

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

DAVID J. FINEIS,

Plaintiff-Appellant,

v

DEAN G. SIENKO, M.D., M.S., and OTTO  
COMMUNITY HEALTH CENTER,

Defendants-Appellees.

---

UNPUBLISHED  
February 15, 2011

No. 293777  
Ingham Circuit Court  
LC No. 08-000626-NH

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendants in this medical malpractice action. We affirm.

In August 1999, plaintiff saw a nurse practitioner (NP) at defendant Otto Community Health Center (Otto), and lab work was performed to check plaintiff's prostate-specific antigen (PSA) level after plaintiff's sister prodded him to have an examination because plaintiff's brother had died of prostate cancer. The test results revealed a PSA level that was diagnosed as being "abnormal." The NP referred plaintiff to radiology for an ultrasound of the prostate gland and surrounding area. The radiologist's impressions were that the prostate was normal and that the seminal vesicles were unremarkable. But the radiologist, in view of the elevated PSA level, suggested a follow-up PSA test in six months, and the radiologist further expressed that, if the test revealed that the PSA level had increased, random biopsies of the prostate may be indicated. Shortly thereafter, plaintiff met with the NP to discuss the ultrasound and the radiologist's findings, and, according to plaintiff, the NP informed him that his prostate was okay, but she said nothing about monitoring his PSA level in the future as recommended by the radiologist. Plaintiff claimed that he was never told about the recommendation to have his PSA level rechecked. Over the next several years, plaintiff visited Otto on occasion for a variety of ailments, seeing NPs for his care. Plaintiff testified that he was never informed of a need to monitor his PSA level on these visits, nor was the PSA topic ever broached. In 2007, after becoming dissatisfied with his treatment at Otto on other health matters, plaintiff visited a physician unassociated with Otto because of heart and thyroid problems, and the physician immediately ordered lab work, which included a check on his PSA level. Plaintiff's PSA level was now alarmingly high, over three times as high as the already elevated level back in 1999. In May 2007, plaintiff was informed that he had prostate cancer, and he subsequently underwent a

radical prostatectomy, which resulted in the removal of his prostate gland and both seminal vesicles, along with nerves and other tissue in the surrounding area.

Plaintiff filed a medical malpractice action against Otto and defendant Dr. Dean G. Sienko, but he chose not to sue any of the NPs involved in his care. Dr. Sienko never saw, treated, or even knew plaintiff, nor was he familiar with any documentation concerning plaintiff's care at Otto. Sienko's name is on most of the medical records, billing statements, and other documents associated with plaintiff's care and treatment at Otto. The reason for Sienko's connection to the documentation was that he had executed NP-physician agreements (hereinafter referred to as collaboration agreements), which appear to be standard forms created and utilized by the Michigan Department of Community Health, Medical Services Administration. These collaboration agreements contained guidelines requiring: systematic formal planning and evaluation meetings between Sienko and particular NPs; periodic formal reports, oral or written, that assessed the implantation of the collaborative arrangement, progress toward established objectives, and outcomes; and documented evidence of consultations, as needed, between Sienko and the NP.<sup>1</sup>

The trial court granted summary disposition in favor of defendants. The trial court first ruled that the claims were barred by the statute of limitations, with the court rejecting plaintiff's argument of recurrent acts of malpractice each time plaintiff visited Otto. The court also indicated that the six-year statute of repose, found in MCL 600.5838a(2), had elapsed. The trial court next found that Sienko and the NPs were protected by immunity, absent willful and wanton misconduct; however, the complaint insufficiently pled allegations of willful and wanton misconduct, nor did the evidence, as a matter of law, show willful and wanton misconduct. The court observed that the collaboration agreements did not mandate personal involvement by Sienko in plaintiff's care and treatment and did not create any obligation or duty the breach of which would support a medical malpractice action. The trial court next found that the affidavit of merit submitted by plaintiff, which was executed by a physician, was insufficient for purposes of any negligence or wrongdoing by the NPs. The court noted that it was less than clear whether Otto was a separate legal entity and that the limited immunity enjoyed by employees might not insulate Otto; however, the court concluded that dismissal was proper because the claims were time-barred and there was no showing of willful and wanton misconduct.

On appeal, plaintiff argues that, for a variety of reasons, the trial court erred in finding that the action was barred by the statute of limitations and statute of repose. Plaintiff further contends that Otto itself does not enjoy statutory immunity. He maintains that, under the doctrine of respondeat superior, Otto is vicariously liable for the ordinary negligence of its employees, here Sienko and the NPs, and can be held directly liable for medical malpractice. Next, plaintiff argues that the actions of the NPs amounted to willful and wanton misconduct.

---

<sup>1</sup> The collaboration agreements also provided that the parties to the agreement recognized the limits of statutory and clinical authority and accountability in relation to established goals and beneficiary needs.

