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## I. RESTATEMENT OF 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 with regard to medical (as opposed to administrative) matters.

## II. STATEMENT OF ESSENTIAL FACTS

Given the clash between the briefing, it is clear that this case turns on the Court's interpretation of two written contractual documents: 1. the release between Nathan Wood and Capitol Medical Center and 2. the contract between the Capital Medical Center and Dr. Wolfe. This case turns on the playing out of the legal implications an apparent dual agency. Nurse Gibson is an agent of Dr. Wolfe as to medical services (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 90-99). Nurse Gibson is also an agent of Capitol Medical Center as to matters of administrative, as opposed to medical, control. The issue on appeal is how this dichotomy affects vicarious liability given the release.

Nurse Gibson himself defined this dichotomy as essential to the running of the Emergency Room involved in this case. He explained the difference between patient care (medicine) and ministerial duties (administration). Physicians are responsible for the provisions of medical care. Dr. Wolfe is particularly responsible for issues of medical care, both as treating physician and as medical director of the Emergency Room. CP 98.

The Professional Services Agreement between Dr. Wolfe and Capitol Medical Center also recognizes this dichotomy. Under that agreement, Dr. Wolfe has the duty “to direct and supervise the technical work and services” of the emergency room staff, underscoring this duty by stating 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” and 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.” CP 90-92.

The Agreement also differentiates of Dr. Wolfe’s duties *from* those of the Capitol Medical Center. Dr. Wolfe was obligated to cooperate 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. Thus, Dr. Wolfe did not have administrative responsibilities, but had sole and ultimate medical responsibilities. 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 hospital retains ultimate and exclusive control and the nurse is an agent of the hospital and not an agent of the doctor. CP 98.

While Nathan Wood’s attorney’s dedicated substantial space in the Opening Brief to describing and establishing the medical negligence of Nurse Gibson (and, by extension, Dr. Wolfe), Dr. Wolfe’s attorneys correctly observed in their Response that this factual background was unnecessary. For purposes of the Summary Judgment Motion, and therefore for purposes of this appeal, medical negligence is presumed. The question is, given the presumption that Nurse Gibson committed medical malpractice, does the release of the Capitol Medical Center from claims relating to improper and negligent administrative operation of the hospital work to release Nurse Gibson (and, by extension, Dr. Wolfe), from liability for that medical malpractice?

Following a mediation, Nathan Wood and Capitol Medical Center agreed to settle the portion of Nathan Wood's claim involving the administrative mistakes of the hospital. (In this case, unlike the cases cited by Dr. Wolfe, Nathan Wood's injuries were made worse by a series of errors, some medical, some administrative, rather than by a single medical mistake.) Under this settlement, Nathan Wood 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, on its terms, preserved the dichotomy between medical treatment and administration, releasing only those claims relating to administration. The Release could hardly have been more clear in

expressing the parties intent that Dr. Wolfe not benefit from or be released from any liability by operation of the Release. Despite this clear language and intent, the Trial Judge granted summary judgment to Dr. Wolfe on the basis that the Release did in fact release Dr. Wolfe for Nurse Gibson's medical malpractice (as opposed to sloppy and negligent administrative practices).

### 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, specifically preserving his claims for medical malpractice. Based on the wording of the Release, which included standard language protecting people who might otherwise face claims covered by the Release, Dr. Wolfe asserted that because Nurse Gibson was the agent of Capitol Medical Center with regard to administrative work and was released from liability for administrative negligence, the Release operates to waive and release claims for medical malpractice insofar as they involve Nurse Gibson. This is a classic fallacy – a fallacy of ambiguity – reminiscent of the following argument (paraphrased) from Plato's Euthydemus:

Soc: That dog is yours?

Euth: Yes.

Soc: And the dog is a father?

Euth: Yes.

Soc: So, if the dog is a father, and the dog is yours, then the dog is your father, and you are the sibling of puppies.

Nurse Gibson was released from administrative negligence claims when Capitol Medical Center was released. However, it does not follow that Dr. Wolfe (or Nurse Gibson) were released from medical malpractice claims. In fact, the Release specifies that it is not to operate that way and that there is a clear and operative distinction between administrative negligence claims (which are released) and medical negligence claims (which are not).

