



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**THOMAS KOPP, et al. v. PHYSICIAN GROUP OF
ARIZONA, INC., et al., No. CV-17-0222-PR**

PARTIES:

Petitioners: Thomas and Angela Kopp, Melissa Ornelas, and Maria Judith and Ralph Gonzalez

Respondents: Physician Group of Arizona, Inc. and the IASIS defendants (Iasis Healthcare Corporation; Tempe St. Luke's Medical Center, LP; Iasis Healthcare Holdings, Inc.; Iasis Finance, Inc.; and St. Luke's Medical Center, LP)

Amicus Curiae: Arizona Association for Justice/Arizona Trial Lawyers' Association

FACTS:

Thomas Kopp, Melissa Ornelas, and Maria Judith Gonzalez each had bariatric weight loss surgery performed at Tempe St. Luke's Hospital by Eric S. Schlesinger, M.D.

In 2011 and 2012, they filed medical malpractice complaints against Dr. Schlesinger, Physician Group of Arizona, Inc., and the IASIS defendants. The plaintiffs alleged that the doctor was negligent in his surgical care and the defendants were vicariously liable for his negligence. Plaintiffs also alleged that the IASIS defendants were independently negligent in the administrative structure of Tempe St. Luke's Medical Center's bariatric surgery program, including the failure to impose reasonable controls for both physician and nursing care. The cases were consolidated by the superior court for discovery purposes.

Before discovery was completed, the plaintiffs entered into a settlement agreement with Dr. Schlesinger. In the agreement, the plaintiffs dismissed their claims against him with prejudice, but retained any independent claims against the other defendants. The agreement expressly prohibited the plaintiffs from maintaining claims against the hospital entities based on a theory of vicarious liability (or *respondeat superior*) arising from the doctor's negligent acts or omissions. It also provided that the settlement was not an admission of any wrongdoing by him. A stipulation to dismiss the vicarious liability claims specifically reserved the plaintiffs' independent claims against the IASIS defendants.

Meanwhile, IASIS filed a motion for protective order seeking to limit discovery. Plaintiffs responded, and IASIS replied. On the date set for oral argument, the superior court ordered the IASIS defendants to file a supplement to their reply by April 10, 2015, "regarding the issues raised by Plaintiffs concerning dismissal of the case after settlement of Dr. Schlesinger." IASIS filed its supplemental reply as ordered. Then, it filed a separate motion to dismiss/supplemental reply on April 17. The motion was filed on behalf of Physician Group of Arizona and the IASIS/Tempe St. Luke's defendants. The plaintiffs responded.

The IASIS defendants and Physicians Group argued that all the plaintiffs' claims against

them were derivative of the negligence claims against the doctor and should be dismissed pursuant to *Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272 (1971). The IASIS defendants also argued that “a settlement by a plaintiff with an agent which includes a dismissal with prejudice of the agent bars not only a vicarious liability claim against the principal but also a claim that the principal negligently retained the agent.” The plaintiffs responded that all remaining claims against the IASIS defendants were non-derivative and predicated only on IASIS’s independent negligence. IASIS conceded that a claim based on nurses’ alleged negligence in hospital post-op wound care could stand as independent claims, but that any claims of negligent credentialing, hiring, and supervision of the doctor were all based on his negligence and should be dismissed.

After a hearing, the superior court dismissed with prejudice plaintiffs’ negligent credentialing, hiring, and supervision claims based on the settlement with the doctor. In a May 8, 2015 minute entry (entered in separate cases), the superior court ruled in pertinent part:

THE COURT FINDS that the settlement with Dr. Schlesinger prevents Plaintiff from pursuing any negligence claims against moving Defendants that can be characterized as a vicarious liability cause of action or as a derivative claim. For purposes of this order, the Court finds that this includes the negligent credentialing claim against the Defendants and the negligent supervision and hiring claim. The Court agrees that any independent negligence claims alleged against the Defendants survive the settlement with Dr. Schlesinger but also feels that the Court cannot, with the exception of the nursing claim alleged in the Jessen case [not at issue here], identify what those claims may be.

....

IT IS ORDERED consistent with *Torres v. Kennecott Copper*, the negligent credentialing, negligent supervision, and hiring claims are dismissed with prejudice.

The superior court then issued orders allowing the plaintiffs to take additional discovery related to their remaining independent claims. It later signed forms of order dismissing the claims. Nine months later, it entered a Rule 54(b) judgment requested by joint stipulation of the parties.

The court of appeals consolidated the individual plaintiffs’ separate appeals into one appeal and affirmed. The plaintiffs filed this petition for review.

ISSUE: “In a medical malpractice action against a bariatric surgeon and a hospital, in which a claim is made against the hospital for acts separate and independent of the surgeon’s actions, does a settlement with the surgeon automatically release the hospital, where the only remaining claim is for independent negligence of the hospital in failing to establish safe protocols and supervise the bariatric program?”

DEFINITIONS: *Respondeat superior* is a Latin term meaning that a party is responsible for the acts of their agents and employees.

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