STATE OF MICHIGAN

COURT OF APPEALS

MARY DOE,

Plaintiff-Appellant,

v

MARSHALL A. SHAPIRO, DO, PATRICIA SOBOLAK, RN, CARO COMMUNITY HOSPITAL, KIMBALL W. SILVERTON, DO, SILVERTON SKIN INSTITUTE, PLLC, GENESYS HEALTH SYSTEM,

Defendants-Appellees.

UNPUBLISHED
March 4, 2008

No. 273950
Genesee Circuit Court
LC No. 04-079118-NH

JANE DOE,

Plaintiff-Appellant,

v

MARSHALL A. SHAPIRO, DO, PATRICIA SOBOLAK, RN, CARO COMMUNITY HOSPITAL,

Defendants-Appellees.

and

KIMBALL W. SILVERTON, DO, SILVERTON SKIN INSTITUTE, GENESYS HEALTH SYSTEM,

Defendants.

No. 273962
Genesee Circuit Court
LC No. 04-079120-NH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In this consolidated negligence/medical malpractice and vicarious liability action, plaintiff Mary Doe appeals as of right the trial court's grant of summary disposition in favor of defendants Marshall A. Shapiro, D.O., Patricia Sobolak, R.N., Caro Community Hospital, Kimball W. Silverton, D.O., Silverton Skin Institute, PLLC, and Genesys Health System in Docket No. 273950. Plaintiff Jane Doe appeals as of right the trial court's grant of summary disposition in favor of defendants Marshall A. Shapiro, D.O., Patricia Sobolak, R.N., and Caro Community Hospital in Docket No. 273962.[1] Because the trial court properly denied as futile plaintiffs' motions to amend their complaints; because no evidence of a special relationship or ostensible agency existed; and, because no evidence that material questions of fact remained, the trial court properly granted defendants' motions for summary disposition. And, finally, because plaintiff Mary Doe failed to file affidavits of merit with respect to her claims against Silverton and Silverton Skin Institute, we affirm.

I

These consolidated cases arise from alleged sexual assaults committed by Howard Stickney, a certified registered nurse anesthetist (CRNA), while he provided anesthesia services on plaintiffs during surgical procedures performed by Dr. Silverton at the Silverton Skin Institute at premises leased from Genesys Health System. Stickney was an independent contractor through his own firm, Professional Anesthesia Services, PC.

Plaintiff Mary Doe alleged that during the afternoon of December 5, 2001, she underwent an outpatient, elective, cosmetic surgical procedure performed by Dr. Silverton at the Silverton Skin Institute. Dr. Silverton and the Silverton Skin Institute engaged Stickney to provide anesthesia services necessary for the surgery under Dr. Silverton's supervision. Following the surgery, as Mary Doe began to come out of the effects of the anesthesia, she alleges that she realized Stickney was inserting his penis into her mouth.

Plaintiff Jane Doe alleged that on April 24, 2002, she underwent an outpatient surgical procedure performed by Dr. Silverton at the Silverton Skin Institute. Dr. Silverton engaged Stickney to provide anesthesia services necessary for the surgery. Following the surgery, as Jane Doe began to come out of the effects of the anesthesia, Stickney was alone with her in the surgical suite. When a medical assistant returned to the surgical suite she saw that Stickney was standing near Jane Doe's head moving his hips back and forth.

These alleged assaults form the basis of plaintiffs' claims against the respective defendants. The trial court granted summary disposition in favor of all defendants. It is from these orders that plaintiffs now appeal.

II

This Court reviews de novo a decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR

---

[1] Defendants Kimball W. Silverton, D.O., Silverton Skin Institute, PLLC, and Genesys Health System were originally parties to plaintiff Jane Doe's appeal. However, since filing her appeal with this Court, she has stipulated to dismiss these parties from her appeal.

2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). A motion under subrule (C)(8) is properly granted if no factual development could justify recovery under the plaintiff's claim. *Id*. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the nonmoving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31.