When an agent has two simultaneous but independent scopes of agency, each principal is separately liable based on his or her respective sphere of responsibility. Problems arise when these scopes of agency overlap. In such case, a release based on negligence within the overlapping sphere of authority can operate to release both principals. However, when, as here, there is no overlap, there is no mutual release. Dr. Wolfe's counsel fails to understand this point, and fails to refute it.

Further, even if Dr. Wolfe's medical duties overlapped with the Capitol Medical Center's administrative duties, such that release of Nurse Gibson on administrative negligence claims could release Dr. Wolfe from medical malpractice claims, a release of an agent only operates to release the principal if the principal proves that the agent was solvent at the time of release. Dr. Wolfe has failed to present such proof. Dr. Wolfe's Response fails to even address this point. Therefore, even if the Release were misinterpreted to prevent Nathan Wood from pursuing his full medical malpractice claim, it could not operate to do so without a further solvency hearing below.

#### IV. ARGUMENT

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

“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). When interpreting a release, 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.*

Here, there was not only no clear intent to release Dr. Wolfe along with the Capitol Medical Center. The Release specifies that claim against Dr. Wolfe are to be preserved, not released. This is not surprising. Nathan Woods’ claim against Dr. Wolfe based on her vicarious liability for the medical negligence of Nurse Gibson is a *different claim* from the claim for administrative negligence against Capitol Medical Center. The release was intended to operate to release administrative negligence claims, not medical malpractice claims.

The Trial Court misinterpreted the Release, which specifically reserved the very claims the Trial Court dismissed. The release of Capitol Medical Center explicitly stated Dr. Wolfe could not “benefit in any way” from that release. Dismissing claims against Dr. Wolfe based on the Release would benefit Dr. Wolfe, violating the clear intent of the release. To hold otherwise is to exploit an ambiguity in the term “employee of Capitol Medical Center.” Nurse Gibson, as an employee of Capital Medical Center, was released from liability on administrative negligence claims, but he was not released on medical malpractice claims.

The Release, by its terms, was not to free Dr. Wolfe from any liability. The Trial Court misinterpreted that Release to do just that. Applying the principles of Vanderpool, this Court should hold that the Trial Court erred.

**B. As An Agent For Two Principals, a Release of Nurse Gibson Only Releases the Principal Within Whose Scope of Authority the Released Claims Lie – Capitol Medical Center and NOT Dr. Wolfe.**

“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). 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.*

Dr. Wolfe had control over Nurse Gibson with regard to medical services. Capitol Medical Center had administrative, but not medical, control over Nurse Gibson. To the extent Nurse Gibson acted negligently while assisting Dr. Wolfe diagnosing and treating Nathan Wood, Dr. Wolfe, as principal, is liable under the doctrine of *respondeat superior*. See Stone v. Sisters of Charity of House of Providence, 2 Wn. App. 607, 610, 469 P.2d 229 (1970). Alternatively, insofar as Nurse Gibson acted negligently in administering the Emergency Room (which he also did), causing *additional* injuries to Nathan Wood, the Capitol Medical Center is liable as the responsible superior.

“[O]n the principles of respondeat superior, the hospital and doctor may each be liable for acts of the hospital nurse.” Id. Here, Capitol Medical Center and Dr. Wolfe entered a Professional Service Agreement that clearly distinguished between medical services and administrative services. Dr. Wolfe maintained medical control over Nurse Gibson, and is the responsible superior if Nurse Gibson commits medical malpractice. The Capitol Medical Center maintained administrative control over Nurse Gibson, and is the responsible superior if Nurse Gibson commits some negligent administrative act. In this case, Nurse Gibson committed both medical malpractice and negligent administrative acts.

In Washington, “on the principles of respondeat superior” the doctor may be liable for acts of the hospital nurse. Stone, 2 Wn. App. at 610. Further, a principal is liable for the torts of an agent committed within the scope of the agency. *See Cameron Cameron v. Downs*, 32 Wn. App. 875, 881, 650 P.2d 260 (1982). A release of claims relating to injuries caused or worsened by administrative negligence should not operate to release claims for other injuries caused for worsened by other, distinct acts of medical negligence. The Release specifically contemplated this argument, and included language to prevent it.

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). This confused the Trial Court. However, it should not confuse this Court. “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)). Liability follows service in such cases.

A principal is only liable for actions of shared agents to the extent the harm resulted from the agent's scope of authority with regard to that particular principal. Likewise, if a principal is discharged from liability for the wrongful conduct of an agent acting under that principal's authority, 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. Each principal is separately liable based on his or her respective authorizations of the agent.

People moonlight, and the law recognizes the implications of that. For instance, consider a case in which Nurse Gibson were moonlighting as a truck driver and caused a collision with injuries through negligent driving, and then, as a Nurse, Nurse Gibson again made mistakes in diagnosing and treating the person injuries he caused in the vehicle collision, both the trucking company and the hospital would be liable (one for negligent driving and the other for medical malpractice). If the injured person settles with the hospital, releasing the hospital and its medical employees from claims for medical malpractice, that release would not operate to release the trucking company from claims for negligent driving. However, this dichotomy is not distinguishable from the dichotomy between medical control and administrative control involved here.

All of Dr. Wolfe's authority involves a very different circumstance – a 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. Perkins v. Children's Orthopedic Hospital, 72 Wn. App. 149, 864 P.2d 398 (1994); and Glover v. Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983). Neither of these cases cast any light on cases involving a clearly defined and relevant division of responsibility and scopes of authority between two principals whose spheres of control do not overlap.

Nathan Wood settled with Capitol Medical Center for injuries involved in the negligent administration of him as a patient. However, that settlement does not release Dr. Wolfe medical malpractice involved in treating Nathan Wood, including injuries relating to medical mistakes by Nurse Gibson. Nurse Gibson had two jobs, for two different principals. He did them both poorly, causing multiple harms to Nathan Wood. Each principal should bear their respective responsibility.

Further, the Release explicitly did not release either medical malpractice claims or Dr. Wolfe. It explicitly stated Dr. Wolfe could not "benefit in any way" from that release. The Trial Court ignored this.

**C. A 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.**

While a vicariously liable principal may be released along with a negligent agent, 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).

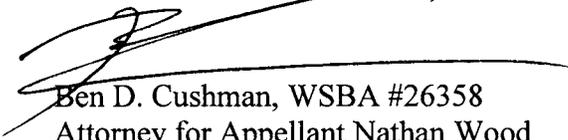
Here, there was no reasonableness hearing and no finding that Nurse Gibson was solvent at the time of the release. Dr. Wolfe fails to address this argument in her Response. Therefore, even if the Court of Appeals is inclined to accept the Trial Court's misinterpretation of the release and the Trial Court's acceptance of an argument based on a fallacious exploitation of an ambiguity in the release, this Court must still reverse and remand for a solvency hearing.

## V. CONCLUSION

The Trial Court dismissed Nathan Wood's claims against Dr. Wolfe for medical malpractice insofar as those claims arose from medical malpractice by Nurse Gibson, a nurse supervised by Dr. Wolfe. The Court ruled that because Nathan Wood had settled with Capitol Medical Center on other claims relating to Nurse Gibson – claims relating to negligent administration of his file – and had released Nurse Gibson from those claims, Nathan Wood had released Dr. Wolfe as well. This ruling is based on a fallacious exploitation of the ambiguity between Nurse Wolfe *qua* nurse (medical professional) and Nurse Wolfe *qua* hospital employee (administrative issues). Further, the ruling confuses two separate and distinct categories of claims (medical malpractice v. administrative negligence). The dismissal was error, and was contrary to the clear intent and plain language of the Release. This Court should reverse and remand this matter to the Trial Court for a trial of Nathan Wood's medical malpractice against Dr. Wolfe.

Respectfully Submitted this 10<sup>th</sup> day of November, 2008.

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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.

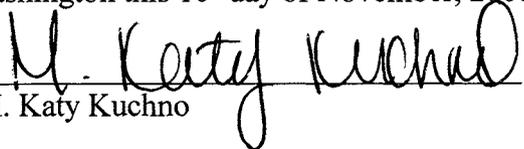
2. On November 10, 2008, I sent via ABC Legal Messengers, for delivery and filing, the original and a copy of Woods' Opening Brief to:

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

3. On November 10, 2008, I sent via ABC Legal Messengers for delivery, a copy of the above-described document to:

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M. Katy Kuchno