

STATE OF MICHIGAN
COURT OF APPEALS

SALLY NIPPA, Personal Representative of
The Estate of ROBERT NIPPA, deceased,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee.

FOR PUBLICATION

July 3, 2003

9:05 a.m.

No. 229113

Oakland Circuit Court

LC No. 99-016078-NH

ON REMAND

Updated Copy

August 15, 2003

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

WHITBECK, C.J. (*dissenting*).

Once again I respectfully dissent. The majority states that it is applying the logic of a recent Michigan Supreme Court opinion, *Cox v Flint Bd of Hosp Managers*,¹ to this case. The legal issue here is whether, under MCL 600.2169, a plaintiff suing a hospital, and *only* a hospital, under a theory of vicarious liability is required to file an affidavit of merit signed by a physician who is board-certified in the specialty or specialties of the agent or agents of the hospital that the plaintiff claims engaged in medical malpractice. One can apply the logic of *Cox* to this legal issue to reach the majority's result only if one is willing to amend MCL 600.2169 so that the term "party" in that statute includes the term "agent." This Court is not a super-Legislature nor should it endeavor to do that which the Legislature did not do in order to make the statute less illogical and thereby more sensible. Accordingly, I would reverse the trial court's grant of involuntary dismissal and remand.

I. Basic Facts And Procedural History

Sally Nippa (Nippa) sued Botsford General Hospital, and *only* Botsford General Hospital, in her capacity as the personal representative of Robert Nippa's estate. In her second amended complaint, Nippa alleged that Botsford was liable for the negligent treatment Drs. Wiley Fan, Gerald Blackburn, and Harris Mainster rendered to Robert Nippa. As the language of Nippa's

¹ *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002).

second amended complaint makes clear,² Nippa was proceeding under a theory of vicarious liability and was attributing the allegedly negligent acts of Drs. Fan, Blackburn, and Mainster, as agents, to Botsford, as the principal.

With her original complaint, Nippa filed an affidavit of merit from Dr. Arnold Markowitz. Botsford sought dismissal under MCR 2.112(L). Although Dr. Markowitz is board-certified in internal medicine, Botsford pointed out that Drs. Fan and Blackburn are board-certified in infectious diseases and Dr. Mainster is board-certified in general surgery; accordingly, Dr. Markowitz's board-certified specialty is not the same as those of Drs. Fan, Blackburn, and Mainster. In essence, Botsford argued that while Drs. Fan, Blackburn, and Mainster were themselves not parties, it was their alleged negligence that was being imputed to the hospital under a theory of vicarious liability. Therefore, Botsford argued, MCL 600.2169(1)(a) required Dr. Markowitz's board-certified specialties to match those of the allegedly offending physicians.

The trial court agreed and granted involuntary dismissal of the second amended complaint. Nippa then appealed the trial court's order granting involuntary dismissal to this Court. The majority of the first *Nippa* panel agreed with Botsford and the trial court, and affirmed.³ The majority described Nippa's contention as follows:

[Nippa] raises a novel, yet ultimately unsuccessful, legal argument concerning the proper interpretation of the word "party" in § 2169. Put rather simply, the thrust of [Nippa's] argument is that the word "party" refers only to those litigants who are parties of record. Therefore, according to [Nippa], because the board-certified physicians who treated [Nippa's] decedent are not named in the action, [Nippa], by virtue of her artful drafting of the second amended complaint, is absolved from complying with the requirements of § 2169.^{4]}

² Paragraph 11, relating to Nippa's allegation of negligence in Count II of her complaint, stated:

That at all times relevant herein, defendant, *BOTSFORD HOSPITAL*, by its employees, agents, servants, officers and/or representatives, owed a duty to the plaintiff's decedent, *ROBERT NIPPA*, as a primary medical care facility, and that said duty was breached by a deviation from the standard of practice of medicine, proximately causing the damages stated herein . . . [Emphasis supplied.]

³ *Nippa v Botsford Gen Hosp*, 251 Mich App 664; 651 NW2d 103 (2002) (*Nippa I*).

⁴ *Id.* at 672.

