STATE OF MICHIGAN

COURT OF APPEALS

KELLY SUE SYMONS, Personal Representative of the Estate of DANIEL A. SYMONS,

Plaintiff-Appellee,

v

DR. ROBERT J. PRODINGER, DALE RUSSELL, P.A., and BATTLE CREEK EMERGENCY ROOM PHYSICIANS, P.C.,

Defendants-Appellants,

and

BATTLE CREEK HEALTH SYSTEMS,

Defendant.

UNPUBLISHED
November 13, 2008

No. 269663
Calhoun Circuit Court
LC No. 04-000769-NH

Before: Markey, P.J., and Saad and Wilder, JJ.

MARKEY, J. (concurring in part, dissenting in part).

I concur with the majority's opinion except as to that found under Section E pertaining to Dr. Prodinger's motion for JNOV.

As the majority notes, Dr. Prodinger argued that he should have been granted JNOV because plaintiff never pled vicarious liability against him based on the claimed negligence of his PA Russell. I find the majority's decision to reverse the trial court's decision denying Dr. Prodinger JNOV factually and legally incongruous and disingenuous under the particular facts of this case.

Let me first discuss the applicable law. As the majority notes, in considering a motion for JNOV, the trial court was required to review the evidence in the light most favorable to the non-moving party; we, then, as an appellate court, review the trial court's decision de novo.

> We "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305

> (2000); *Forge, supra* at 204, quoting *Orzel v Scott Drug Co,* 449 Mich 550, 557; 537 NW2d 208 (1995). A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Wilkinson, supra* at 391; *Forge, supra* at 204.

Moreover, and most pertinent to this case, is that physician assistants are permitted to practice medicine only as set forth under Michigan statute. Specifically, the Public Health Code (PHC) defines a physician's assistant as "an individual licensed as a physician's assistant under part 170 or part 175." MCL 333.2701(o). The most important part of MCL 333.17001(1), found in part 170 of the PHC, is (f) which provides as follows:

> "Practice as a physician's assistant" means where practice or medicine where osteopathic medicine and surgery *performed under the supervision of a physician or a physicians* licensed under this part or part 175 [emphasis added].

In fact, provisions essentially identical to those in part 170 are also found in part 175. For example, at the time relevant to the malpractice here, MCL 333.17501(e) provided: "'practice as a physician's assistant' means the practice of osteopathic medicine performed under the supervision of a physician licensed under this part or part 170." 2005 PA 264 effective March 30, 2006, amended this section to redesignated § 17501(e) so it now reads: "practice as a physician's assistant' means the practice of medicine, osteopathic medicine and surgery, and podiatric medicine and surgery performed under the supervision of a physician or podiatrist licensed under this article." Thus, it is patent that a physician's assistant may only practice medicine under the *license* and *supervision* of a licensed physician, here, unequivocally, Dr. Robert Prodinger.

The fact that many physicians are employed by professional corporations is irrelevant as to these statutory requirements. Given that professional corporations are the norm for practicing physicians, were the existence of the corporation as the ostensible employer of both the supervising physician and the PA a shield from liability from the requisite supervision the supervising physician must provide a PA practicing under him, the statute would have no practical application. PAs would simply be practicing medicine along with their co-employees, the licensed physicians. But corporations are not required to be licensed, nor are they individuals, so in effect, no one would be responsible for supervising PAs practicing medicine. This argument is patently specious and would create a huge, unintended loophole. Medical professional corporations are comprised of professionally licensed individual physicians. These individuals are and must be the licensed physicians responsible for supervising the PAs who are practicing medicine under the physicians' licenses and with whom they are working. Dr. Prodinger may not have seen Mr. Symons and he may not have discussed his case with PA Russell or reviewed Mr. Symons' chart immediately, but legally and factually Dr. Prodinger was the licensed physician in charge of supervising PA Russell in this case. And it is he who was responsible for PA Russell's care and treatment as such. Neither can there be any serious doubt that BCERP, P.C. and all of its practicing physicians always understood that their PAs could only practice medicine under the physicians' supervision. Indeed, that is one of the main reasons that defendants understood plaintiff's allegations as initially set forth in the notice of intent and later in the subsequent complaint.