III

On appeal, both plaintiffs argue that the trial court erred when it denied their motions to amend their complaints to plead a violation of MCL 750.411 ruling that the plain language of the statute did not fit the instant facts. Because Jane Doe has dismissed Silverton, Silverton Skin Institute, and Genesys Health Systems from her case on appeal, her alleged errors regarding her motion to amend her complaint pertain only to defendants Shapiro, Sobolak, and Caro Community Hospital. Mary Doe wages her allegations of error regarding her motion to amend her complaint against defendants Shapiro, Sobolak, and Caro Community Hospital.

The grant or denial of a motion for leave to amend pleadings is reviewed for an abuse of discretion. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 346; 715 NW2d 324 (2006). "An abuse of discretion occurs when the decision [of the trial court] results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Under MCR 2.118(A)(2), a party may move to amend a pleading by leave of the court, and "[l]eave shall be freely given when justice so requires." MCR 2.118(E) provides:

> On motion of a party the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense.

In *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007), our Supreme Court reiterated the well-established principles regarding motions to amend pleadings:

> Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile . . . . [Citations and internal quotation marks omitted.]

"The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result; amendment is generally a matter of right rather than grace." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

MCL 750.411 provides in pertinent part:

> (1) A person, firm, or corporation conducting a hospital or pharmacy in this state, the person managing or in charge of a hospital or pharmacy, or the person in charge of a ward or part of a hospital to which 1 or more persons come or are brought suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence, has a duty to report that fact immediately, both by telephone and in writing, to the chief of police or other head of the police force of the village or city in which the hospital or pharmacy is located, or to the county sheriff if the hospital or pharmacy is located outside the incorporated limits of a village or city. The report shall state the name and residence of the person, if known, his or her whereabouts, and the cause, character, and extent of the injuries and may state the identification of the perpetrator, if known.
>
> (2) A physician or surgeon who has under his or her charge or care a person suffering from a wound or injury inflicted in the manner described in subsection (1) has a duty to report that fact in the same manner and to the same officer as required by subsection (1).
>
> (3) A person, firm, or corporation that violates this section is guilty of a misdemeanor.

"'Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue.'" *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006), quoting *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006). "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Id*., at 136. This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

Plaintiffs argue on appeal that defendants Sobolak, Caro Community Hospital, and Shapiro negligently failed to inform police agencies and medical licensing authorities of alleged sexual attacks on female patients perpetrated by Stickney prior to plaintiffs' alleged attacks. We will address each of the three defendants referenced in turn.

First, we address Sobolak. Plaintiffs allege that Sobolak, a nurse and employee of Dr. Shapiro, negligently failed to inform police agencies and medical licensing authorities of her personal observations of an alleged sexual attack of one of Dr. Shapiro's female patients perpetrated by Stickney on April 30, 2001. Plaintiffs' argument fails for two reasons. First, plaintiffs admitted at oral argument on appeal that MCL 750.411 does not apply to Sobolak on its face because as a nurse she does not fall under the purview of MCL 750.411(1) that applies to hospitals and pharmacies, or MCL 750.411(2) that applies to physicians and surgeons.

Plaintiffs' argument regarding Sobolak also fails because of this Court's holding in *Marcelletti v Bathani*, 198 Mich App 655, 659-663; 500 NW2d 124 (1993). In *Marcelletti*, this Court reviewed Michigan's child abuse reporting statute, MCL 722.633, in the context of the same type of presented claims with issues similar to those presented in this matter. The *Marcelletti* Court held that the plain language of MCL 722.623(1) indicated "the Legislature intended that liability under the statute be limited to claims for damages by the identified abused child about whom no report was made." *Id.*, at 659. Like *Marcelletti*, neither the statute at issue, MCL 750.411(1) or (2), nor any case law addressing such a duty to report referenced by plaintiffs provide that the reporting duty runs to any person other than the alleged "person suffering from a wound or injury." The purpose of MCL 750.411 is to engage the criminal process for the protection of the discrete victim and not for an indirect purpose of potential protection of other unknown persons. We therefore conclude that the trial court did not err when it denied plaintiffs' motions to amend their complaints because the prior claims related to alleged victims other than plaintiffs. See *Marcelletti, supra* at 659-663. Therefore, regarding defendant Sobolak, the trial court did not err when it denied as futile, plaintiffs' motion to amend their complaints to add a violation of MCL 750.411.