The majority then went on to conclude, in essence, that the word "party" as used by the Legislature in MCL 600.2169 did not mean a "party" as defined in Black's Law Dictionary.⁵ The majority supported this conclusion as follows:

In spite of the unique meaning the word "party" has acquired in the law, we do not agree with [Nippa] that by referring to "party," the Legislature indicated its intention that the requirement that an expert witness share the same board certification as one he intends to testify against extend (sic) only to named parties to the record. In the instant case, a careful review of the second amended complaint reflects that [Nippa] is alleging liability on the part of [Botsford] under a theory of vicarious liability. As our Supreme Court observed in *Theophelis v Lansing General Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988) (Griffin, J.), "[v]icarious liability is indirect responsibility imposed by operation of law." Further, a master may not be held liable under a vicarious liability theory where the servant is not liable. *Rogers v J B Hunt Transport, Inc*, 244 Mich App 600, 608; 624 NW2d 532 (2001), lv gtd 465 Mich [903] (2001). This is because the principal has not committed a tortious act, and is therefore not a "tortfeasor." *Theophelis, supra* at 483.

In our view, the acceptance of [Nippa's] interpretation of the statute would "effectively repeal" § 2169, rendering it nugatory and meaningless, an interpretation that this Court must avoid. *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000). Similarly, if we were to accept [Nippa's] argument, plaintiffs in medical malpractice actions could routinely avoid the requirements of § 2169 by declining to name individual physicians as defendants. In a different context, our Supreme Court has expressed its dissatisfaction with such gamesmanship, specifically where parties draft pleadings to avoid the procedural medical malpractice requirements. *Dorris v Detroit Osteopathic Hosp Corp*, 460

⁵ The majority in *Nippa I, supra* at 674, quoted the following definition of a "party" from Black's Law Dictionary (6th ed), p 1122:

"A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A party to an action is a person whose name is designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment.

"Party is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties." [Emphasis supplied; citations and internal quotation marks omitted.]

Mich 26, 43-47; 594 NW2d 455 (1999); see also *Stover v Garfield*, 247 Mich App 456, 467-469; 637 NW2d 221 (2001) (O'Connell, J., dissenting).^[6]

Dissenting, I placed particular emphasis on Justice Markman's statement in *Robertson v DaimlerChrysler Corp.*,⁷ that "[W]e believe that it is the constitutional duty of this Court to interpret the words of the lawmaker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less 'illogical.'"⁸ I stated that, in my view, the majority had disregarded the plain language of the law in order to avoid reaching what it considered to be an absurd result.⁹ I noted that the word "party" is a legal term of art that has acquired a particular meaning in the law—quoting Black's Law Dictionary for the proposition that the word party "refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant"—and contended that, while Drs. Fan, Blackburn, and Mainster may be interested persons and may be Botsford's agents, they are *not* party defendants.¹⁰

I also noted that by, in essence, amending the plain words of the statute, the majority was substituting its policy preferences for those of the Legislature, all to make the statute less illogical.¹¹ I observed that the majority's policy preference was clear: that a plaintiff should be required to file affidavits of merit signed by board-certified physicians whose specialties match those of the individual physicians who are not parties but for whose alleged negligence the plaintiff seeks to hold a party defendant hospital accountable under a theory of derivative¹² liability.¹³ Such approach would be my policy preference as well, but I concluded that "[t]he problem, of course, is that this is *not* the policy preference that the Legislature expressed in the clear and unambiguous words of the statute."¹⁴

Nippa then filed an application for leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the judgment of this Court in *Nippa I* and remanded to this Court for reconsideration in light of *Cox, supra*. The Supreme Court stated:

A hospital may be vicariously liable for the negligence of its agents [citing *Cox, supra* at 11]. In *Cox*, the Court stated that a "hospital's vicarious liability

⁶ *Id.* at 675-676.

⁷ *Robertson v DaimlerChrysler Corp.*, 465 Mich 732; 641 NW2d 567 (2002).

⁸ *Id.* at 758 (emphasis in the original).

⁹ *Nippa I, supra* at 680.

¹⁰ *Id.* at 686.

¹¹ *Id.* at 690-691.

¹² I used the term "derivative" liability as a synonym for "vicarious" liability.

