IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ELSIE HOWARD, *Plaintiff/Appellant*,

v.

WASHINGTON ELEMENTARY SCHOOL DISTRICT NO. 6 et al.,
Defendants/Appellees.

No. 1 CA-CV 20-0390
FILED 2-8-2022

Appeal from the Superior Court in Maricopa County
No. CV2017-055367
The Honorable Lisa Daniel Flores, Judge (Retired)

AFFIRMED

COUNSEL

The Law Office of Stephen L. Crawford PLLC, Phoenix
By Stephen L. Crawford
Counsel for Plaintiff/Appellant

Hendricks Murphy PLLC, Phoenix
By Ed F. Hendricks, Jr., Brendan A. Murphy
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the court, in which Presiding Judge Jennifer M. Perkins and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Elsie Howard ("Mother") appeals from the trial court's dismissing her amended complaint and granting Washington Elementary School District ("the District") summary judgment on her negligence and loss of consortium claims. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother's child attended school in the District. In August 2016, a teacher opened an exterior door and accidentally injured the child's eye and face. Mother filed a timely notice of claim and a complaint against the District and unnamed defendants alleging negligence and loss of consortium. The cause of action against the District relied exclusively on the theory of respondeat superior. She did not, however, file a notice of claim against the teacher who opened the door, or specifically name the teacher in her original complaint.

¶3 After the close of discovery, the District sought summary judgment, but the trial court denied the motion, finding genuine disputes of material fact about whether the teacher acted negligently in opening the door. Mother then moved to amend her complaint to add a negligence claim against the teacher. The District responded that any amendment was futile because the teacher had never been served a notice of claim and more than 180 days had passed since the accident. The court granted Mother permission to amend the complaint for the limited purpose of naming the teacher but preserved resolution of any legal issue for later. Thereafter, Mother submitted an amended complaint naming the teacher, but also added a negligent supervision claim against the District.

¶4 The District moved to dismiss the amended complaint, arguing that Mother had failed to serve a notice of claim on the teacher within 180 days as A.R.S. § 12–821.01(A) required, which barred any cause of action against the teacher. It also argued that Mother's amended complaint should be dismissed because it exceeded the trial court's limited

leave to amend. The court dismissed the amended complaint with prejudice because Mother's claim against the teacher did not comply with the notice of claim statute, and because Mother had improperly added the new independent claim for negligent supervision against the District.

¶5 The District then moved for summary judgment, arguing that because the court dismissed the claim against the teacher on its merits when it dismissed the amended complaint, the District could not be liable under the theory of respondeat superior. The court granted the motion, subsequently entered a final judgment for the District and the teacher, and awarded them their costs pursuant to A.R.S. § 12–341. Mother timely appealed.[1]

DISCUSSION

¶6 Mother argues that the trial court erred by dismissing her amended complaint and granting the District summary judgment. We will affirm a dismissal under Ariz. R. Civ. P. ("Rule") 12(b)(6) for failure to state a claim when "the allegations of the complaint do not state a cause of action recognized by law." *Owens v. City of Phoenix*, 180 Ariz. 402, 405–06 (App. 1994). In reviewing a judgment on the pleadings, we accept as true the factual allegations of the complaint, *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 218 ¶ 6 (App. 2007), and review de novo whether an amended complaint states a claim for relief, *see Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.*, 244 Ariz. 234, 237 ¶ 7 (App. 2018). We also review de novo whether any genuine issues of material fact exist and whether the court properly applied the law in granting summary judgment. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130 ¶ 4 (App. 2000).

I. Dismissal of the Amended Complaint Was Proper.

¶7 The court did not err in dismissing the amended complaint. The amended complaint stated two new causes of action: negligence against the teacher and negligence against the District in hiring, training, and supervising the teacher. Neither cause of action was proper. Regarding

---

[1] This court stayed this appeal pending the resolution of *Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, 249 Ariz. 132 (App. 2020), *rev. granted in part, den. in part* (Nov. 3, 2020) ("Banner"), because the Arizona Supreme Court's decision might have affected the resolution of this case. Because the supreme court has issued its decision, *Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, No. CV-20-0179-PR, 2022 WL 176286 (Ariz. Jan. 20, 2022) ("Banner I"), we hereby lift the stay and resolve this appeal.