Although the majority discusses pleading-notice issues with respect to Dr. Prodinger, the record is replete and clear with the fact that any such issues were forfeited, waived, or simply harmless because upon agreement of all parties. Evidence of this agreement is that the case was ultimately submitted to the jury via a special verdict form only with respect to PA Russell. Moreover, contrary to defendant's argument on appeal and the majority's discussions and analysis, the record evidences that defendant tried this case with the understanding and *agreement* that both Dr. Prodinger and Battle Creek Emergency Room Physicians, P.C., which employed both Dr. Prodinger and P.A. Russell, *only* faced vicarious liability for any negligence the jury might find with respect to PA Russell. That is exactly what the jury did: They found PA Russell negligent. And they did it unequivocally in a detailed special verdict form.

Indeed, the notice of intent (NOI) is also straightforward, and it stretches credulity to claim that any of the defendants in this case did not clearly understand it. Paragraph 12 of the NOI sets forth that "the negligence and violations of the applicable standard of care by PRODINGER, an emergency room physician, RUSSELL, a licensed physician assistant, and triage nurses in the emergency room at BCHS, by failing . . .." It then further sets forth the various allegations of negligence. It is, and certainly was not at the time, an unknown fact that PA Russell could only practice under the direct supervision of a licensed physician. Of course, the supervising physician likely changed depending on who was assigned to what shift but, unfortunately, on the day of Mr. Symons' treatment at issue, May 2, 2003, Dr. Prodinger was the emergency room physician on duty, and PA Russell was the physician assistant working under his supervision. There was simply no misunderstanding of any of these facts by any of the defendants in this case.

Eventually, as the case proceeded, and is often the case in litigation, more facts came to light, and trial strategies were refined. Sometimes during the course of this process, parties are released by a settlement or for other reasons, issues actually tried may have evolved and changed. Not only is that trial scenario common place, it is contemplated and legally sanctioned. MCR 2.118(C)(1) provides in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated s if they had been raised by the pleadings.

That is precisely what occurred here. Although, paragraph 12 of plaintiff's complaint also set forth allegations of negligence by Russell and against Prodinger, eventually, both plaintiffs and defendants stipulated that the only issue that would be presented to the jury pertained to whether or not Russell was negligent as a physician's assistant in his care and treatment of Mr. Symons. Again, the record is clear that the defendants *stipulated* that Dr. Prodinger was Russell's supervising physician and on that basis could be held vicariously liable for Russell's actions. A party may not stipulate to a position in the trial court and then argue on appeal that the resulting action was error. *Czymbor's Timber, Inc. v Saginaw*, 269 Mich App 551, 556; 771 NW2d 442 (2006); *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

A precise wording of the stipulation set forth on the record at trial is as follows:

> MR. ROYCE: On May 2, 2003, Russell and Dr. Prodinger and were employees of Battle Creek Emergency Room physicians. Russell and Prodinger were in the course and scope of their employment. Russell is a licensed PA. Dr. Prodinger is an emergency room physician. And Russell was acting under the supervision of Dr. Prodinger at the time of the events in this lawsuit. Thank you.
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> THE COURT: All right. Is that an accurate statement of the stipulation in which you're willing to agree Mr. Hackney?
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> MR. HACKNEY: Yes, your Honor.

Initially, defense counsel had argued in a motion in limine that there were no viable allegations against Dr. Prodinger and that "this case should be tried against. . . PA Russell and then the PA should be in here as being vicariously liable for PA Russell but there's no reason to have Dr. Prodinger in here individually . . ." The trial court noted that it would await the proofs to make such a decision. Then, at trial, one of plaintiff's experts testified that Dr. Prodinger violated the standard of care because Russell was "working as a surrogate for Dr. Prodinger," who was "supposed to be supervising the physician's assistant." In essence, Dr. Barton testified that Dr. Prodinger either failed to directly supervise PA Russell or failed to provide him guidance on when to seek help.

After plaintiff rested her case–in chief, defendants then moved for directed verdict with respect to Dr. Prodinger. Defense counsel again referred to the stipulation that Dr. Prodinger was Russell's supervisor and that he was therefore in a respondeat superior position. The trial court ultimately concluded that Dr. Barton's testimony regarding Dr. Prodinger's failure to supervise was sufficient to deny defendants' motion for directed verdict. Under the trial scenario that developed here, it's neither surprising nor unreasonable that both plaintiff and defendant's counsel entered into such a stipulation: PA Russell was simply unable to perform his duties unless he did so under the supervision of a licensed physician, here, again, unequivocally, Dr. Prodinger. This stipulation protected Dr. Prodinger from having to defend further by limiting his exposure to that for respondeat superior, which greatly simplified the case. Ultimately, under these facts, and viewing them in the light most favorable to plaintiff, the trial court's denial of defendant's motion for directed verdict and later JNOV was patently correct.

On appeal, our Court, while reviewing the evidence de novo must use the same perspective, but then reach the difficult conclusion that the evidence "fails to establish a claim as a matter of law." I completed disagree with the majority's conclusion that the trial court erred and question their full application of the requisite standard of review. Unfortunately, I must conclude that the majority's decision usurps the legal judgment and decisions of the attorneys and judge trying the case, side-steps the law and the determination of a jury that had listened to all the evidence and had been properly instructed. In our system jury verdicts are, and should be, nearly sacrosanct, overturned in only the rarest of situations. So, in my view, the majority has rendered a decision far beyond our permissible bounds as appellate court judges in overturning the trial court's decision that JNOV was unwarranted.

Additionally, case law in general supports the contention that Dr. Prodinger was appropriately deemed to be in a position of a respondeat superior for PA Russell's actions. Frankly this legal proposition seems so basic as to not require any detailed analysis. Surely a supervising physician of a PA is in a position of respondeat superior. Indeed, the most recent case involving a physician's assistant, *Wolford v Duncan*, 279 Mich App 631 (2008) presents a factual scenario of a supervising physician and a PA wherein it is simply understood and apparently an inherent proposition that the physician is responsible for any potentially negligent acts of the PA whom he is supervising. Although nothing in either MCL 333.17076 or MCL 333.17078 plainly imposes vicarious liability on a supervising physician for the acts of a physician's assistant, they need not because the common law of agency remain in effect. (See *Barnes v Mitchell*, 341 Mich 720; 67 NW2d 208 (1954), which held a chiropractor vicariously liable for the negligent acts of one of his employees. The Court determined the employee had (1) acted within the scope of her employment and also (2) had acted "to further the interest of the defendant rather than her own interest.") Even though both Russell and Prodinger were employed by BCERP, P.C., case law supports that Prodinger is vicariously liable for Russell: "As a general rule, a supervising physician is vicariously liable for the negligence of subordinate physicians acting as his agent." *Thomas v Van Tuinen*, unpublished opinion per curiam of the Court of Appeal, issued February 20, 2007 (Docket No. 263613), slip op at 5. Although unpublished cases are not precedential, they may persuade and guide us. The *Thomas* Court relied on several authorities, including *Barnes*, *supra*, and *Whitmore v Fabi*, 155 Mich App 333; 399 NW2d 520 (1986). In the later case, this Court opined:

> Physicians and surgeons, like other persons, are subject to the law of agency. *Barnes v Mitchell*, 341 Mich 7, 19; 67 NW2d 208 (1954). A physician or surgeon may be liable for the negligence or malpractice of another physician or surgeon acting as his agent. *Barnes, supra*, pp 18-19; see, also, Anno: *Liability of one physician or surgeon for malpractice of another*, 85 ALR2d 889. A physician who calls in or recommends another is not liable for the other's malpractice where there is no agency, concert of action or negligence selection. *Rodgers v Canfield*, 272 Mich 562, 564; 262 NW 409 (1935); *Hitchcock v Burgett*, 38 Mich 501 (1878). Likewise, physicians who are independently employed or acting independently in a case cannot be held vicariously liable. *Brown v Bennett*, 157 Mich 654, 658; 122 NW 305 (1909). Vicarious liability has been recognized, however, where the physicians are jointly employed or acting jointly on a case. See 85 ALR2d 889, 904 and the cases cited therein. [*Whitmore*, *supra* at 338-339.]

The following statutes regulating supervision of physician's assistants also suggest that the duty is not delegable. MCL 333.17048(4) (governing the practice of medicine), and MCL 333.17548(4) (governing the practice of osteopathic medicine and surgery), each provides: "A physician shall not delegate ultimate responsibility for the quality of medical care services, even if the medical care services are provided by a physician's assistant." See, also, *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005), in which the vicarious liability of the physician for the negligence of the physician's assistance is assumed but not an issue in the case. Hence, it appears evident that Dr. Prodinger was vicariously liable for PA Russell. But, again, the

majority erred in even reaching this issue because defense counsel stipulated at trial that Dr. Prodinger would be vicariously liable for any negligence found in respect to PA Russell.

In conclusion, in my opinion, the trial court properly denied defendant Prodinger's motion for JNOV[1], and its decision should be affirmed. Otherwise, I agree with the majority's conclusions.

/s/ Jane E. Markey

[1] My analysis, of course, would also apply to any prior motions pertaining to this and related subject matter, e.g. the motion for directed verdict.