separate and parallel scopes of authority for two separate and distinct principals. Nathan Wood settled with one of these principals (Capitol Medical Center) with regard to those negligent acts that occurred within the scope of authority (administrative duties) Nurse Gibson had from Capitol Medical Center. Nathan Wood did not settle with Dr. Wolfe, and the settlement document specifically preserves claims against Dr. Wolfe, with regard to any medical negligence, including medical negligence by Nurse Gibson acting within the separate (medical) scope of authority he had under Dr. Wolfe.

D. The Release of Capitol Medical Center Operated to Release Nurse Gibson only from Claims Relating to the Scope of His Agency for Capitol Medical Center and Did Not Operate to Release Dr. Wolfe from Any Liability Associated with the Provision of Medical Services, which was Outside the Scope of Nurse Gibson's Agency for Capitol Medical Center

Nurse Gibson described his two types of duties: some administrative (for the hospital), like ordering supplies and seeing that forms are filed correctly; and some medical (for the doctor), like taking a history, doing an exam, and giving discharge instructions. Dr. Wolfe, as the principal of Nurse Gibson, is liable for Nurse Gibson's negligence in

the provision of medical services both under the doctrine of *respondeat superior* and under Dr. Wolfe's contract with Capitol Medical Center for patient care. Both Nurse Gibson's and Dr. Wolfe's testimony is undisputed that as to patient care (medicine), Dr. Wolfe is in control, and has the right to direct the other ER personnel, including Nurse Gibson.

Dr. Wolfe has admitted that she had control over Nurse Gibson. Dr. Wolfe, as a member of a professional limited liability company that contracted with Capitol Medical Center to provide emergency room physicians, and emergency medicine through the ER and its staff, had a duty to "*direct and supervise the technical work and services*" of the emergency room staff. CP 90-92. To the extent Nurse Gibson acted negligently while assisting Dr. Wolfe in caring for Nathan Wood, Dr. Wolfe, as principal, is liable under the doctrine of *respondeat superior*, as well as under her contract with Capitol Medical Center. See Stone v. Sisters of Charity of House of Providence, 2 Wn. App. 607, 610, 469 P.2d 229 (1970).

In Stone, the Court held that "on the principles of *respondeat superior*, the hospital and doctor may each be liable for acts of the hospital nurse." *Id.* Also, sister states of Washington follow the same rule. See, e.g., Foster v. Englewood Hospital Association, 19 Ill. App.3d 1055,

1061, 313 N.E.2d 255 (1974) (noting that a doctor may be held liable for the negligence of a hospital employee who is subject to the doctor's control and supervision).

Other states that have adopted this theory of liability sometimes call it the "captain of the ship doctrine." Under that doctrine, a surgeon is responsible for the acts and omissions of assistants acting under the surgeon's direction. *See Marie Y. v. General Star Indem. Co.*, 110 Cal. App. 4th 928, 942, 2 Cal. Rptr. 3d 135 (2003); *see also Bradley v. Southern Baptist Hosp. of Florida, Inc.*, 943 So.2d 202, 205 (Fla. App.1st Dist. (2006)) (noting that "a nurse can come under the direction and control of a physician, and liability for the nurse's actions then shifts from the hospital to the doctor.") Here, Capitol Medical Center and its ER physicians, including Dr. Wolfe, entered a contract that placed both a right and a duty on the doctors to control the ER staff, including the nurses, in the provision of medical services. Just as in *Bradley*, Nurse Gibson came "under the direction and control of a physician, and liability for the nurse's actions then *shifts from the hospital to the doctor.*" *Id.*

Dr. Wolfe was obligated to control and supervise Nurse Gibson and all ER staff in the provision of medical services according to her contract with the hospital. Dr. Wolfe cannot avoid liability by blaming

Nathan Wood's injuries on the Capitol Medical Center nurse and ER staff when it is explicitly stated in her contract with the hospital that she is under a duty to supervise and direct those personnel in regards to patient care (medicine).

Nurse Gibson was an agent or servant of Dr. Wolfe in the provision of medical services. It is settled law in this state that "on the principles of respondeat superior" the doctor may be liable for acts of the hospital nurse. Stone, 2 Wn. App. at 610. It is also settled law in this state that a principal is liable for the torts of an agent committed within the scope of the agency. *See Cameron*, 32 Wn. App. at 881, *citing to* Restatement (Second) of Agency § 243 (1958) ("A master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of their agency"). As between Capitol Medical Center and Dr. Wolfe, they resolved these rights and responsibilities in their contract, and thereafter, Nurse Gibson came "under the direction and control of a physician, and liability for the nurse's actions then shifts from the hospital to the doctor." Bradley, 943 So.2d at 205. The question of agency is disposed of by the contract and the undisputed testimony of both the nurse and the doctor. Dr. Wolfe had the right and the power to control the nurse, and with that right and power, goes the liability.

An excellent analysis of agency appears at O'Brien v. Hafer, 122 Wn. App. 279, 930 P.3d 930 (2004). There it is stressed that the essential question to determine agency is the right to control.

The crucial factor is the right to control the manner of performance that must exist to prove agency. The negligence of the agent is imputed to the principal because he has the right to control the acts of the agent. It is the existence of the right to control, not its exercise, that is decisive.

Id. at 283-84.

Here there is no question. The contract between Dr. Wolfe and Capitol Medical Center gives her the right and the duty to control the subordinate staff in the ER. Both Dr. Wolfe and Nurse Gibson acknowledged this right to control. Although both stated that the doctor does not micro-manage the nurse, it is not the act of actual control, but the right to control, that establishes agency. The nurse is the doctor's agent for purposes of medical care, and that doctor is liable for the nurse's mistakes in patient care (medicine).

Nathan Wood settled with Capitol Medical Center. However, that settlement does not release Dr. Wolfe for the negligence of Nurse Gibson in the provision of medical services. Nurse Gibson was an agent of two principals, Dr. Wolfe and Capitol Medical Center, but as to distinct and separate duties. When Nurse Gibson was performing medical services, he

was an agent of Dr. Wolfe. When Nurse Gibson was performing administrative duties he was an agent of Capitol Medical Center. As between Capitol Medical Center and Dr. Wolfe, their contract makes Dr. Wolfe responsible for Nurse Gibson's provision of medical services.

Further, the release of Capitol Medical Center explicitly did not release Dr. Wolfe and explicitly stated Dr. Wolfe could not "benefit in any way" from that release. A release of Dr. Wolfe for the misdeeds of her own agents, such as Nurse Gibson, over whom she has control, and who are her agents, not the hospital's agents, when it comes to the provision of medical services, would benefit Dr. Wolfe. Therefore, the Capitol Medical Center Release could not release an agent of Dr. Wolfe, acting under the control of Dr. Wolfe, since to do so would release Dr. Wolfe from that liability and benefit her.

On the motion below, Dr. Wolfe relied upon, and the Trial Court accepted, the case of Perkins, 72 Wn. App. 149 (*see full citation, supra*). Perkins is clearly distinguishable and not applicable to the present case. In Perkins, Children's Hospital filed a motion for partial summary judgment praying for dismissal of Plaintiff's claims that Children's Hospital was vicariously liable for the acts and omissions of alleged agents of the University of Washington: specifically Drs. Mismach, Cohen, Furman,

McCroskey, and Morray. Plaintiff had settled with the University for approximately \$1.7 million for medical services provided by the University and its agents and employees. All the above physicians were providing patient care (medicine) and were released from all claims for such care. Since these doctors were agents of *both* Children's and the University *for the same duties* (medical care), a release of the doctors for their medical malpractice as agent for either Children's or the University would release them as to both.

In the present case, Nathan Wood entered into a settlement agreement with Capitol Medical Center and its agents. Dr. Wolfe would be considered an agent of Capitol Medical Center for the provision of medical care, but she was explicitly excluded from being released, or "benefitted in any way," by the terms of the settlement. Nurse Gibson (who was an agent of Dr. Wolfe for medical care) would be part of the medical care element for which Dr. Wolfe remained responsible. The Release only released Capitol Medical Center for the negligence of Nurse Gibson when he was serving in the capacity as the hospital's agent: to wit: with regard to administrative duties. It did not release Dr. Wolfe, or her agents, from liability for negligently provided patient care (medicine), whether rendered directly by Dr. Wolfe or by her agent, Nurse Gibson.

Gibson, as an agent of Dr. Wolfe. One of the claims against Dr. Wolfe is the claim that she is liable for the admitted negligence of her agent, Nurse Gibson. Dr. Wolfe's negligence may be based upon her own acts or upon the acts of those, like Nurse Gibson, over whom she had control, in the provision of medical services. Hence, *by not releasing any claims* that might run against Dr. Wolfe, Nathan Wood kept Dr. Wolfe in the case as to all possible bases of liability, including the negligence of her agent or servant, Nurse Gibson.

But the distinction between the releases in Perkins and this case does not stop there. Not only is Dr. Wolfe explicitly not released from any claim arising out of the provision of medical services at Capitol Medical Center, but the Release further states that "nothing in this release is intended to release *or benefit in any way* Dr. Cynthia Wolfe." Dr. Wolfe is not released from any conceivable type of claim arising out of the provision of medical services at Capitol Medical Center, including claims based on Nurse Gibson's negligent provision of medical care which are chargeable to Dr. Wolfe, and not covered by the Release! The summary judgment granted by the Trial Court clearly benefits Dr. Wolfe. It benefits Dr. Wolfe to be relieved of the liability she assumed by contract as well as by operation of law over the negligence of Nurse Gibson in the provision

of medical services. The Release specifically denies her any such benefits.

Dr. Wolfe also relied upon, and the Trial Court also accepted, Glover v. Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983). Glover is also readily distinguishable from the present case. In Glover, the court dismissed the claim against the hospital based on its vicarious liability for the acts of anesthesiologists who were employees and agents of the hospital, with which doctors the plaintiff had already settled. Since the doctors, the agents, were released, the hospital, the principal was released. Here, Dr. Wolfe, the hospital's agent, was not released. *See also Vanderpool*, which distinguishes Glover and confines Glover's holding to those cases where the settlement was with the agent. 110 Wn.2d at 487. Here, the settlement and Release was with *one* principal, Capitol Medical Center, as to any administrative negligence, not medical negligence. While Nurse Glover was also the hospital's agent for administrative work, he was not a party to the case nor to the release.

The main distinction between the present case and Glover is that the Release explicitly stated *it would not benefit Dr. Wolfe*, who would remain liable for any and all claims arising out of the provision of medical services at Capitol Medical Center. If the Order of Summary Judgment stands, and Nurse Gibson, in his capacity as Dr. Wolfe's agent for medical

care (not in his capacity as agent of the hospital for administrative duties) is released, it will benefit Dr. Wolfe, and hence violate the Release. The correct interpretation of the Release would release Nurse Gibson in his capacity as agent for Capitol Medical Center as to administrative duties, but would still leave Dr. Wolfe accountable for Nurse Gibson's negligence in the provision of medical services both under the doctrine of *respondeat superior* and under her contract for patient care (medicine). Dr. Wolfe should still be held liable for the negligence of Nurse Gibson in the provision of medical services because medical services were her responsibility.

Further, under Hansen v. Horn Rapids ORV Park, 85 Wn. App. 424, 932 P.2d 724 (1997), the operation of the Release with Capitol Medical Center is further constrained:

The City contends Mr. Hansen's dismissal of his claims against Tri City Aid Service also requires dismissal of his claims against the other defendants, whose liability is founded solely on a theory of vicarious liability for Tri City's acts. However, the rule is that ordinarily a principal is derivatively responsible for an agent's acts, unless the agent's responsibility has been discharged 'on the merits and not based on a personal defense.'

Id. at 429. Here, any release of the hospital for Nurse Gibson's administrative negligence as an agent or employee of the hospital was certainly not a discharge on the "merits." Therefore, it should not operate

to discharge the principal, Dr. Wolfe for her responsibility for Nurse Gibson's medical negligence.

E. Even if Nurse Gibson's Agency were an Overlapping Dual Agency such that Release of Nurse Gibson could Release Dr. Wolfe, Release of an Agent only operates to Release the Principal if the Principal Proves that the Agent was Solvent at the Time of Release, and Dr. Wolfe has Failed to Present such Proof.

On Summary Judgment, Dr. Wolfe argued that the release of Nurse Gibson by operation of Nathan's settlement with Capitol Medical Center (on his *negligent administration*, as opposed to negligent medical diagnosis and treatment, claims) operates to discharge Dr. Wolfe because Nurse Gibson was Dr. Wolfe's agent (on his *negligent medical diagnosis and treatment*, as opposed to negligent administration, claims). While a vicariously liable principal may be released if the *negligent agent* whose actions caused the harm is released, this only operates if the principal proves that the released agent was solvent at the time of the release:

The release of an agent as a result of a reasonable settlement may extinguish a vicarious liability claim against the principal. After a plaintiff has settled with an agent, the trial court may discharge a principal if the Court approves the settlement as reasonable. However, in that situation, the principal is released by operation of law only where the agent is deemed 'solvent'. If the agent is deemed to be insolvent or incapable of making the plaintiff whole, the principal is entitled only to an offset of the settlement amount of any judgment it incurs.

