

## **Court of Appeals Holds That Agents' Dismissal with Prejudice on Notice of Claim Grounds Does Not Require Dismissal of Vicarious Liability Claim Against the Principal**

*Banner University Medical Center Tucson Campus et al. v. Gordon* (Ct. App. Div. Two May 29, 2020)

By [Eileen GilBride](#)

Division Two of the court of appeals recently held in a two-to-one opinion that medical malpractice plaintiffs could proceed with a vicarious liability claim against a principal (Banner University Medical Center Tucson) even though its agents (physicians employed by the State/University of Arizona) had been dismissed with prejudice for plaintiff's failure to serve the physicians with notices of claim.

Plaintiffs filed a medical malpractice claim against doctors who were employed by the State/University of Arizona and working at Banner University Medical Center and against Banner for vicarious liability. The trial court held that because the doctors were employed by the State, A.R.S. § 12-821.01 required plaintiffs to serve them with notices of claim within six months of the claim's accrual. Plaintiffs did not do so, and consequently the trial court dismissed the claims against the doctors with prejudice. Banner then moved for summary judgment on the vicarious liability claim, arguing that if there was no liability against the doctors, there could be no vicarious liability. *De Graff v. Smith*, 62 Ariz. 261 (1945), holds that a dismissal with prejudice is an adjudication on the merits. And *Law v. Verde Valley*, 217 Ariz. 92 (App. 2007), holds that an adjudication on the merits in favor of an agent or employee precludes a vicarious liability claim against the principal or employer. Because the doctors had won a judgment on the merits in their favor, they argued that the vicarious liability claim could not proceed. To do so would not only contravene *De Graff* and *Law*, but also (a) deprive them of their judgment on the merits (because a jury would have to adjudicate their fault in order to determine the vicarious liability issue) and (b) accomplish an end run around the notice of claim requirement. The trial court denied the motion, and Banner and the physicians took a special action to the court of appeals.

The two judges in the court of appeals majority disagreed. They reformulated the issue as "whether a vicarious liability claim against a private employer must be dismissed when the claims against its employees were dismissed with prejudice due to the plaintiff's failure to timely serve those employees with a notice of claim as required by A.R.S. § 12-821.01 due to their joint employment by a public entity." The majority then reasoned that this was a matter of "claim preclusion," and "The policies underlying the notice-of-claim requirement are not served by applying claim preclusion here." The chief purpose of the notice of claim requirement is to give "the government notice of potential liability, an opportunity to investigate claims, the chance to avoid costly litigation through settlement, and assistance in budgeting." These purposes would not be served here, it said. Furthermore, the State would not suffer financially from an adverse judgment because Banner insures the doctors. And claim preclusion does not apply to a vicarious claim when the judgment is based on a defense personal to the defendant.

The dissenting judge said the vicarious liability claim should have been dismissed. Under Rule 41(b), Ariz. R. Civ. P., unless the order dismissing a claim states otherwise, an involuntary dismissal of a claim "operates as an adjudication on the merits." Here, the trial court dismissed the claims against the doctors "with prejudice," and consequently, it was also on the merits. Thus, even though the claims were dismissed on a matter of procedure—for failure to comply with § 12-821.01—the dismissal was still on the merits, and cannot be brought again. And because the claims against the Banner Physicians were adjudicated on the merits and dismissed for lack of liability, those same claims, brought vicariously against Banner, must also be dismissed. The dissent further reasoned that it makes no difference whether the employer benefitting from the dismissal of the employee is a private or state employer; it is the vicarious nature of the claims themselves, not the relationship of the parties, that is fundamental to this analysis. Indeed, it does not even matter how the claims are dismissed against the employee. The dissent concluded that because the claims against Banner were wholly derivative, the adjudication of the claims against the doctors on the merits "conclusively negatives liability of" Banner as to a solely derivative claim.

As to the majority's statement that dismissing the vicarious liability claim would not serve the purpose of the notice of claim statute, the dissent stated that the court's role is not to declare public policy, but merely to apply the law. In any event, the doctors did not claim immunity and Banner was not attempting to benefit from any immunity enjoyed by them. Both simply argued that under existing Arizona Supreme Court law, a dismissal with prejudice is an adjudication on the merits that precludes a purely derivative vicarious liability claim against the principal. The dissent concluded by urging the Supreme Court to resolve this question given "the majority's departure from the reasoning of prior cases, and uncertainty regarding continued applicability of *De Graff* in this context."

We will continue to keep you posted on this case as it makes its way through the courts.

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