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Supreme Court of Virginia Grants Cert in Respondeat Superior Case

By: Erin McNeill. On *Monday, December 17th, 2012*

Hat tip to the **Virginia Lawyers Weekly** for covering a story about a recent case that may have a far-reaching impact on the doctrine of respondeat superior in Virginia. The Supreme Court of Virginia has granted **certiorari** in a case out of Portsmouth Circuit Court, ***Westermann v. Bermisa M.D.*** (Va. Lawyers Weekly subscription needed) that could have wide implications for the application of the doctrine of **respondeat superior** liability across Virginia. Respondeat superior holds employers liable for the negligence of their employees, when their employee acted negligently within the "scope and course" of his employment and that negligence caused injury to another.

In *Westermann*, a 24 year old man went to his physician complaining of chest pain and cough. The defendant doctor prescribed cough syrup, but also ordered a chest x-ray, to check for pneumonia. The doctor received the x-rays the next day, when the patient returned to his office for a follow up visit, but the doctor failed to review the results of the x-ray in time to inform his patient of the results. In fact, he did not review the x-ray until two days after the second visit, when he discovered the patient had pneumonia.

The defendant doctor's office then attempted to call the patient with the results, but mis-dialed the number and never succeeded in contacting the patient. The patient was found unresponsive in his home later the same day and died shortly thereafter in the hospital.

The Portsmouth jury reached a controversial verdict when they awarded the patient's estate damages that were reduced to the medical malpractice cap of $1.85 million. However, the award was based on a finding that the doctor's medical group was liable on a theory of respondeat superior, but that the doctor himself was not negligent. In a post-trial motion, the defendant moved to have the court set aside the verdict, because there could be no respondeat superior liability without a finding that the medical group's employee, the defendant doctor, was negligent. The Circuit Court for the City of Portsmouth agreed, and set aside the verdict.

Both sides **filed an appeal** (the defendant on the basis that the set aside should be final, the plaintiff on the basis that setting aside the verdict was error). The Supreme Court of Virginia has granted certiorari, agreeing to review the findings of the Portsmouth court for error. The grant of cert is a little

surprising, because the Portsmouth court appears to have acted on the well-settled law of how respondeat superior liability works, namely, that the employer's employee has to be negligent before the employer could be held liable. The Supreme Court only grants cert in its discretion, generally reviewing only those cases in which there is a genuine question as to the law of Virginia or when the Supreme Court believes that the facts of the case would justify a modification to existing law, or to highlight for the legislature an area of the law that could use more legislation. The grant of certiorari in the *Westermann* case does not clearly offer any legal controversy, at least from a defense perspective, leading to some speculation as to what attracted the Supreme Court's attention in this case.

One issue may be that the medical group's failure to report the patient's condition to him after the doctor's review, due to the mis-dialed number or other mistake, may be cause for finding respondeat superior liability for one of the group's other employees, other than the defendant doctor. Another may be that the Supreme Court found the jury instructions flawed, leading to this confusing result, requiring remand back to the circuit court for retrial, so the jury could make its decision with a better understanding of the law. Only time will tell, but this case is definitely one that bears watching for corporate defense counsel. If the Supreme Court finds that the error was in setting aside the verdict because there is no need for a finding that the employee was negligent to hold an employer liable, it could radically change the way that respondeat superior is applied in Virginia, to the detriment of businesses operating in the Commonwealth.