the claim against the teacher, Mother never filed a notice of claim against the teacher and never served him with the notice. Before a person can sue a public entity, public school, or public employee, the person must file a notice of claim within 180 days "after the cause of action accrues," A.R.S. § 12–821.01(A), and personally serve the claim, *id.*; Rule 4.1(d); *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 61 ¶ 2 (App. 2010) (each individual defendant must be served with the notice of claim). Strict compliance with the notice of claim statute is required, *Falcon ex rel. Sandoval v. Maricopa Cty.*, 213 Ariz. 525, 527 ¶ 10 (2006), and failing to file a notice of claim bars the cause of action, A.R.S. § 12–821.01(A). Regarding the new claim against the District, the court permitted Mother to amend her complaint only to add the claim against the teacher, not a new claim against the District. Because Mother exceeded the trial court's permission, the court had the authority to dismiss the claim as a sanction for violating its order. *Green v. Lisa Frank*, 221 Ariz. 138, 149–50 ¶ 29 (App. 2009). The court thus correctly dismissed the amended complaint.

¶8 Mother nonetheless argues that the trial court's order dismissing these claims with prejudice was improper because under A.R.S. § 12–821.01(D), her child could independently file a claim against the District and the teacher when she turns 18 years old. Because Mother did not raise this issue to the trial court, the issue is waived on appeal. *Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 541 ¶ 17 n.1 (App. 2004).

¶9 In any event, the argument is meritless. Although A.R.S. §§ 12–502(A) and –821.01(D) indeed give a minor the opportunity to file claims after turning 18, the claims will be barred if the minor's parent or guardian already litigated the claims. *4501 Northpoint LP v. Maricopa Cty.*, 212 Ariz. 98, 103 ¶ 26 (2006) (noting that a prior judgment on the merits will bar a second suit on the same claim). Mother has already litigated the negligent supervision claim against the District and the negligence claim against the teacher for her child's injuries, and the trial court dismissed them with prejudice, which constitutes an adjudication on the merits. Rule 41(b); *see Circle K Corp. v. Indus. Comm'n of Ariz.*, 179 Ariz. 422, 425 (App. 1993) (stating that claim preclusion does not require actual litigation). Mother's child will thus be barred from litigating these claims when she turns 18. Mother supports her argument with *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, but that decision holds only that a negligence action to recover medical expenses for a minor's injuries belongs to the minor and the parents, 226 Ariz. 387, 390 ¶ 15 (2011). The decision does not say that when a minor turns 18 years old she can relitigate a negligence action already litigated by the parents, and in keeping with the bar against relitigating, the decision warns that "double recovery is not permitted." *Id.*

The trial court did not err in dismissing the amended complaint with prejudice.

II. Summary Judgment Against Mother and the Child Was Proper.

¶10 The trial court did not err in granting the District summary judgment on Mother's original negligence and loss of consortium claims. Summary judgment is proper when no genuine dispute exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(a). This court reviews de novo whether any genuine issues of material fact exist and whether the court properly applied the law. *Eller Media Co. v. City of Tucson,* 198 Ariz. 127, 130 ¶ 4 (App. 2000).

¶11 The basis of Mother's claims against the District was that the District was vicariously liable for the negligence of its employee, the teacher, under the doctrine of respondeat superior, which provides that an employer is vicariously liable for "the negligent work-related actions of its employees." *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, 57 ¶ 9 (2012). Vicarious liability results solely from the principal-agent relationship and "those whose liability is only vicarious are fault free—someone else's fault is imputed to them by operation of law." *Wiggs v. City of Phoenix*, 198 Ariz. 367, 371 ¶ 13 (2000). When an employee is dismissed with prejudice from litigation it is a determination "on the merits" relieving the employer from any vicarious liability. *See* Rule 41(b) (a dismissal operates as an adjudication on the merits unless otherwise stated); *De Graff v. Smith*, 62 Ariz. 261, 270 (1945); *Law v. Verde Valley Med. Ctr.*, 217 Ariz. 92 (App. 2007). Because the negligence claim against the teacher was dismissed with prejudice for Mother's failure to file and serve a notice of claim on the teacher, Mother's claims against the District—based solely on vicarious liability—necessarily fail, and the trial court correctly granted the District summary judgment.