¹³ *Id.* at 689-690.

¹⁴ *Id.* at 690.

arises because the hospital is held to have done what its agents have done." *Id.* at 15. Even when the hospital is the only named defendant, the issue remains whether the hospital's agents violated the standard of care applicable to them. *Id.* at 5, 14-15.^[15]

The majority, not surprisingly, now reaches the conclusion that *Cox* supports its decision in *Nippa I*.¹⁶ It concludes that the Supreme Court remanded this case for us to apply the logic of *Cox* to the present case¹⁷ and states that:

Applying the logic of *Cox* to the present case, we hold that the standard of care applicable to the hospital is the same standard of care that is applicable to the physicians named in the complaint. For all practical purposes, the hospital stands in the shoes of its agents (the doctors).

* * *

All procedural requirements are applicable to the hospital in the same manner and form as if the doctor were a named party to the lawsuit. This is so because the law creates a practical identify between a principal and an agent, and, by a legal fiction, the hospital is held to have done what its agents have done [citing *Cox, supra* at 11]. It would be absurd to have one set of legal rules for a hospital and another set of legal rules for its agents.^[18]

The majority then concludes that, because Botsford's physicians involved in this matter are board-certified in general surgery and infectious diseases while Nippa's expert is not board-certified in either specialty, the trial court properly dismissed the complaint.¹⁹

II. Applying The Logic Of *Cox* To The Facts Of This Case

I first note that *Cox* did not deal at all with an interpretation of MCL 600.2169. Rather, it dealt with the propriety of a jury instruction relating to the neonatal intensive-care unit at Hurley Medical Center. When the trial court instructed the jury, it significantly modified SJ12d 30.01. The trial court stated:

¹⁵ *Nippa v Botsford Gen Hosp*, 468 Mich 881 (2003) (vacating and remanding in lieu of granting leave to appeal).

¹⁶ *Ante* at ____.

¹⁷ *Ante* at ____.

¹⁸ *Ante* at ____, citing, as an example, *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142-143, 150; 662 NW2d 758 (2003) (statutory construction should avoid an illogical or absurd result).

¹⁹ *Ante* at ____.

"When I use the words professional negligence or malpractice with respect to the Defendant's conduct, I mean the failure to do something which a *hospital neonatal intensive care unit* would do or the doing of something which a *hospital neonatal intensive care unit* would not do under the same or similar circumstances you find to exist in this case.

"It is for you to decide, based upon the evidence, what the *hospital neonatal intensive care unit* with the learning, judgment or skill of its people would do or would not do under the same or similar circumstances."^[20]

The Supreme Court held that this modified instruction was in error and that this error was not harmless.²¹ It noted that the jury instruction, as modified, eliminated any reference to any particular profession, person, or specialty and substituted, instead, the phrase "neonatal intensive care unit." It also noted that the modified jury instruction also failed to differentiate between the various standards of care applicable to different professions and specialties.²² It further noted that because no evidence of record existed that the neonatal intensive-care unit itself is capable of any independent actions, including negligence, "it follows that the unit itself could not be the basis for [the hospital's] vicarious liability."²³

The Supreme Court discussed the concept of vicarious liability, stating that a hospital may be vicariously liable for the negligence of its agents²⁴ and that even when the hospital is the only named defendant, the issue remains whether the hospital's agents violated the standard of care applicable to them.²⁵ The Court then held that in order to find a hospital liable on a vicarious-liability theory, the jury must be instructed regarding the specific agents against whom negligence is alleged and the standard of care applicable to each agent.²⁶

Applying this logic to the facts of this case would, I readily concede, be difficult, for the simple reason that this case did not go to trial and there was no jury instruction. Had there been such an instruction, however, it is abundantly clear from *Cox* that it would have been error to simply insert the words "Botsford Hospital" in place of the words "named profession" in SJI2d 30.01, as the trial court in *Cox* substituted the words "hospital neonatal intensive care unit" for the words "named profession" when it modified SJI2d 30.01. Rather, here, Nippa would have

²⁰ *Cox, supra* at 10 (emphasis supplied).

²¹ *Id.* at 14 n 14.