Next, we address plaintiffs' claims regarding defendant Caro Community Hospital. Plaintiffs allege that Caro Community Hospital administration negligently failed to inform police agencies and medical licensing authorities of an alleged sexual attack of a female patient perpetrated by Stickney on May 15, 2001. Plaintiffs assert that Caro Community Hospital's alleged failure to report this alleged incident should properly form the basis of a violation of MCL 750.411 and thus, the trial court erred when it denied their motion to amend their complaints as futile. Plaintiffs' argument fails for three reasons. First, the record reveals that a patient at Caro Community Hospital reported the possibility that an untoward incident occurred between Stickney and another patient in a companion bed behind a pulled screen. After receiving the report, Caro Community Hospital conducted an investigation of the alleged incident. During the investigation, the patient actually involved denied the incident. Caro Community Hospital took no further action because after the involved patient denied that the incident occurred, there was nothing to report. Since there was no incident to report, Caro Community Hospital did not violate MCL 750.411 because it had no duty to report an incident that did not occur.

Secondly, we must consult the specific statutory language of the applicable statute at issue, MCL 750.411(1). MCL 750.411(1) states that hospitals and pharmacies must report individuals who "come or are brought [to the hospital] suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence" to the police. MCL 750.411(1). This language poses no ambiguity and must be enforced as written. *McManamon, supra* at 135-136. The facts presented show that the alleged victim did not come to Caro Community Hospital suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence. Instead, any alleged injuries occurred during treatment and therefore do not come within the ambit of MCL 750.411(1).

Third, like Sobolak, we conclude that the trial court did not err when it denied plaintiffs' motions to amend their complaints as it relates to Caro Community Hospital because of this Court's holding in *Marcelletti, supra*. The *Marcelletti* Court counsels that a reporting duty does

not run to any person other than the alleged "person suffering from a wound or injury." See *Marcelletti, supra* at 659-663. Thus, had the May 15, 2001 incident (1) actually occurred, and (2) occurred as described in, and met the requirements of MCL 750.411(1), the only person who could assert a violation of MCL 750.411(1) pursuant to *Marcelletti, supra,* would have been the alleged victim of the incident, not plaintiffs. *Id.* Therefore, regarding defendant Caro Community Hospital, the trial court did not err when it denied as futile, plaintiffs' motion to amend their complaints to add a violation of MCL 750.411(1).

Finally, we address plaintiffs' claims regarding defendant Shapiro. Plaintiffs allege Dr. Shapiro negligently failed to inform police agencies and medical licensing authorities of an alleged sexual attack on a female patient under his care perpetrated by Stickney on September 9, 1998. Plaintiffs assert that defendant's alleged failure to report this alleged incident should properly form the basis of a violation of MCL 750.411(2) and thus, the trial court erred when it denied their motion to amend their complaints as futile. However, plaintiffs' arguments once again fail by virtue of the Court's holding in *Marcelletti, supra*. See *Marcelletti, supra* at 659-663. Again, plaintiffs cannot assert a claim for violation of MCL 750.411(2) against defendant Shapiro for alleged injuries suffered by a victim other than themselves.[2]

IV

Next, plaintiffs argue that the trial court erred when it erroneously concluded that plaintiffs could not sustain claims in negligence against defendants as a matter of law under either a special relationship theory or a theory of ostensible agency, and further, that no material questions of fact remained on the record. Plaintiffs, in their common law claims, assert this error against all defendants. Jane Doe has dismissed defendants Silverton, Silverton Skin Institute, and Genesys Health Systems from her appeal, therefore we will address her asserted errors against only defendants Shapiro, Sobolak, and Caro Community Hospital. We will address Mary Doe's alleged errors against all defendants.

The existence of a duty is ordinarily a question for the trial court to decide as a matter of law. *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979). If the question of duty involves no disputed factual issues, and the court concludes that a defendant owes the plaintiff no duty, summary disposition is proper. *Id.* This Court reviews de novo a trial court's determination whether a defendant owes a duty toward a plaintiff. *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

To prevail in a negligence claim, a plaintiff must prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "[A] negligence action may be

---

[2] Plaintiff has assigned error in the trial court's denial of the motion to amend the Jane Doe complaint predicated on Silverton and Silverton Skin Institute's failure to report the alleged earlier incident involving Mary Doe. Resolution of Jane Doe's claims against Silverton and Silverton Skin Institute by stipulation during the pendency of this appeal renders that assigned error moot.

maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). In determining whether a duty exists, courts consider many different variables, including:

> (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant. [*Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997) (citations omitted).]

