

STATE OF MICHIGAN  
COURT OF APPEALS

---

RENATE DEZACKS, Personal Representative of  
the estate of NAUM ZACKS, Deceased,

UNPUBLISHED  
July 28, 2005

Plaintiff-Appellant,

v

TENDERCARE, INC., and WHISPERING WAY  
CARE SERVICES, INC.,

No. 254468  
Ingham Circuit Court  
LC No. 03-001400-NH

Defendants-Appellees.

---

Before: Owens, P.J., and Cavanagh and Neff, JJ.

NEFF, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusions that affirm the dismissal of plaintiff's claims, with the exception of the claim based on the negligent hiring and supervision of Georgia Shaft. I respectfully dissent from the majority's analysis of that claim and would reverse and remand for further proceedings.

Plaintiff alleged that Shaft had multiple felony convictions, which resulted in restrictions on her nursing license. As the majority notes, by alleging that Tendercare placed Shaft in a supervisory capacity over the decedent's care contrary to the restrictions on Shaft's license, plaintiff facially established a violation of MCL 333.21796. The legal effect of Tendercare's violation of its statutory duty of care, standing alone, would be enough to establish a prima facie case of negligence. *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986); *Dep't of Transportation v Christensen*, 229 Mich App 417, 420; 581 NW2d 807 (1998). While this presumption of negligence may be rebutted with a showing of a legally sufficient excuse for the statutory violation, *Klanseck, supra* at 86, no such showing had yet occurred in this case.

Moreover, even in the absence of a presumption of negligence arising from Tendercare's statutory violation, plaintiff has made out a prima facie case of common law negligence arising from Tendercare's failure to properly screen, supervise, and place Shaft. A claim against a hospital may be based on direct liability for negligence in the selection, retention, and supervision of medical staff, or it may be based on vicarious liability for the negligence of its agents. *Cox v Bd of Hosp Managers, City of Flint*, 467 Mich 1, 11; 651 NW2d 356 (2002). See also *Ferguson v Gonyaw*, 64 Mich App 685, 697; 236 NW2d 543 (1975) (noting that one of a hospital's key functions is to screen its medical staff). Here, plaintiff chose to pursue a direct

liability claim against Tendercare under negligence principles rather than malpractice. See *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 420-421; 684 NW2d 864 (2004); *Adkins v Annapolis Hosp*, 420 Mich 87, 95 n 10; 360 NW2d 150 (1984). In Michigan, she is permitted to make that choice.

In ruling that plaintiff's claim sounded in medical malpractice, the trial court improperly relied on *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999). In that case, 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. *Id.* 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.

Here, however, plaintiff's claim arising from Tendercare's hiring and placement of Shaft does not involve medical judgment. An ordinary layman would know that a nursing home should carefully screen any registered nurse before hiring and that screening process should include, at minimum, a check of the status of the nurse's license. To the extent that plaintiff alleges that the decedent was abused and neglected as a result of Shaft's supervision of his care, such allegations are relevant to the issue of proximate cause and within the determination of a layperson.

Plaintiff alleged that under Shaft's supervision, the decedent was subject to a pattern of abuse and neglect, including (1) double doses of medication, (2) frequent diet errors, (3) falling several times and his injuries being ignored by staff, and (4) inadequate hygiene. Because the trial court failed to consider the prima facie evidence of negligence, and failed to recognize that the issues of abuse and neglect alleged in this case do not require expert medical testimony, I would reverse the dismissal of the claim based on a theory of negligent hiring and supervision of Shaft and remand for further proceedings. *Bryant, supra* at 430-432.

/s/ Janet T. Neff