²² *Id.* at 10.

²³ *Id.* at 12.

²⁴ *Id.* at 11.

²⁵ *Id.* at 5, 14-15.

²⁶ *Id.* at 15.

been required to prove the negligence of at least one agent of Botsford to give rise to vicarious liability on the part of Botsford and the trial court would have been required to instruct with respect to the negligence and the standard of care of this agent—or these agents—and not with respect to Botsford as the principal. Such an approach would be eminently sensible and would align directly with the overall concept of vicarious liability.

III. Applying The Logic Of *Cox* To The Legal Issue In This Case

To belabor the point, however, these are not the facts of this case and proceeding down this road is an exercise in futility. The more productive exercise, it seems to me, is to apply the logic of *Cox* to the legal issue in this case. That legal issue, again, is whether, under MCL 600.2169, a plaintiff suing a hospital, and *only* a hospital, under a theory of vicarious liability is required to file an affidavit of merit signed by a physician who is board-certified in the specialty or specialties of the agent or agents of the hospital that the plaintiff claims engaged in medical malpractice.²⁷

The majority uses the logic of *Cox* to amend MCL 600.2169 so that the term "party" in that statute includes the term "agent."²⁸ This, I contend, is exactly contrary to the explicit language of *Cox*. In dealing with the issue of the applicable standard of care for nurses—an issue not present in this case—the Supreme Court was interpreting MCL 600.2912a, the statute that

²⁷ In its footnote 6, the majority notes that *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 213; 642 NW2d 346 (2002), involved a medical-malpractice action with a hospital as a sole defendant. My reading of the case compels the same conclusion. However, I do note that the opinion in *Tate* did not address the issue here. Indeed, it appears that the *Tate* panel assumed, without confronting the issue at all, that when a hospital is the sole defendant MCL 600.2169 requires a plaintiff to file an affidavit of merit signed by a physician who is board-certified in the specialty or specialties of the agent or agents of the hospital that the plaintiff claims engaged in medical malpractice. Thus, much as the majority does here, the *Tate* panel appears to have conflated a defendant hospital with its physician agent when dealing with the requirements of MCL 600.2169. See, for example, the following statement from *Tate*:

Surely the Legislature did not intend to eradicate a plaintiff's ability to bring a meritorious malpractice action *against a defendant physician* who happens to have board certifications in several different fields. [*Tate, supra* at 219 (emphasis supplied).]

Both the majority and I agree that *Tate* did not involve a defendant physician. Rather, it involved a hospital as the sole defendant. It is difficult to see, therefore, how *Tate* helps us here; rather, it appears simply to compound the confusion.

²⁸ The majority denies that it is amending the statute so that the term "party" includes the term "agent." *Ante* at ___ n 9. Rather, it concludes "only that the term 'party' encompasses the negligent party as set forth in the complaint filed by plaintiff." *Id.* The majority will forgive me if I fail to comprehend the difference between that which it claims not to do and that which it does.

sets out the standard of care for general practitioners and specialists. The Supreme Court noted that the statute does not define "general practitioner" or "specialist." The Court then stated:

When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the statutory language. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000); *Massey v Mandell*, 462 Mich 375, 379-380; 614 NW2d 70 (2000). Undefined statutory terms must be given their plain and ordinary meanings. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249; 596 NW2d 574 (1999). When confronted with undefined terms, it is proper to consult dictionary definitions. *Id.*^[29]

In *Nippa I*, the majority straightforwardly admitted (1) that the term "party" in MCL 600.2169 was not defined in the statute, (2) that it had therefore consulted Black's Law Dictionary (6th ed), and (3) that the word "party," as defined in Black's Law Dictionary, is a "legal term of art that has acquired a particular meaning in the law."³⁰ One searches in vain in Black's, or other commonly used dictionaries,³¹ to find a definition of the word "party" that includes the word "agent"; indeed, Black's states, as noted above, that the word "party" "refers to those by or against whom a legal suit is brought, whether in law or in equity, *the party plaintiff or defendant*, whether composed of one or more individuals and whether natural or legal persons; *all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.*" *Nippa, I, supra* at 674 (emphasis supplied). Quite clearly, then, the word "party" does not include within its meaning the word "agent."

IV. Conclusion

Applying the logic of *Cox* to the facts of this case leads ultimately to a blind alley. *Cox* deals, with respect to the concept of vicarious liability, with an instructional error. There were no instructions in this case and therefore there can be no instructional error. Applying the logic of *Cox* to the legal issue in this case is possible only if one expands the meaning of the word "party" to include the word "agent."

²⁹ *Cox, supra* at 18.

³⁰ *Nippa I, supra* at 674.

³¹ See *Random House Webster's College Dictionary* (1997): a "party" is "one of the litigants in a legal proceeding; a plaintiff or defendant . . . a signatory to a legal instrument." See also Garner, *A Dictionary of Modern Legal Usage* (New York: Oxford University Press, 2d ed, 1995) (a "party" is "a LEGALISM that is unjustified when it merely replaces *person*. If used as an elliptical form of *party to the contract* or *party to the lawsuit*, *party* is quite *acceptable* as a TERM OF ART") (emphasis in the original).

With what, then, are we left? I believe we are left with a well-intentioned effort to rewrite MCL 600.2169 to make it less "illogical" and more in accordance with common sense. At the risk of repetition, I return to my conclusion in *Nippa I*:

[S]uch an amended statute would be logical, fair, and, I would hope, workable. Perhaps the Legislature will enact such an amendment. As yet, however, it has not. There is nothing in our judicial commissions or anywhere to be found in the concept of the separation of powers that empowers us to perform this task as the Legislature's surrogate. It is not within our judicial responsibilities to undertake to do what the Legislature should have done, but did not do. The majority chooses to embark on just such an undertaking. I do not. I would, therefore, reverse.^[32]

The majority again raises, in responding to this dissent, the issue of the definition of the word "party," suggesting that the dissent uses a "pigeonholed definition" and "destroys the intended purpose and meaning of the statute."³³ Again at the risk of repetition, I note that in *Nippa I*, the majority conceded that MCL 600.2169 does not define the word "party."³⁴ That was certainly correct. Accordingly, the majority in *Nippa I* turned to a dictionary to ascertain the meaning of that word.³⁵ That was certainly appropriate.³⁶ The dictionary to which the majority turned was Black's. The central definition of a party in Black's is: "A party to an action is a person whose name is designated on record as plaintiff or defendant."³⁷ The majority now contends that the statute itself does not say "party defendant," "party of record," "party plaintiff," or agent for "party plaintiff."³⁸ This is certainly so. The majority then states that, "What § 2169 does say is 'party.'"³⁹ This is also certainly so. It is equally certain that, under any dictionary definition that I have been able to find, the term "party" does *not* include the allegedly negligent agent of a party.

The majority's statement that it has resolved the "linguistic problem" with a "straightforward, common-sense approach" is, however, certainly true.⁴⁰ The attempt is earnest

³² *Nippa I, supra* at 691.

³³ *Ante* at ____.

³⁴ *Id.* at 673.

³⁵ *Id.* at 674.

³⁶ See *Donajkowski, supra*.

³⁷ Black's, *supra*, p 1122. See also *Random House Webster's College Dictionary, supra*, and *A Dictionary of Modern Legal Usage, supra*.

³⁸ *Ante* at ____.

³⁹ *Id.* at ____.

⁴⁰ *Ante* at ____.

and well-intentioned. It makes the statute less illogical and more sensible. But we are not modern-day alchemists with a roving commission to turn legislative lead into judicial gold. We cannot, in the name of common sense, redefine the word party to include the word agent; that is a task for the Legislature to undertake if it chooses. The response to the Supreme Court's remand should not be to undertake the legislative task of amending the statute but rather to give the plain and ordinary meaning to the undefined statutory term⁴¹ "party." If one does so, then I believe the resolution to the problem at hand is to hold that Nippa, while required to file an affidavit of merit signed by a physician, was not required, when she sued only Botsford, to file an affidavit signed by a board-certified specialist. This is not, by any stretch of the imagination, an absurd result and it applies the law as the Legislature enacted it.

/s/ William C. Whitbeck

⁴¹ *Cox, supra* at 18.