A. Special Relationship

In general, there is "no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves, supra* at 493. "The rationale underlying this general rule is the fact that '[c]riminal activity, by its deviant nature, is normally unforeseeable.'" *Id*., quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). However, social policy has led courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Some examples of special relationships that have been recognized under Michigan law include a landlord and tenant, proprietor and patron, employer and employee, residential invitor and invitee, carrier and passenger, innkeeper and guest, and doctor and patient. *Graves, supra* at 494; *Marcelletti, supra* at 664. The rationale for "imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Williams, supra* at 499; also see *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-9; 492 NW2d 472 (1992). Moreover, such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party. *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).

(1) *Defendants Shapiro, Sobolak, and Caro Community Hospital*[3]

In this case, regarding defendants Shapiro, Sobolak, and Caro Community Hospital, plaintiffs have not shown that a special relationship exists between these defendants and plaintiffs. The record reveals that defendants Shapiro, Sobolak, and Caro Community Hospital had no relationship with plaintiffs let alone exerted any control over either plaintiff. Plaintiffs were never patients of Dr. Shapiro, Nurse Sobolak, or Caro Community Hospital on the date of the alleged incident or at any other time. And, defendants Shapiro, Sobolak, and Caro

[3] Both Jane Doe and Mary Doe assert error against these defendants under the special relationship theory.

Community Hospital had no control over Stickney, an independent contractor, while he provided anesthesia services to plaintiffs at the offices of a completely separate physician, Dr. Silverton, at a separate facility, the Silverton Skin Institute.

Again, an individual has no duty to protect another who is endangered by a third person's conduct. But where there is a duty to protect an individual from harm by a third person, that duty to exercise reasonable care arises from a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. *Marcelletti, supra* at 664. Because there was no relationship at all between defendants Shapiro, Sobolak, and Caro Community Hospital and plaintiffs, there can be no "special relationship" and no concomitant duty to protect either plaintiff from the criminal acts of a third party. Similarly, no special relationship exists between Stickney, an independent contractor, and defendants because of their past engagements. The record displays that defendants Shapiro, Sobolak, and Caro Community Hospital had no control over Stickney at the time of the incidents. He not only was an independent contractor employed by his own professional corporation when providing services, but his services were independently hired out to other physicians and facilities both unknown and distant to these defendants. We therefore conclude that no duty exists. It is axiomatic that there can be no tort liability unless a defendant owed a duty to a plaintiff. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The trial court properly granted summary disposition in favor of defendants Shapiro, Sobolak, and Caro Community Hospital because no recognized relationship existed creating a legal duty to either plaintiff.

(2) *Defendant Genesys Health System*[4]

Genesys Health System had no relationship with Mary Doe or Stickney because it only leased office space to Dr. Silverton for his private offices. As such, because there was no relationship at all between defendant Genesys Health System and Mary Doe, there can be no "special relationship" and no responsibility to protect her from the criminal acts of a third party. Also, this defendant was not even aware of the existence of Stickney, who happened to provide anesthesia services on property it leased for private medical office space. Therefore, the trial court properly granted summary disposition in favor of defendant Genesys Health System because no recognized relationship existed creating a legal duty to Mary Doe. *Marcelletti, supra* at 664.

(3) *Defendants Silverton and Silverton Skin Institute*[5]

The facts show that plaintiff Mary Doe was a patient of defendants Silverton and Silverton Skin Institute, thus a doctor and patient relationship existed. Again, special relationships have been recognized to exist when a doctor and patient relationship exists. *Graves, supra* at 494; *Marcelletti, supra* at 655. There exists a "special relationship" between a doctor and the doctor's patient where there is some degree of "readily identifiable" forseeable danger.

---

[4] Only Mary Doe asserts error against this defendant under the special relationship theory.

[5] Only Mary Doe asserts error against these defendants under the special relationship theory.

Id. Actual or constructive knowledge on the part of the defendant of some danger to be protected against is usually a critical factor in determining whether a special relationship exists. See *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 403-406; 224 NW2d 843 (1975). This is related to the requirement of foreseeability because foreseeability depends on knowledge. *Id*. at 405. The existence of a duty depends in part on foreseeability, i.e., whether it was foreseeable that the actor's conduct may create a risk of harm to the victim. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977); *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 481; 413 NW2d 433 (1987). Forseeability depends in large part on knowledge, but also "upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions." *Samson, supra* at 405-406.

Whether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury. *Holland v Liedel*, 197 Mich App 60, 63; 494 NW2d 772 (1992). But, in this case, plaintiff Mary Doe has wholly failed to satisfy her burden to establish a genuine issue of material fact. Plaintiff Mary Doe failed to demonstrate that Silverton and the Silverton Skin Institute had actual or constructive knowledge because she presented no testimonial or documentary evidence to indicate that Silverton and the Silverton Skin Institute either knew or should have known that Stickney might sexually assault a patient. The fact that Mary Doe brought an action against Shapiro, Sobolak, and Caro Community Hospital for *failing* to report alleged assaults that Stickney committed at their facilities prior to the alleged assaults on plaintiffs supports Silverton's lack of knowledge. Following plaintiff's own assertion to its logical end: if Shapiro, Sobolak, and Caro Community Hospital never informed anyone about the previous alleged assaults, then Silverton and Silverton Skin Institute could not have known about the previous alleged assaults or have any reason to believe that contracting with Stickney might pose a risk to their patients.

The only evidence plaintiff Mary Doe relies on is her own self-serving deposition testimony that she informed Dr. Silverton's nurse manager Liz Niec after her surgery that Stickney assaulted her as she was coming out of the effects of the anesthesia. While there may be a dispute regarding what was told to Niec--Niec specifically denying that she was advised of an assault--Mary Doe admitted to specifically telling Niec twice *not* to tell Dr. Silverton that she believed she had been assaulted by Stickney. Because plaintiff Mary Doe provided no evidence to support the conclusion that defendants Silverton and Silverton Skin Institute were aware or should have been aware that Stickney might sexually assault a patient, Stickney's conduct was not foreseeable. Therefore, plaintiff Mary Doe failed to establish a genuine issue of material fact regarding whether defendants Silverton and Silverton Skin Institute owed her duty to protect her from an unforeseeable sexual assault, and summary disposition under a "special relationship" theory was proper.

B. Ostensible Agency

An ostensible agency may be created "'when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.'" *VanStelle v Macaskill*, 255 Mich App 1, 9; 662 NW2d 41 (2003), quoting *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 252-253; 273 NW2d 429 (1978). Under the theory of ostensible agency, a principal may be vicariously liable for the malpractice of actual or apparent agents. *Id*. As stated by this Court in *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991):

> The following three elements . . . are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. [Citations omitted.]

(1) *Defendants Silverton and Silverton Skin Institute*[6]

Mary Doe argues that Silverton and Silverton Skin Institute are liable for Stickney's actions by virtue of an ostensible agency wherein Silverton engaged Stickney's anesthesia services and provided him both the patient and instrumentalities. Under the theory of ostensible agency in this context, Silverton and Silverton Skin Institute are the principals to be charged for providing the agent Stickney. We need not engage in an inquiry regarding each element of ostensible agency. Even if Mary Doe could successfully establish the elements of an ostensible agency in an attempt to fix liability on Silverton and Silverton Skin Institute for Stickney's alleged intentional acts, her argument fails because Michigan law does not subscribe to a theory creating vicarious liability in a principal for the commission of an unknown criminal act by an agent aided in that act through the agency relationship. *Zsigo v Hurley Medical Center*, 475 Mich 215, 231; 716 NW2d 220 (2006).

Further, in general, an employer is not liable for the tortious acts of its employees who are acting outside the scope of their authority. *Zsigo, supra* at 223. We do note that the *Zsigo* Court did state that employers can be "subject to liability for their negligence in hiring, training, and supervising their employees." *Id* at 227. But, in particular, when discussing the rule of respondeat superior employer liability, the *Zsigo* Court flatly rejected the assertion that a principal is liable if the agent is aided in the accomplishment of a tort by the existence of the agency relationship. *Id*. Hence, under *Zsigo*, Mary Doe's argument that Silverton and Silverton Skin Institute are liable for Stickney's intentional acts by virtue of an ostensible agency cannot be successful. *Id*. Therefore, Mary Doe's arguments fails as a matter of law by application of *Zsigo*. *Id*.

