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Suing Principals Alone for the Acts of Agents

By Jeffrey A. Parness and Alex Yorko*

This past August the Illinois Appellate Court, in *Yarbrough v. Northwestern Memorial Hosp.*,¹ suggested there was never a need to join, or to continue to join, an agent when pursuing a vicarious liability lawsuit against its principal.² Herein, we review this statement in *Yarbrough*. We then counsel lawyers and judges regarding future suits against principals based on the acts of agents. When it reviews the apparent agent issue in *Yarbrough*, perhaps the Supreme Court will clarify when the joinder of principals and agents may be required.

In *Yarbrough*, the court ruled that a hospital could be vicariously liable for the acts of the employees of an unrelated, independent clinic under the doctrine of apparent authority. The clinic was never made a party to the litigation against the principal. The court relied on *Gilbert v. Sycamore Mun. Hosp.* in concluding that the plaintiffs were not required to name the apparent agent as a party.³ But the court noted that in *Gilbert*, the issue of whether the apparent agent must be named as a party when the principal was sued “was not at issue.”⁴ Additionally, the court relied on *Miyzed v. Palos Community Hosp.*, a First District case, where a medical negligence claim was allowed to move forward against a hospital as the principal for the acts of a physician who rendered treatment on behalf of an independent medical group “under the doctrine of actual and apparent agency.”⁵

The *Yarbrough* court also looked to the Illinois Pattern Jury Instructions to support the notion that a “principal may be sued even where the apparent agent is not.”⁶ The Note accompanying one instruction, 105.11, says the instruction “should be used where the issue of apparent agency is in dispute, *the principal alone is sued*, and the plaintiff alleges reliance upon a ‘holding out’ on the part of the principal.”⁷ Thus, in medical malpractice cases per *Yarbrough*, plaintiffs do not always have to name an independent clinic or its employees when attempting to hold the principal/hospital vicariously liable.⁸

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1. *Yarbrough v. Northwestern Memorial Hosp.*, 2016 App (1st) 141585, ¶ 43 [hereinafter *Yarbrough*].

2. Herein, principals and agents include employers and employees. Compare *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 5 (4th Dist. 1993) (“cases recognize the rule of vicarious liability only where a principal and agent or employer and employee relationship is shown”).

3. *Yarbrough*, at ¶ 44 (citing *Gilbert*, 156 Ill.2d 511 (1993)) [hereinafter *Gilbert*].

4. *Id.*

5. *Id.* (citing *Miyzed v. Palos Community Hosp.*, 2016 IL App (1st) 142790, at ¶¶ 23-25 [hereinafter *Miyzed*]).

6. *Id.* at ¶ 45.

7. *Id.* (emphasis added by court).

8. *Id.* at ¶ 46.

9. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 517 (1993) [hereinafter *Gilbert*].

In *Gilbert*, the administrator of a decedent's estate sued both a treating physician and a hospital for the wrongful death of the decedent arising out of negligent emergency room care.⁹ The physician practiced through a professional medical association whose work in the hospital was considered by the hospital as the work of an independent contractor, as the association's doctors were paid no salary by the hospital.¹⁰ After the administrator settled with the doctor, the hospital moved for summary judgment, arguing there was no vicarious liability as the doctor was not an agent or employee of the hospital.¹¹ The court held that "under the doctrine of apparent authority, a hospital can be held vicariously liable for the negligent acts of a physician providing care at a hospital, regardless of whether the physician is an independent contractor, unless that patient knows, or should have known, that the physician is an independent contractor."¹² The court in *Yarbrough* correctly observed that the need for a continuing joinder of the agent was not an issue in *Gilbert*.

In *Mizyed*, the physician and the related medical association that treated the plaintiff were not included as parties in a medical malpractice lawsuit against a hospital alleged to be vicariously liable for the acts of the physician under the actual and apparent agency doctrines.¹³ The court granted summary judgment on behalf of the hospital, which urged successfully that the physician was not the hospital's agent, so there could be no vicarious liability.¹⁴

While unnoted in *Yarbrough* and *Mizyed*, the Supreme Court opinion in *DeLuna v. Treister* presents difficulties for these rulings on suing only principals. There, a plaintiff sued a doctor and a hospital as principal. The claim against the doctor was dismissed for pleading deficiencies. The hospital, in a refiled case, then urged that dismissal of the claim against it was required.¹⁵ The court allowed the claim against the hospital to

proceed, holding that the defenses articulated by the doctor in the first case were "personal" to the doctor and that *res judicata* did not bar the claim against the hospital/principal in the second case, citing Section 51 of the ALI Restatement (Second) of Judgments.¹⁶ The court suggested, however, that generally the dismissal of a claim against an agent with prejudice compels dismissal of any vicarious liability claim against the principal.¹⁷ This can be read to apply even when there is only one lawsuit wherein the agent and principal are sued and then the agent is dismissed. Yet, the court further noted in *DeLuna* that "[h]ad plaintiff chosen to do so," plaintiff could have sued St. Elizabeth's "alone" as the doctor "was not a necessary party" and that "it would be particularly unfair to permit" the hospital "to avoid liability merely because of its employee's fortuity in obtaining an involuntary dismissal from plaintiff's lawsuit, where that dismissal did not otherwise absolve the employee of fault."¹⁸ Thus, *DeLuna* hints that suing principals alone can sometimes prompt difficulties for claimants.