¶12 Mother argues, however, that dismissal of her claims against the teacher did not defeat her claims against the District. She relies on this court's majority decision in *Banner*, which held that the dismissal of negligence claims against physicians working at a hospital for failing to file notices of claim did not justify summary judgment in favor of the hospital. 249 Ariz. at 136–37 ¶¶ 10–14, *vacated*, *Banner 1*, 2022 WL 176286. The majority held so because (1) it questioned whether the hospital was in privity with the physicians—an essential element to find preclusion; (2) regardless of dismissing the claims in question, other claims of liability for the physicians' negligence remained; and (3) the hospital, a private entity,

should not benefit from the protection of the notice-of-claim statute that is extended only to the State and its employees. *Id.*

¶13 The *Banner* decision does not support Mother for two reasons. First, the reasons for refusing to dismiss the claims of vicarious liability against the hospital in *Banner* do not apply in this case. Privity exists between the District and its employee-teacher. Once the claims against the teacher are dismissed, no other claims against the teacher exist for which the District could be liable. And both the District and the teacher are protected by the notice of claim statute. Second, as the supreme court recognized on review, the trial court in *Banner* did not consider the dismissal of the claims against the physicians as an "adjudication on the merits," so the dismissal did not preclude the claims of vicarious liability against the hospital. *Banner 1,* 2022 WL 176286, at *3 ¶ 11. In contrast, the trial court here did consider the dismissal as an adjudication of the merits.

¶14 Mother also cites *Kopp v. Physician Group of Ariz., Inc.*, for the proposition that a dismissal with prejudice of a claim against an employee is not necessarily an adjudication on the merits relieving vicarious liability against the employer. 244 Ariz. 439 (2018). *Kopp* does not avail Mother, however. In *Kopp*, the plaintiffs sued a surgeon for negligent medical care and the hospital employing the surgeon, claiming that it was vicariously liable for the surgeon's own negligence and that it was independently negligent in administering its surgery program. *Id.* at 440 ¶ 2. The plaintiffs subsequently agreed to settle their claim against the surgeon and their claim against the hospital based on its vicarious liability, but the agreement expressly left undisturbed the plaintiffs' claims against the hospital for its independent negligence. *Id.* at ¶ 3.

¶15 The trial court then dismissed all claims against the hospital that were "derivative" of the surgeon's negligence, including the claim that the hospital negligently administered the surgery program. *Id.* at 441 ¶ 4. On review, the supreme court reversed, holding that the negligent administration of the surgery program claim was independent of any negligence of the surgeon because the hospital's liability was not vicarious, but based on its own negligence. *Id.* at 441–42 ¶¶ 11–12. The supreme court further held that although the settlement agreement was an adjudication on the merits of the plaintiffs' claim against the surgeon, it was not "on the merits" for purposes of litigating the surgeon's negligence as part of the plaintiffs' proof of the hospital's independent negligence of administering the surgery program, despite the claim being derivative of the surgeon's negligence, because the issue of the surgeon's negligence had not been "actually litigated." *Id.* at 442–43 ¶¶ 14–15 (noting that claims may be

precluded by agreement or by pre-trial rulings, but that issues are not precluded without actual litigation unless the parties agreed that they are precluded).

¶16 As the recitation of these facts shows, *Kopp* does not apply to this case. Unlike the claims in *Kopp*, Mother's original claims against the District (the ones not associated with the dismissal of the amended complaint) were based solely on the District's vicarious liability for the teacher's negligence and not on its own negligence. Once the claim against the teacher was dismissed, Mother had no independent claim against the District in her original complaint. Although Mother brought an independent claim in her amended complaint, the trial court dismissed it as outside its order allowing an amendment to the complaint, which precluded further litigation of it. The supreme court even recognized that pretrial rulings—which would include the dismissal here—would preclude bringing the claim again in future litigation. *See id.* at 442–43 ¶¶ 14–15. Accordingly, the trial court did not err in considering the dismissal with prejudice an adjudication on the merits. *See De Graff*, 62 Ariz. at 270.

¶17 Mother next argues that the District waived any non-compliance with the notice of claim statute as to the teacher either by failing to plead it or by its conduct. The notice of claim requirement is procedural and subject to waiver. *Pritchard v. State*, 163 Ariz. 427, 432 (1990). But the District did in fact raise the issue in its opposition to Mother's motion to amend and the trial court ruled on the issue. The District did not raise the issue in its answer, because at that time, Mother had not yet filed a claim against the teacher. The trial court did not err in granting the District summary judgment.

CONCLUSION

¶18 For the foregoing reasons, we affirm. We deny Mother's request for attorneys' fees because she did not prevail on appeal. *See* ARCAP 21. As the successful party, the District is awarded its costs on appeal after compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA