A TALE OF TWO EMPLOYERS

McLaughlin v. Nahata, 2021 Pa. Super. LEXIS 486 (July 28, 2021) (Murray, J.), although a case from our intermediate appellate court, raises the very interesting question of indemnity between two different entities employing doctors found liable for negligence. The issue in this case is one of first impression. Since the context of the litigation was decided in the Superior Court, there is a tendency by some lawyers to ignore it. However, most appellate cases in Pennsylvania are decided by the Superior Court, and very few, relatively speaking, ever see the sanctified doors of the Pennsylvania Supreme Court.

In *McLaughlin*, a $17,263,159.33 verdict was entered in favor of McLaughlin against The Washington Hospital (hereinafter "TWH"). TWH is the ostensible employer of two physicians who provided medical treatment to Mrs. McLaughlin while she was a patient at TWH. The physicians were Ganjoo and Nahata. The physicians were found to be at fault for causing catastrophic harm to plaintiff. Dialysis Clinic, Inc. (hereinafter "Dialysis Clinic"), was the actual employer of the physicians found to have malpracticed. TWH sought contribution and indemnity against Dialysis Clinic.

The Court addressed whether TWH may seek contribution from Dialysis Clinic, a secondarily liable party, for the negligence of Dialysis Clinic employees. Neither the MCARE Act nor common law precludes a finding that two parties may be vicariously liable for the negligent acts of a physician. At issue also was the Uniform Contribution Among Tortfeasors Act (hereinafter "UCATA"). The Superior Court upheld the lower court's finding that TWH may seek contribution from Dialysis Clinic. The doctors were undeniably ostensible agents of TWH and actual employees of Dialysis Clinic. The trial court denied summary judgment and the Dialysis Clinic appealed.

The trial court ruled that TWH possessed a right of contribution against Dialysis Clinic because each could be vicariously liable for the fault of the doctors. The court cited *Sleasman v. Brooks*, 32 Pa. D.&C.3d 187 (Somerset Co. C. P. 1984). Two vicariously liable parties are effectively "joint tortfeasors". Co-employers can be joint tortfeasors; jointly and severally liable to plaintiff to the extent of the employee's liability. It logically and sensibly follows that they are, also like joint tortfeasors, subject to the rights and liabilities of contribution. The Superior Court accepted the lower court's reasoning that *Sleasman* was not necessarily at odds with other appellate decisions such as *Mamalis v. AtlasVan Lines, Inc.*, 560 A.2d 1380, 1381 (Pa. 1989), that define "joint tortfeasor" as requiring some degree of common fault. In a complex setting of this protracted medical negligence case, however, relying on a targeted precedent such as *Mamalis* would be misplaced. *Mamalis* involved a simple fact pattern involving a single principal, a single agent and a single event. *McLaughlin, supra*, at *22. Under UCATA, joint tortfeasors are defined as two or more persons jointly or severally liable in tort for the same injury to persons or properties. The statutory language does not limit the right of contribution to tortfeasors who have been guilty of negligence. Contribution is available whenever two or more persons are jointly or severally liable in tort, irrespective of the theory by which tort liability is imposed. A master who has paid an injured person for harm done by a servant can recover from another master equally subject to liability. *Id.* at *22 -*24.

> A tortfeasor's right to receive contribution from a joint tortfeasor ***derives not from his liability to the claimant but rather from the equitable principle that once the joint liability of several tortfeasors has been determined, it would be unfair to impose the financial burden of the plaintiff's loss on one tortfeasor to the exclusion of the other***. It matters not on which theory a tortfeasor has been held responsible for the tort committed against the plaintiff. So long as the party seeking contribution has paid in excess of his or her share of liability, it would be inequitable under the [UCATA] to deny that party's right to contribution from a second tortfeasor who also contributed to the plaintiff's injury.

Id. at *24-*25 (emphasis in original)(quoting *Svetz v. Land Tool Co.*, 513 A.2d 403, 407 (Pa. Super. 1986).
Under this analysis, the trial court found that neither TWH, an ostensible employer, nor Dialysis Clinic, the actual employer, should be permitted to escape liability without a full and fair hearing. The facts and circumstances surrounding who controlled Drs. Ganjoo and Nahata in their treatment of Mrs. McLaughlin should be determined. Then the financial burden should be apportioned accordingly.

The Superior Court agreed with the trial court's assessment of the facts of this case and existing law. Accordingly, the intermediate appellate court was not persuaded by the Dialysis Clinic's claim that a secondarily liable party has no legal right to seek contribution from another secondarily liable party. *Id.* at *25*; see also Straw v. Fair*, 187 A.3d 966, 1002 (Pa. Super. 2018)(stating the UCATA "does not limit the right of contribution to tortfeasors who have been guilty of negligence."); *Svetz, supra.* The appellate tribunal agreed with the trial court that further evidentiary proceedings are warranted, and thus, remand to the trial court was appropriate.

The Superior Court next examined TWH's claim for indemnity. The Dialysis Clinic argued that indemnity was not available because it was not primarily liable and indemnity could not be obtained against a secondarily liable party. However, [Appellant's] lack of sole liability to the McLaughlins does not preclude TWH's right to pursue its equitable remedies. As the Superior Court in *Burch* v. Sears, Roebuck & Co., 467 A. 2d 625 (Pa, Super. 1983) explained:

> These remedies between defendants are available even against defendants whom the plaintiff does not sue, and their statute of limitations does not commence at the time of the plaintiff's injury. *Wnek v. Boyle,* 374 Pa. 27, 96 A.2d 857 (1953). Thus, victims may not, by the timing of their complaint, choose which tortfeasor will pay, and defendants faced with the frequent occurrence of eleventh-hour lawsuits may still pursue their rightful equitable remedies against other tortfeasors. *Id*.

Burch, 467 A.2d at 622 (emphasis added).

The ~~combination of~~ fact that the McLaughlins chose not to include the Dialysis Clinic as an original defendant but was joined by another defendant and the mechanical application of statutory ostensible agency principles should not compel TWH to pay for liabilities [Appellant's] employees created while acting within the course and scope of their employment. Denying TWH its day in court appears inequitable and unjust. Appellant relied heavily upon *Builders Supply Co. v. McCabe*, 77 A. 2d 368 (Pa. 1950), but within the *Builders Supply* opinion itself, one finds support for TWH's right to seek indemnity ~~from [Appellant]~~. The Court in *Builders Supply* described indemnity as being dependent upon a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. *Builders Supply*, 77 A.2d at 370. The Superior Court therefore affirmed the holding of the trial court that "longstanding precedent appears to support one corporate entity seeking indemnification against another corporate entity whose employees have been negligent." *McLaughlin, supra,* at *29.

Nevertheless, issues of fact remained:

> In determining whether a person is the servant of another it is necessary that he not only be subject to the latter's control or right of control with regard to the work to be done and the manner of performing it but that this work is to be performed on the business of the master or for his benefit. *McGrath v. Edward G. Budd Manufacturing Co.*, 348 Pa. 619, 623, 36 A.2d 303, 305. Actual control, of course, is not essential. It is [the] right to control which is determinative. On the other hand, the right to supervise, even as to the work and the manner of performance, is not sufficient; otherwise a supervisory employee would be liable for the negligent act of another employee though he would not be the superior or master of that employee in the sense the law means it. Restatement (Second), Agency, § 220(1) (1958); *Orris v. Roberts*, 392 Pa. 572, 141 A.2d 393.
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> *Yorston*, 153 A.2d 255, 259-60. The issue of [w]hether the power of control was sole or joint is a jury question. *Tonsic*, 329 A.2d at 500.
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> Also, though [TWH's] right to indemnity against Drs. Nahata and Ganjoo has been determined [at the non-jury trial], [Appellant] was not a party to the trial. To deny [Appellant] the opportunity to be heard constitutes a violation of due process of law and results in an invalid judgment. *Shay v. Flight C Helicopter Servs., Inc.*, 822 A.2d 1, 11 (Pa. Super. 2003) [(Lack of notice and an opportunity to be heard constitutes a violation of due process of law and results in an invalid judgment.)], and *MIIX Ins. Co.*, 937 A.2d at 473 [(same)].

McLaughlin, supra, at *30-*31 (quoting trial court opinion)>

The Superior Court affirmed the trial court with the understanding that the Superior Court is an error-correcting court, and "[i]t is not the prerogative of an intermediate appellate court to enunciate new precepts of law or to expand existing legal doctrines. Such is a province reserved to the Supreme Court." *John v. Philadelphia Pizza Team, Inc.,* 209 A.3d 380, 386 (Pa. Super. 2019) (citation omitted), *appeal denied,* 221 A.3d 1205 (Pa. 2019).

The Superior Court discerned no error by the trial court and affirmed the February 5, 2020 order, remanding for further proceedings consistent with the opinion.

McLaughlin v. Nahata, 2021 Pa. Super. LEXIS 486 (July 28, 2021) (Murray, J.).

- $17 million verdict entered in favor of McLaughlin.
- Ostensible agency verdict under MCARE Act found against the hospital TWH.
- TWH seeks contribution and indemnity from the actual employer of the doctors, Dialysis Clinic.
- Indemnity may be sought in separate trial.
- Nothing under the Uniform Tortfeasors Act or MCARE prohibits an indemnity claim, regardless of the theory of underlying liability.
- Neither TWH, an ostensible employer, nor the actual employer, Dialysis Clinic, should be permitted to escape liability without full and fair hearing.
- This is an equitable matter not barred by the UCATA or any other law.
- This is a case of first impression.