DeLuna was applied by the Second District in 2003 in *Sterling v. Rockford Mass Transit District*.¹⁹ There, plaintiffs sued a motorist, as well as a bus company and its driver, for personal injuries arising from the motorist's causing the bus to crash into a restaurant.²⁰ The claims against the bus company were

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10. *Gilbert*, 156 Ill.2d at 515.

11. *Id.* at 517.

12. *Id.* at 524.

13. *Mizyed*, at ¶¶ 23-25.

14. *Id.* at ¶ 64.

15. *DeLuna v. Treister*, 185 Ill.2d 565, 571 (1999) [hereinafter *DeLuna*].

16. *Id.* (citing Restatement (Second) of Judgments § 51 (1982)).

17. *Id.* at 581 (citing *Towns v. Yellow Cab Co.*, 73 Ill.2d 113, 124 (1978) [hereinafter *Towns*]), while positing that this is because the principal's liability is "derivative" and the principal and agent "are considered one and the same tortfeasor").

18. *Id.* at 582.

19. *Sterling v. Rockford Mass Transit Dist.*, 336 Ill. App. 3d. 840, 846 (2d Dist. 2003) [hereinafter *Sterling*].

20. *Sterling*, at 843.

21. *Id.*

based on the doctrine of respondeat superior.²¹ The plaintiffs later dismissed the bus driver voluntarily, whereupon the bus company sought dismissal. As the plaintiffs at the close of the evidence voluntarily dismissed the bus driver with prejudice, the company urged that it was entitled to a favorable judgment.²² The court referenced *Towns*, which said that “in suits based on respondeat superior, a judgment for either the employer or the employee, arising out of an action predicated on the alleged negligence of the employee, bars a subsequent suit against the other for the same claim of negligence where the agency relationship is not in question.”²³ In *Towns*, there was no second lawsuit as in *DeLuna*, only a “subsequent” claim presentation against an agent once an earlier claim against the principal was dismissed and operated as “an adjudication upon the merits.” This dismissal of the principal led the *Towns* court to dismiss the claim against the agent.²⁴

Viewing the issue under *res judicata*, the *Sterling* court said it had to decide “under what circumstances will a voluntary dismissal with prejudice be deemed an adjudication on the merits.”²⁵ While the court recognized that although generally a dismissal of an agent compels a dismissal of any vicarious liability claim against a principal, “the key inquiry is whether the defenses articulated by the parties are substantively different.”²⁶ As the plaintiffs voluntarily dismissed only the bus driver without a finding as to his negligence, the *Sterling* court ruled there were different defenses.²⁷ Citing *DeLuna* the court also said that “had the plaintiffs chosen to do so,” they could have sued the bus company alone.²⁸

In recognizing that not all judgments dismissing agents “with prejudice” will prompt claim preclusion defenses for principals, the *Sterling* court distinguished between dismissals bearing or not bearing any “relationship to the actual merits.”²⁹ It opined that no personal defenses available to agents could be employed by principals seeking dismissals. Yet the *Sterling* court also more broadly ruled that, under *DeLuna*, plaintiffs can sue principals alone, so that agents need not be joined.³⁰

“The safest road for plaintiffs is to join agents when suing principals, and to continue joinder until judgment...”

The provision in the Restatement (Second) of Judgments, utilized in *DeLuna*, states that an earlier judgment involving an injured person bars that person from later bringing a related lawsuit against any other person who may have been responsible unless the later lawsuit is based upon grounds that could not have been asserted in the earlier action or unless any judgment in the earlier action was based on a defense “personal to the defendant” in that action.³¹ Another provision in the same Restatement, unrecognized in *Sterling*, effectively states that a settlement with an agent in a case generally does not “discharge the liability of any other persons liable for the loss” who were sued in the case.³² It does not say, however, that an involuntary dismissal of an agent does not discharge the principal in the same case.

22. *Id.* at 845.

23. *Id.*

24. *Towns*, 73 Ill. 2d at 117 (per Rule 273, a dismissal with prejudice of a claim against a principal for a discovery violation was an adjudication upon the merits barring a claim against).

25. *Id.* at 847.

26. *Id.* at 848.

27. *Id.*

28. *Id.*

29. *Id.* at 849 (citing *DeLuna*, at 578-579).

30. *Id.* at 848.

31. Restatement (Second) of Judgments § 51 (1982).

32. Restatement (Second) of Judgments §50 (1) (1982) (though the settlement by its terms can discharge others).

33. *DeLuna*, at 582.

So, some Illinois precedents support the statement in *Yarbrough* that agents need not always be continued in suit if earlier joined when claims are presented against principals based on vicarious liability. Yet other precedents indicate that *res judicata* can bar claims against principals when agents are sued and then dismissed based on defenses that are not “personal” to them. Perhaps as well, there can be barriers to suits against principals when agents are never sued, but would have had defenses not personal to them if they were sued.

After *Yarbrough*, what should plaintiffs do? In particular, how should they differentiate between defenses that are and are not personal to agents? We suggest the safest road is to join agents [even those without money] when suing principals and to continue to sue to them until the vicarious liability claims against the principals are resolved, unless it is absolutely clear or a court rules the agents are not suable due to their “personal” defenses.

As to what constitutes a personal defense, we suggest caution. It clearly does not encompass a defense that absolves the agent of fault, per *DeLuna*.³³ It likely does not include a defense that could have absolved the agent of fault if the agent had ever been sued.³⁴ As well as, for now at least, it does not include a successful defense of an agent who is sued, where the involuntary dismissal of the agent never prompted for the principal “the inconvenience of having to prepare for trial,” per *Sterling*.³⁵ Pleading deficiencies prompting dismissals of agents with prejudice, as in *DeLuna*,³⁶ and statute of limitations defenses prompting dismissals of agents with prejudice, as in *Sterling*,³⁷ seemingly are “personal” when successfully raised by agents. Lawyers can find further clarifications on “personal” defenses of agents in judicial precedents outside of Illinois which utilize, as did *DeLuna*, the Restatement (Second) of Judgments (though such precedents are sparse).

Section 51 of the Restatement presents other traps for claimants who sue principals for vicarious liability without suing or

without continuing to sue their responsible agents. It states: “If the action is brought against the primary obligor and judgment is against the injured person, it extinguishes the claim against the person vicariously responsible if under applicable law the latter is an indemnitor where liability arises only when the primary obligor is found to be liable to the injured person.”³⁸ Here, claimants should distinguish between a principal’s vicarious liability for an agent and a person’s indemnification liability (e.g., for an insured). More pertinent to *Yarbrough*, Section 51 also states that a judgment in favor of an injured person usually “is conclusive ... as to the amount of ... damages,” meaning a later suit (or a continuing suit?) against the principal will often be precluded.³⁹

The safest road for plaintiffs is to join agents when suing principals, and to continue joinder until judgment, unless an agreement on the waiver of a *res judicata* or similar defense is obtained. Plaintiffs should not assume that all possibly nonsubstantive defenses leading to involuntary dismissals of agents will not impact the continuing claims against principals. Illinois Supreme Court Rule 273, utilized in *Towns*, allows some involuntary dismissals on procedural (i.e., nonsubstantive) grounds to be adjudications “upon the merits,” especially where, per *Sterling*, these dismissals came after the principals endured “the inconvenience of having to prepare for trial.”

Written norms are possible when the vicarious liability of a principal ends with the end of the liability of an agent, whether due to the nonjoinder of the agent and the running of the limitation periods, or through a settlement postsuit with the agent, or due to a dismissal with prejudice postsuit of a claim against the agent involving no settlement, or otherwise. One Illinois Supreme Court Rule⁴⁰ already expressly recognizes a suit against a principal can continue when an agent is dismissed from the suit due to a failure of reasonable diligence in service of process (clearly a “personal” defense). As well, an Illinois Civil Procedure Code provision expressly recognizes “a judgment in an action brought and conducted by a subrogee”

34. But see *DeLuna*, at 582 (claimant can sue principal “alone,” without noting explicitly a bar if there was a defense for the agent that was not personal).

35. *Sterling*, at 849 (citing *Leow v. A&B Freight Line, Inc.*, 175 Ill.2d 176, 186-187 (1997) [hereinafter *Leow*]).

36. *DeLuna*, at 581.

37. *Sterling*, at 849 (citing *Leow*, at 188).

38. *Id.*, at § 51 (3).

39. *Id.*, at § 51 (2).

40. Ill. Sup. Ct. R. 103(b).

by virtue of a subrogation right “is not a bar or a determination on the merits ... in an action by the subrogor to recover” upon a claim “arising out of the same transaction or series of transactions.”⁴¹ Even if there is to be no new general written norm governing all cases, regardless of any personal or nonpersonal actual or potential defenses of agents, there should at least be a new written norm on the effects of settlements with agents alone, as here there appears significant discord in the Illinois courts.⁴²

41. 735 ILCS 5/2-403(d) (not saying that a judgment in an action by a subrogee will not bar a later action by a subrogee).

42. See, e.g., *McGrath v. Price*, 342 Ill. App. 3d 19, 36-37 (1st Dist. 2003) (“appears to be a conflict” on whether a settlement with an agent “extinguished any potential vicarious liability on the part of the principal”).

The court in *Yarbrough* said that generally a claimant need not join an agent when suing a principal. Yet lawyers in civil cases alleging vicarious liability of a principal must proceed with caution regarding nonjoinder of the agent since sometimes there will operate a *res judicata* defense. Lawyers should take particular care when settling with defending agents (or even principals per Towns) when they wish to pursue related vicarious liability claims against principals (or agents). □



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