No. 28738 - June Glover, as Executrix/Personal Representative of the Estate of Charles Glover, and June Glover v. St. Mary's Hospital of Huntington, Inc., a West Virginia corporation, and Sirous Arya, M.D.

FILED
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OF WEST VIRGINIA

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OF WEST VIRGINIA

Davis, J., dissenting:

In this medical malpractice action, there are two parties plaintiff: Mr. Glover, who, upon his death, was replaced as a party plaintiff by his estate (hereinafter referred to as "the Estate"), and Mrs. Glover, in her individual capacity. On appeal to this Court, then, the Estate, on Mr. Glover's behalf, is asserting his primary claim, while Mrs. Glover, herself, continues to pursue her claim which is derived therefrom. Only if the Estate succeeds in prosecuting its claims may Mrs. Glover recover on hers. Yet, despite this procedural posture, and the implications thereof, the majority has refused to recognize this distinction and has strayed from the crucial issue presented for the Court's resolution in this case. The dispositive issue in this case requires a determination of whether an agency relationship existed between St. Mary's Hospital of Huntington (hereinafter referred to as "the Hospital") and Dr. Sirous Arya. If such an agency relationship existed, then the Hospital is liable for any negligence Dr. Arya may have committed in treating the decedent, Mr. Charles Glover. The circuit court found that no evidence was presented to establish an agency relationship and therefore granted summary judgment to the Hospital. Rather than addressing this dispositive issue, though, the majority opinion has reversed and remanded the case for findings of fact on an issue that is wholly irrelevant to the case. I believe this Court should affirm the circuit

court's ruling. No evidence was presented by the Estate to show that a genuine issue of material fact exists. Therefore, I dissent.

The Estate Presented No Evidence that the Hospital's Advertisement Impacted Mr. Glover's Decision to Enter the Hospital or to be Treated by Dr. Arya

The Estate sought to establish liability against the Hospital on the theory that Dr. Arya was an ostensible agent of the Hospital. This Court held in *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982), that a hospital is not liable for the negligent acts of a patient's privately retained physician, even though the negligence occurred at the hospital. Syllabus point 7 of *Cross* states, in part, "the hospital where that treatment was performed will ordinarily not be held liable to the patient . . . where the physician involved was not an agent or employee of the hospital during the period in question." *Id.* In order to establish liability against a hospital for the negligence of a doctor, we held in Syllabus point 2 of *Thomas v. Raleigh General Hospital*, 178 W. Va. 138, 358 S.E.2d 222 (1987), that "[w]here a patient goes to a hospital seeking medical services and is forced to rely on the hospital's choice of physician to render those services, the hospital may be found vicariously liable for the physician's negligence." *Cf.* Syl. pt. 1, *Torrence v. Kusminsky*, 185 W. Va. 734, 408 S.E.2d 684 (1991) ("Where a hospital makes emergency room treatment available to serve the public as an integral part of its facilities, the hospital is estopped to deny that the physicians and other medical personnel on duty providing treatment are its agents. Regardless of any contractual arrangements with so-called independent contractors, the hospital is liable to the injured patient for acts of malpractice committed in its emergency room, so long as the requisite proximate cause and damages are present.").

During the proceedings below, the circuit court found, and the majority opinion implicitly concluded, that the Estate failed to present *any* evidence to show that an agency relationship existed between the Hospital and Dr. Arya. Unfortunately, the majority opinion ignored this dispositive finding. Instead, the majority opinion asserted that Mrs. Glover, in her individual capacity, *may* have presented a material issue of fact relating to the Hospital's use of advertisements to entice patients to that specific hospital. To support her position, Mrs. Glover submitted an affidavit stating that the Hospital's advertisement influenced her belief that the Hospital would provide adequate care for Mr. Glover. Concluding that the circuit court's summary judgment order did not address the affidavit, the majority opinion has remanded the case so that the trial court may address the matter in its order.

In this regard, the majority opinion is fundamentally flawed. The majority has failed to distinguish the Estate's primary claim from Mrs. Glover's claim. Mrs. Glover's claim is a derivative claim. That is, the claim presented by Mrs. Glover must stand or fall based upon the disposition of the Estate's case. Courts have recognized that "[i]t is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done to the principal." *Jacoby v. Brinckerhoff*, 735 A.2d 347, 351 (Conn. 1999). *See also Lynn v. Allied Corp*., 536 N.E.2d 25, 36 (Ohio Ct. App. 1987) ("The derivative cause of action for loss of consortium cannot provide greater relief than the relief permitted for the primary cause of action."). It is generally recognized that when judgment has been granted against the primary injured party, any derivative claim must also fall. *See Sanchez v. School District 9-R*, 902 P.2d 450, 453 (Colo. Ct. App. 1995) ("[B]ecause we conclude summary judgment in favor of defendant was properly granted on Heidi's claim, and because DiFerdinando's consortium claim is derivative of

Heidi's claim, the consortium claim cannot survive[.]"); *Lynn v. Allied Corp.*, 536 N.E.2d 25, 36 (Ohio Ct. App. 1987) ("Finally, since appellant Janice Lynn's causes of action failed to survive appellees' motion for summary judgment, appellant Luther Lynn's cause of action for loss of consortium must also fail."); *Gregorio v. Zeluck*, 678 A.2d 810, 815 n.3 (Pa. 1996) ("[B]ecause a loss of consortium claim is a derivative cause of action, such a claim will not survive, as we have determined that no injury was established."); *Villacana v. Campbell*, 929 S.W.2d 69, 76 (Texas App. 1996) ("If the decedents' underlying causes of action fail to survive a motion for summary judgment then the derivative actions, being one and the same as the underlying claims, also fail."). Indeed this Court has recognized that "the derivative claims for loss of love, society, comfort, companionship, and services stand or fall with [the primary] claims[.]" *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 656, 482 S.E.2d 620, 641 (1996). *Accord Brooks v. City of Weirton*, 202 W. Va. 246, 252, 503 S.E.2d 814, 820 (1998).

Mrs. Glover's affidavit indicating that she *may* have relied on Hospital advertisements in forming her opinion that the Hospital would provide proper care to Mr. Glover is irrelevant in this case. The affidavit could only be used, at best, to support Mrs. Glover's derivative claim. In order to make such evidence relevant, it had to be submitted by the Estate to demonstrate the advertisement's effect on Mr. Glover's opinion of the Hospital's quality of care.[1] Therefore, the trial court was absolutely correct in not

[1]I am not implying that had the Estate submitted an affidavit regarding the impact of the Hospital's advertisement on Mr. Glover, such evidence would have been sufficient to withstand summary judgment. On the contrary, I do not believe that showing the Hospital displayed advertisements extolling its excellent care creates an ostensible agency relationship between the Hospital and Dr. Arya. To make such a ruling would result in one of two things: (1) all medical hospitals in the State of West Virginia would stop informing

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addressing the advertisement issue. The Estate never raised this issue as a basis for denying summary judgment to the Hospital.

The logical result of the majority opinion in this case is that West Virginia will be the only State in the nation where an injured spouse can lose his/her primary case, while the spouse with the derivative claim nevertheless prevails. This result is illogical.

For the reasons articulated, I respectfully dissent.

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[1](...continued)
the public of the services they provide, or (2) all hospitals in the State would be held strictly liable for medical malpractice committed on their premises by totally independent doctors.