Hogan v. Sacred Heart, 101 Wn. App. 43, 49-50, 2 P.3d 968 (2000)

(internal citations omitted).

Here, there was no reasonableness hearing and no finding that Nurse Gibson is solvent or was solvent at the time of the release as to the extent of damages sought to be imposed upon Dr. Wolfe under principles of vicarious liability. Moreover, such a nonsensical over-extension of both Glover and Perkins would have the effect of leaving Nathan Wood incompletely compensated for his pain, suffering, and medical expenses. The rationale of Glover and Perkins is to avoid double recovery, not to deprive an injured party the “maximum opportunity to be fully compensated.” See Vanderpool, 110 Wn.2d at 487.

In fact, Glover and Perkins are distinguishable from this present case in a very fundamental way. In both Glover and Perkins, there was only one scope of agency. Here, there is Capitol Medical Center, a principal. There is Dr. Wolfe, who is an agent of Capitol Medical Center and a principal in her own right. There is Nurse Gibson, who is an agent of Capitol Medical Center for administrative services and of Dr. Wolfe for medical services.

The releases in Glover and Perkins could run from the agent to the principal or the principal to the agent without complicating matters. In

both Glover and Perkins, the agents were parties to the case and sources of compensation to the injured party. Here, the release was of a principal, Capitol Medical Center, for claims of administrative negligence, including administrative negligence committed by Nurse Gibson. It was not a settlement *with* Nurse Gibson, although as an agent of the hospital for administrative functions, he was also released, nor was Nurse Gibson even a party to the case or a potential source of recovery for Nathan Wood. Therefore, under a strict reading of Hogan, both Glover and Perkins are distinguishable.

On an analogous reading of Hogan, however, applying the holding to *Dr. Wolfe*, who argues that she – a principal – should be relieved of liability for her agent’s *medical* negligence when that same agent was released as to any administrative negligence claims via the settlement with the *hospital*, a principal, the analysis still stands. The rationale for making sure that an agent is solvent before allowing a release with an agent to also release the principal is that doing so ensures that the injured party can be fully compensated. If the Trial Court’s Summary Judgment holding is allowed to stand, and Dr. Wolfe, who bears responsibility for Nurse Gibson’s *medical* negligence, is relieved of all vicarious liability because Capitol Medical Center was released from vicarious liability for Nurse

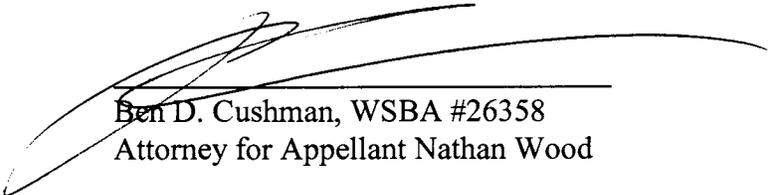
Gibson's *administrative* negligence, then Nathan will not be fully compensated.

V. CONCLUSION

Judge Pomeroy dismissed, on summary judgment, Nathan Wood's claims against Dr. Wolfe for medical negligence to the extent that those claims were based on the medical negligence of Nurse Gibson, a nurse supervised by and working for Dr. Wolfe. The basis for this dismissal is that Nathan Wood had settled with Capitol Medical Center on other and different claims relating to Nurse Gibson – specifically those claims relating to negligent administration of his file. This conflation of two separate and distinct categories of claims, based on separate and distinct theories of negligence on the part of Nurse Gibson, who was operating under separate and distinct scopes of agency, was error. This Court should reverse and remand this matter to the Trial Court for a full trial of all of Nathan Wood's medical negligence claims against the responsible physician, Dr. Wolfe.

Respectfully Submitted this 9th day of September, 2008.

CUSHMAN LAW OFFICES, P.S.



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Attorney for Appellant Nathan Wood

M. Katy Kuchno certifies and declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S. I am over the age of 18, and not a party to this action.

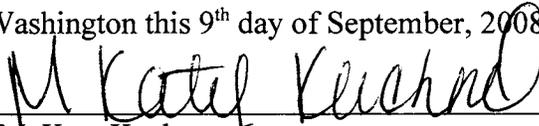
2. On September 9, 2008, I sent via ABC Legal Messengers, for delivery and filing, the original and a copy of Woods' Opening Brief to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

3. On September 9, 2008, I sent via ABC Legal Messengers for delivery, a copy of the above-described document to:

A. Clarke Johnson
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DATED at Olympia, Washington this 9th day of September, 2008.



M. Katy Kuchno

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