Moreover, the rule exempting vicarious liability in the principal for the unknown criminal acts of its agent finds support in *Brown v Brown*, 478 Mich 545, 566; 739 NW2d 313 (2007). Our Supreme Court recently overruled a conclusion by a panel of this Court that "an employer may share liability for intentional torts committed by an employee who is acting beyond the scope of employment if the employer knew, or should have known, of the employee's violent propensities." *Brown v Brown*, 270 Mich App 689, 694; 716 NW2d 626 (2006), citing *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). In *Brown*, the plaintiff worked the night shift as a security guard in a plant. The plaintiff complained to her employer at least three times that another employee, Michael Brown, "routinely" "made sexually explicit and offensive comments" that "made her uncomfortable." *Brown, supra* at 478 Mich 549, 566.

---

[6] Only Mary Doe asserts error against these defendants under the ostensible agency theory.

Despite the plaintiff's complaints and requests to her employer, the vulgar and offensive comments continued. Ultimately, Brown raped the plaintiff. Our Supreme Court held that the defendant employer was not vicariously liable for Brown's actions because "[d]efendant could not reasonably have anticipated that Brown's vulgarities would culminate in a rape." *Id*., at 566.

The defendant employer in *Brown, supra*, was aware of a high level of unwanted sexual advances and a propensity for vulgar and offensive sexually based speech made by Brown. Despite this information, our Supreme Court found that the defendant employer's knowledge was not enough to make Brown's criminal act foreseeable, i.e., it was not foreseeable that Brown's conduct may have created a risk of harm to the victim. *Brown, supra* at 566. The facts of the instant case, where plaintiff Mary Doe has shown no evidence that Silverton had any knowledge whatsoever that Stickney had the propensity to commit sexual assault, do not rise to the level of those in *Brown, supra*. Hence, when applying the rules enunciated by our Supreme Court in *Zsigo, supra*, and *Brown, supra*, we conclude that plaintiff Mary Doe's argument that liability is created by virtue of an ostensible agency relationship fails.

(2) *Defendant Genesys Health System*[7]

Mary Doe argues that Genesys Health System is liable for Stickney's actions by virtue of an ostensible agency. In general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and only uses a hospital or medical center's facilities to provide treatment to patients. *Grewe, supra* at 250; *VanStelle, supra* at 8. But, "if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found." *Grewe*, supra at 250-251.

Here, Mary Doe has not provided evidence on the record to display anything more than a property leasing arrangement between Genesys Health System and Silverton or the Silverton Skin Institute. Under these facts, a lease arrangement does not create an ostensible agency without more. Mary Doe has not provided any evidence that Genesys Health System was in any way a referring hospital system under the facts presented. The record displays that Mary Doe had specifically sought out treatment from Dr. Silverton and the Silverton Skin Institute on her own volition. Mary Doe provided no evidence that she looked to, received, or relied on representations made by Genesys Health Systems to provide her with a physician or any other medical care. *Grewe*, supra at 250-251. Because Mary Doe did not look to Genesys Health System for a reference to a physician or other health care provider, and because Mary Doe had a prior relationship with Silverton and Silverton Skin Institute and not Genesys Health System, an ostensible agency did not exist. Thus, Genesys Health System cannot be liable for the actions, neglect, or misconduct of Silverton, Silverton Skin Institute, or Stickney. *Grewe, supra* at 250-251; *VanStelle, supra* at 8.

[7] Only Mary Doe asserts error against this defendant under the ostensible agency theory.

3. Remaining Assertions of Material Questions of Fact

All that remains are plaintiff Mary Doe's generalized assertions that material questions of fact exist on the record regarding: defendant Silverton's duty to any and all patients while under sedation, what defendants may have known about Stickney's alleged assaults on sedated patients; vicarious liability relations amongst all named defendants; special relationships amongst the parties imposing legal duties on them to act for plaintiffs' protection; inadequacy of defendants' response to actual notice or knowledge of the assaults; whether Stickney was an ostensible, apparent, and/or direct agent of defendants Silverton, Silverton Skin Institute, and Genesys. Providing generalized assertions that material questions of fact exist without more is not enough to survive summary disposition. To avoid summary disposition under MCR 2.116(C)(10), a plaintiff must offer admissible documentary evidence. Plaintiff Mary Doe has not met this burden. When proffered admissible evidence does not establish a genuine issue regarding any material fact for trial, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Further, this Court is not required to search the record for factual support for a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

V

Finally, plaintiff Mary Doe asserts that the trial court erred when it granted summary disposition in part because she did not file affidavits of merit with respect to her claims against Silverton and Silverton Skin Institute due to the fact that they were not required in this vicarious liability action. Defendants Silverton and Silverton Skin Institute respond that plaintiff Mary Doe's claims, although labeled as vicarious liability claims, are actually medical malpractice claims and affidavits of merit were required.

It is well established that "[t]he gravamen of an action is determined by reading the claim as a whole," *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), and looking "beyond the procedural labels to determine the exact nature of the claim." *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987). Our Supreme Court has held that "'a complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.'" *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (E D Mich, 1997).

A medical malpractice claim arises from the course of a professional relationship, and it involves questions of medical judgment beyond the scope of common knowledge and experience. A claim of ordinary negligence raises issues within the common knowledge and experience of a factfinder. In determining whether a claim sounds in medical malpractice or ordinary negligence, a court must consider: (1) whether the claim pertains to an action that occurred in the context of a professional relationship; and (2) whether the claim raises questions of medical judgment that are beyond the realm of common knowledge and experience. If both questions are answered in the affirmative, the claim sounds in medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). Also, if the reasonableness of an action can be evaluated by a jury only after the presentation of expert testimony, the claim sounds in medical malpractice. *Id*. at 423; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999).

At first glance, Mary Doe's vicarious liability claim involving an alleged sexual assault does not appear to fit the mold of a commonplace medical malpractice case. However, we conclude that the claim actually raises questions of medical judgment that are beyond the realm of common knowledge and experience. *Bryant, supra*, at 422. Our Supreme Court's decision in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999) provides guidance. In *Dorris, supra*, the plaintiff in the companion case, *Gregory v Heritage Hosp* alleged that she was assaulted by another psychiatric patient and that the hospital had breached its duties to hire employees who would protect patients from other patients with violent propensities, to closely monitor such patients, and to provide adequate staffing to control the behavior of patients under psychiatric care. *Dorris, supra* at 31, 46. In evaluating whether the plaintiff's claim sounded in negligence or medical malpractice, our Supreme Court held:

> The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. [*Id*. at 46, citing *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981).]

The Supreme Court ruled that the plaintiff's allegations regarding staffing decisions and patient monitoring involved questions of "professional medical management and not ordinary negligence" because "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward." *Id*. at 47.

Mary Doe's complaint raises substantially similar questions to those raised in *Dorris, supra*, involving Silverton and Silverton Skin Institute's medical judgment specifically regarding both the selection and retention of medical personnel and the monitoring and supervision of patients throughout the course of their operative and post-operative care. Mary Doe further argued that the failure to supervise and protect her was a deviation in the standard of care. We conclude that like *Dorris, supra*, questions involving the proper monitoring and supervision required by a physician for either a certified registered nurse anesthetist or a patient under general anesthesia are beyond the "realm of common knowledge and experience" of a layperson. *Bryant, supra*, at 422-423; *Dorris, supra* at 46-47. Mary Doe admits that her claim was unsupported by any affidavit of merit pertaining to Silverton and Silverton Skin Institute. To the extent that the trial court granted summary disposition to Silverton and Silverton Skin Institute on this basis, we affirm.

VI

The trial court properly denied as futile plaintiffs' motions to amend their complaints to add the claim of violation of MCL 750.411. The trial court properly granted defendants' motions for summary disposition because no evidence of a special relationship or ostensible agency existed, and no material questions of fact remain on the record. The trial court properly granted summary disposition in part because plaintiff Mary Doe failed to file affidavits of merit with respect to her claims against Silverton and Silverton Skin Institute. For these reasons, we

affirm the trial court's grant of summary disposition in favor of defendants.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto