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DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NATHAN WOOD,

Appellant,

vs.

CYNTHIA WOLFE, M.D., and CAPITAL EMERGENCY PHYSICIANS

Respondents.

RESPONDENT'S BRIEF

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a valid release executed between a plaintiff and a defendant hospital operated to dismiss all claims for the alleged acts of a nurse employed by the hospital.
2. Whether a valid agreement between a physician and hospital allocated liability for the acts of non-physician personnel to the hospital.
3. Whether the appellate court should consider the issues of mutual mistake, misunderstanding or impossibility for the first time on appeal.
4. Whether the doctrines of mutual mistake, impossibility, or misunderstanding apply to the release entered into between the hospital and the appellant.

II. RESTATEMENT OF THE CASE

A. Appellants' Statement of the Case is Improper.

RAP 10.3(a)(4), provides in relevant part: "Reference to the record must be included for each factual statement." All such statements in violation of this rule should not be considered by the Court. Appellants' factual assertions are replete with "un-referenced assertions" which must be

deemed irrelevant because of their non compliance with RAP 10.3(a)(4). Similarly, Appellants' Statement of the Case is more argument than fact and thus should not be considered by the Court. Appellant also presents a long discussion alleging to show Nurse Gibson's negligence. It should be noted that the issues before the court do not involve whether or not that Nurse Gibson was negligent, according to Appellant's own Statement of Issues. Appellant's Brief at 1. The Appellant is attempting to distract this Court from the true issues in the appeal, which are whether or not Nurse Gibson has been dismissed, and whether vicarious liability for his acts may be claimed against Respondent.

B. Statement of Facts.

David Gibson, RN, was employed as an emergency room nurse by Capital Medical Center on December 30, 1999. CP 114. David Gibson, RN, was acting within the course and scope of his employment by Capital Medical Center in all of his involvement in the care provided to Nathan Wood on December 30, 1999. CP 59-60. Capital Medical Center, as Mr. Gibson's employer, was legally liable for his allegedly negligent acts. CP 59. Capital Medical Center was sued in this action for the acts of their employee/agent, David Gibson, RN. CP 59-60.

Capital Medical Center settled with the Appellant and the Appellant

signed a release of all claims against Capital Medical Center, their agents and employees ("Release"). CP 56-58. The Release explicitly states that the plaintiff "releases Capital Medical Center...and...their employees and assigns." CP 56. The agreement entered into between Dr. Wolfe and Capital Medical Center ("Contract") also specifically provided that the hospital would provide insurance for the "acts and omissions" of its "agents." CP 86. The agreement between Dr. Wolfe and Capital Medical Center contains language explicitly reserving liability for all nursing personnel:

Facility [Capital Medical Center] shall employ all non-physician technical and clerical personnel it deems necessary for the proper operation of the Service. The Director of the Service [Dr. Wolfe] shall direct and supervise the technical work of such Department Personnel. However, Facility **retains full administrative control and responsibility for all such Service personnel.**

CP 90.

It is undisputed that Mr. Gibson is an agent/employee of Capital Medical Center. CP 114. Moreover, Appellant is attempting to sue Dr. Wood in this case for exactly the same alleged negligence which was the basis of their claim against Capital Medical Center. CP 114.

III. ARGUMENT

A. The Release Expressly Dismissed all Employees of Capital

Medical Center, Including Nurse Gibson.

The Release expressly dismisses all employees of Capital Medical Center from claims arising from the medical care and treatment of Appellant. The central omission in Appellant's brief is that it concentrates on the issue of agency and totally and completely ignores the fact that Mr. Gibson was the hospital's employee. In the express terms of the Release, all claims against the hospital and its employees have been resolved. It is undisputed that Nurse Gibson was the hospital's employee, not Dr. Wolfe's. Thus, claims involving actions of Nurse Gibson have been dismissed.

B. The Release Does not Distinguish Between “Administrative” and “Medical Negligence”; the Parties Intended a Complete Release for All Acts.

Appellant makes an interesting and novel argument that the intent of the parties was to dismiss Nurse Gibson's “administrative negligence” attributed to Capital Medical Center, but “medical negligence,” under the alleged control of Dr. Wolfe. First, under Washington contract interpretation rules, this argument fails. The trial court correctly interpreted the Release to dismiss all “employees” of Capital Medical Center for all “claims...arising from, or relating to...medical care and treatment rendered to me at Capital Medical Center.” CP 56. Absent is any distinction between “administrative” and “medical negligence.” Thus, the agreement was carefully drafted to

release all employees for all acts, regardless of how they may be characterized. Nurse Gibson was an employee of Capital Medical Center, so is released for all of his acts or omissions.

It cannot be disputed that the Appellant brought claims against the hospital related to his medical care and treatment, which can encompass both “administrative” or “medical” acts or omissions. All of those claims were dismissed pursuant to the Release against both the hospital and all of its employees, including Nurse Gibson. Appellant seeks to inject a claim that was neither initially made, nor arises from any facts that have been before the trial court, in order to rewrite the terms of the original Release. In any event, the language of the Release clearly contemplates releasing Nurse Gibson, an employee of Capital Medical Center, from all acts, whether medical or “administrative.” In any event, Appellant provides no authority or factual material showing that the Nurse Gibson’s alleged acts could not be characterized as “administrative” error. According to Appellant’s own argument, Nurse Gibson failed to convey information to Dr. Wolfe about the length of the rod that had impaled Appellant. Appellant’s Brief at 8-9. Such an act could just as easily be considered “administrative” as well as medical, because it would involve properly recording patient history. Moreover, if Appellant’s intention was to release only a portion of the claims against

Nurse Gibson, that language could easily have been added to the Release.

C. The Contract Between Respondent and Capital Medical Center Did Not Create a Principal-Agent Relationship Between Respondent and Nurse Gibson.

Appellant misconstrues the plain language and context of the agreement (“Contract”) between Respondent (“Dr. Wolfe”) and Capital Medical Center. Respondent agrees with the Appellant that Nurse Gibson’s acts were within the scope of his employment. Appellant’s Brief at 27.

However, under the terms of the Contract,

Facility [Capital Medical Center] shall employ all non-physician technical and clerical personnel it deems necessary for the proper operation of the Service. The Director of the Service [Dr. Wolfe] shall direct and supervise the technical work of such Department Personnel. However, Facility **retains full administrative control and responsibility for all such Service personnel.**

CP 90-92.¹ “Administrative control” is almost always construed as conferring a principal-agent relationship on one party or another. For example, in Arrington v. Galen-Med, Inc. 838 So.2d 895, La. App. (3 Cir., 2003) the court found that a hospital asserting “administrative control” over a doctor may be responsible for that physician’s acts. In that case, the court

¹ Notably, Appellant omits the majority of this clause in his brief.

extensively discussed an agreement between a physician and the hospital. There, the language of the agreement was found to clearly indicate that the language “administrative control and responsibility” made the physician an employee, and also shifted liability for any of his actions to the hospital. Id. Here, if the hospital was asserting “administrative control,” it assumed liability for all of nurse’s acts, just as the hospital in Arrington was for its doctor. In addition, Washington courts have uniformly interpreted the language showing assumption of “responsibility” to indicate the shifting of liability. For example, in Scott By and Through Scott v. Pacific West Mountain Resort 119 Wash.2d 484, 491, 834 P.2d 6 (1992), the Washington Supreme Court examined a clause in a contract that stated a skier would “accept full responsibility for the cost of treatment for any injury.” The Supreme Court found that the parties intended to shift the burden of liability to the skier through use of the term responsibility. Id. Here, there can be no dispute of fact that Capital Medical Center asserted “administrative control and responsibility” over all “non-physician” employees, including Nurse Gibson. The language of the Contract further underlines the hospital’s charge of all nurses by claiming “responsibility” for such employees. The notion that the hospital sought to retain control is further supported by the fact that it was required to maintain insurance for the acts of such personnel in its

contract with Respondent. CP 86. It follows that the parties contracted for Dr. Wolfe to remain responsible only for her own actions, not those of hospital personnel.

D. Nurse Gibson's Alleged Acts as a "Dual Agent" were Dismissed in the Release.

Appellant attempts make Dr. Wolfe responsible for Nurse Gibson's acts under a "dual agency" theory. However, the precise issue involved in this case was decided by Washington courts in Perkins v. Children's Hospital, 72 Wn. App. 149, 864 P.2d 398 (1993). The Perkins court, at page 150-1 stated:

First, is the rule set forth in Glover (footnote omitted) that the release of a solvent agent releases a principal from claims based on vicarious liability for the negligence of the released agent, still a viable theory in this state? Second, if so, in a case where dual agency exists, does the release of one principal and its "agents", without specifically naming them, release the agent and extinguish any vicarious liability of the second principal for their acts? We answer both questions affirmatively.

The Perkins court, at 159-160, citing Glover v. Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983), stated: Glover concluded that the very foundation of a principal's secondary liability would be undermined if a primarily liable agent, capable of making the plaintiff whole, were released and the principal pursued for any remaining damages. Vanderpool

v. Grange Ins. Ass'n, 110 Wn.2d 483, 487, 756 P.2d 111 (1988) reconfirmed Glover, stating such result is necessary under the tort reform act because a release between a plaintiff and an agent forecloses any possibility of the principal receiving contribution from his agent.

Appellant claims that the intent of their release was to specifically preserve the claims they were making against Dr. Wolfe. The Perkins court also dealt with a similar contention, and at page 162 stated:

Even assuming that Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) requires an examination of the plaintiff's subjective intent as to meaning of the release, under these circumstances the plaintiffs' intent cannot control the legal consequences of the executed release. In Glover the plaintiff's intent not to release the hospital was *expressly* stated in the release. Nonetheless, the Glover court held the hospital was released as a matter of law following the release of the doctors/agents. The same result follows here.

The Perkins court went on to state at page 163:

This result is not unfair to plaintiffs. In the face of Glover, plaintiffs are charged with the knowledge that as a matter of law they cannot release the doctors/agents and preserve the vicarious liability of the hospital/principal. If plaintiffs truly intended not to release Drs. Cohen, Furman, McCroskey, and Morray they could easily have added the phrase, "except Drs. Cohen, Furman, McCroskey, and Morray" immediately after the word "agents" in the release.

The court concluded at page 164, by stating:

We hold the executed release, by its express terms, released the unnamed doctors from liability to the plaintiffs, and by

operation of law the release of the doctors in turn released Children's Hospital from any claim of vicarious liability based upon the negligence, if any, of those doctors.

Thus, even if a jury were to find that Nurse Gibson was Dr. Wolfe's agent, under Washington law his release would extinguish vicarious liability for Dr. Wolfe.

Appellant's attempt to distinguish the case at bar from the situation in Perkins fails. Appellant's Brief at 36. Just as the doctors in Perkins were sued for the same medical treatment of the plaintiff in that case, Nurse Gibson and Dr. Wolfe were both sued for the same treatment provided to Appellant on December 30, 1999. Appellant's "administrative/medical" distinction is artificial and should be disregarded by the court.

Appellant argues that because the Dr. Wolfe could not "benefit in any way" from the Release that the language is "clear and unambiguous" in retaining vicarious liability against Respondent. Appellant's Brief at 21. However, this language cannot be clear in that respect. Such an interpretation would invalidate the release of the hospital itself. If the hospital had remained a party, it would be possible that it would seek contribution from Respondent at some point. The Release of the hospital benefits Respondent in that the issues she must defend are more limited in scope. Thus, the language Appellant cites is not clear with regard to retaining claims of

vicarious liability. In actuality, the language clearly releases Nurse Gibson, and thus, by operation of law, Respondent, at least with respect to liability for his acts.

E. Appellant May not Raise the New Issues of Mutual Mistake, Impossibility, or Misunderstanding for the First Time on Appeal.

Appellant claims in effect that the parties made a mutual mistake with regard to the release of Capital Medical Center and urges reformation. Appellant's Brief at 23. Appellant also argues in his brief that performance of the Release would result in a impossibility. Id. Washington appellate courts will not generally address issues, contentions, or theories raised for the first time on appeal. RAP 2.5(a).. *See, e.g., Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992); State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991). Washington courts have also characterized the rule as barring consideration of contentions not made in the trial court. *See, e.g., Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn.App. 408, 814 P.2d 243 (1991)(contentions not made to trial court in its consideration of summary judgment motion need not be considered on appeal). Appellant did not bring the claims of mutual mistake, misunderstanding, or impossibility to the attention of the trial court. Thus, these issues should not be considered on appeal.

F. Mutual Mistake is Not Applicable to the Clear and Unambiguous Language of the Release.

Mutual mistake occurs where both parties to a contract share a common assumption about a vital existing fact upon which they based their bargain and that assumption turns out to be false. Bennett v. Shinoda Floral, Inc., 108 Wash. 2d 386, 739 P.2d 648 (1987) (plaintiffs could not claim mutual mistake in signing of release from liability for personal injuries, since injured party bore the risk of mistake). In addition, mutual mistake only applies if it is bilateral. Woods v. Gamache, 14 Wn. App. 685, 687 (1975) “The law favors the amicable settlement of claims when the settlement is secured without fraud, misrepresentation or overreaching.” Beaver v. Estate of Harris, 67 Wn.2d 621, 409 P.2d 143 (1965). Interpretation of an unambiguous contract is a question of law. Mayer v. Pierce County Medical Bureau, Inc., 80 Wn.App. 416, 420, 909 P.2d 1323 (1995). If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. Voorde Poorte v. Evans, 66 Wn.App. 358, 362, 832 P.2d 105 (1992). Most important, ambiguity will not be read into a contract where it can be reasonably avoided. McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1995).

The purpose of contract interpretation is to ascertain the parties’

intent. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). In Berg, the Washington Supreme Court adopted the “context rule” for interpreting contracts, citing with approval the statement from J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944):

May we say here that we are mindful of the general rule that parol evidence is not admissible for the purpose of adding to, modifying, or **contradicting** the terms of a written contract [P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed for the purpose of ascertaining the intention of the parties and **properly construing the writing** Such evidence, however, is admitted, **not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed.** Evidence of this character is admitted for the purpose of aiding in the interpretation of **what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written**

Berg, 115 Wn.2d at 669 (emphasis added). Further, the Washington Supreme Court has also confirmed that Berg did not undermine Washington courts' traditional adherence to “the objective manifestation theory of contracts”, under which

we impute to a person an intention corresponding to the reasonable meaning of his words and acts. **Petitioner's unexpressed impressions are meaningless when attempting to ascertain the mutual intentions [of the parties].**

Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wash. 2d 678, 684, 871 P.2d 146, 149 (1994) (emphasis in original), quoting Dwellely v. Chesterfield, 88 Wash. 2d 331, 335, 560 P.2d 353, 356 (1977). Furthermore, the court emphasized that extrinsic evidence “is admitted for the purpose of aiding in the interpretation of what is in [a written] instrument, and not for the purpose of showing intention independent of the instrument.” Lynott, *id.*, quoting Berg, *supra*, 115 Wash.2d at 669, 801 P.2d at 222. See also Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wash. 2d 178, 188, 840 P.2d 851, 856 (1992). The “relevant intention of a party is that manifested by him rather than any different undisclosed intention.” Lynott, *supra*, quoting the Restatement (Second) of Contracts § 212, comment a (1965). The facts of Lynott are illustrative for the case on appeal here. In Lynott, an insurer sought issued a directors and officers liability insurance policy, with the plaintiff’s company as the named insured. Plaintiffs were directors and/or officers of company during the policy period. A lawsuit had been brought against several people, including plaintiffs, claiming liability for numerous alleged wrongful

acts and omissions arising from the sale of company stock to investors. The insurer denied coverage and refused to defend. Plaintiffs sued for damages arising from the defendant insurer's denial of coverage and refusal to defend and settle the litigation against them. Defendant insurer raised a policy exclusion as a defense. Both sides moved for summary judgment. The trial court granted summary judgment to defendant based on the policy exclusion. The Court of Appeals reversed. The Washington Supreme Court affirmed, holding that there was no objective manifestation to exclude from coverage the stock purchases, which were being negotiated when the policy was issued, and that the exclusion was ambiguous. The exclusion was thus found ineffective. The Lynott court noted that it was

highly significant that National Union [the defendant insurer] had available a form endorsement specifically excluding claims arising out of a merger or acquisition involving a particular entity. National Union did not use that available, standard form endorsement which would have identified with particularity the transaction which it now claims it intended to exclude.

Id. at 688. The Lynott court thus paid special attention to the available options in objectively manifesting intent. This method of interpretation is applicable here. Appellant had every opportunity to clarify in the release that all vicarious liability claims would not be released. Appellant had every

opportunity to specifically retain claims of vicarious liability. Such language would have been simple to include at the time of drafting, but it was not. In addition, Appellant has provided no written evidence of either his intent to retain claims against another party for Nurse Gibson's acts. In addition, there is no evidence whatsoever that the hospital intended such a release. Mutual mistake is impossible to argue where there is no evidence that a party was mistaken. Appellant should not be permitted to rewrite the Release years after its execution.

G. Impossibility is Inapplicable to the Release.

Appellant's argument that the Release would somehow be impossible to perform because "it is impossible to release Capitol Medical Center without releasing Dr. Wolfe" is without merit. Appellant's Brief at 24. As discussed in section B., *supra*, impossibility is a novel argument that should not be considered on appeal. In any event, the doctrine of impossibility is wholly inapplicable to Appellant's argument. Appellant has not provided evidence of any "extreme or unreasonable difficulty, expense, injury, or loss," as required under the doctrine. Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wash.2d 425, 439 (1986). In addition, construction of the Release to except the actions of Dr. Wolfe alone, while dismissing all others, is not only possible, but the correct interpretation of the contract.

IV. CONCLUSION

The language of the Release indicates that Nurse Gibson, an employee/agent of Capital Medical Center, was released from liability for Appellant's treatment. Under Washington law, this release operated to dismiss vicarious liability for Nurse Gibson's acts with respect to Respondent. Appellant can point to no language that expressly retains vicarious liability for Nurse Gibson, which would have been simple to add to the Release. Appellant's argument that the hospital and doctor were responsible for separate types of negligence is without support in the record or in case law. In addition, the agreement between Dr. Wolfe and the hospital expressly shifted liability for all nurses to the hospital, making it impossible for Dr. Wolfe to be liable for his acts. In addition, Appellant's arguments regarding mutual mistake and impossibility are brought for the first time on appeal, so should be ignored. In any event, such arguments are inapplicable because the Release reflects that the intent of the parties was clearly to dismiss all claims against every individual and entity save Respondent. There is also no record that either the Appellant or Capital Medical Center was mistaken about the intent of the Release. The trial court correctly found that Dr. Wolfe cannot be

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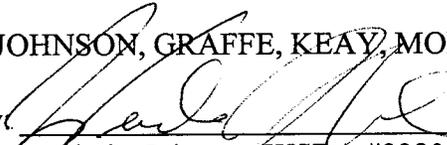
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liable for Nurse Gibson's acts as a matter of law. This appeal should be dismissed.

Dated this 8 day of October, 2008.

Respectfully submitted,

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CERTIFICATION
I hereby certify that on 10/9/08, I delivered via U.S. Mail/Legal Messenger/fax/e-mail a copy of the document to which this certificate is attached to all counsel of record.