He further complains that the system in place for patient treatment at Otto was willfully indifferent with respect to whether harm would result, where the collaboration agreements created a fiction that a physician would be meaningfully involved in patient care and oversight in situations in which a patient was being directly treated by an NP. This was a fiction, according to plaintiff, because in reality the physicians were not supervising NPs, as was the case with Sienko under his collaboration agreements with the NPs who provided care to plaintiff. We note that plaintiff does not directly claim that Sienko engaged in willful and wanton conduct in his chief brief on appeal, although he makes the argument in his reply brief. Finally, plaintiff argues that the trial court should have allowed him to locate an expert qualified to execute an affidavit of merit in regard to the malpractice of the NPs.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

With respect to the trial court's conclusion that the claims were time-barred, there may indeed be some merit to plaintiff's assertion that the claims were timely under MCL 600.5838a(2)(b) and (3) on the basis that there was a permanent loss of or damage to his reproductive organs resulting in an inability to procreate and that suit was filed within six months after he discovered or should have discovered the existence of a cause of action. Nevertheless, given our discussion and holding below, it is ultimately unnecessary to further address and resolve this issue.

Because Otto provides medical care and treatment for patients, it is not protected by statutory immunity under MCL 691.1407(4), and the parties do not disagree on this matter. There is also no dispute that Sienko and the NPs, generally speaking, are protected by limited immunity under MCL 333.2465(2), which provides that "[a] local health officer or an employee or representative of a local health department is not personally liable for damages sustained in the performance of local health department functions, except for wanton and wilful misconduct." Willful and wanton misconduct is only established where the conduct at issue reflected an intent to harm or where the conduct showed such indifference to whether harm would result as to be the equivalent of intending harm. *Jamieson v Luce-Mackinac-Alger-Schoolcraft Dist Health Dep't*, 198 Mich App 103, 113; 497 NW2d 551 (1993) (interpreting MCL 333.2465[2]). A high degree of carelessness does not suffice. *Id.*

The parties disagree on the issue of whether the vicarious liability of Otto can be established only by a showing, as argued by defendants, that Sienko or the NPs engaged in willful and wanton acts of misconduct, or whether it can be established by simply showing, as argued by plaintiff, that Sienko or the NP's engaged in ordinary negligent conduct. In *Hamburger v Henry Ford Hosp*, 91 Mich App 580, 589; 284 NW2d 155 (1979), this Court held that the "defendant hospital was not entitled to immunity for ordinary negligence . . . regardless of the immunity of any of its allegedly negligent employees." See also *Thornhill v Detroit*, 142 Mich App 656, 661; 369 NW2d 871 (1985) ("there is no derivative immunity of the master from the servant in the absence of a statute to the contrary"). Ultimately, this issue is irrelevant for purposes of our resolution of this appeal, as will be explained below.

Although it is certainly arguable that an issue of fact exists regarding whether the conduct of the NPs constituted ordinary negligence, and possibly even willful and wanton misconduct,

any basis to find Otto vicariously liable for the acts of its NPs necessarily fails because plaintiff did not procure and file an affidavit of merit from a nurse practitioner. MCL 600.2912d; MCL 600.2169; *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484; 708 NW2d 453 (2005) (addressing affidavits of merit by nurses and nurse practitioners); *Nippa v Botsford Gen Hosp*, 257 Mich App 387, 393; 668 NW2d 628 (2003) (in a medical malpractice suit against an institutional defendant based on the alleged negligent conduct of the institution's agents, i.e., vicarious liability, the plaintiff must submit an affidavit of merit from an expert who specializes or is board-certified in the same specialty or field as the agents accused of negligence). We note that a certified NP is "an individual licensed as a registered professional nurse under part 172 who has been issued a specialty certificate as a nurse practitioner by the board of nursing under section 17210." MCL 333.2701(c).

Plaintiff argues that he should be given an opportunity to procure an affidavit of merit from an NP where trial counsel had a reasonable belief that the affidavit of merit actually submitted, which was executed by a physician, would be sufficient to proceed with the action. MCL 600.2912d(1) provides that "the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes meets the requirements for an expert witness* under section [600.2169]." (Emphasis added.) In determining the reasonableness of a counsel's belief, this Court must examine the information available to counsel when he or she prepared the affidavit of merit. *Bates v Gilbert*, 479 Mich 451, 459; 736 NW2d 566 (2007).

Plaintiff contends that trial counsel only learned of the true extent of the NPs' involvement with his treatment and care after the litigation had commenced and only about a month before the suit was dismissed. Plaintiff maintains that, because Dr. Sienko's name was so prevalent in the medical documentation associated with plaintiff's treatment, counsel reasonably believed that an affidavit of merit from a physician would suffice. We find plaintiff's argument wholly lacking in merit. The notice of intent and the complaint itself are replete with references to the acts of the NPs relative to plaintiff's care. The complaint alleged that the NPs were employees and/or agents of Otto and that defendants and their agents and employees owed plaintiff a duty to exercise reasonable care, which duty was breached in myriad ways outlined in the complaint, including failure to inform plaintiff of the radiologist's recommendations. Given that plaintiff attempted to hold Otto liable, in part, on the basis of the NPs' actions or lack thereof, it is entirely unreasonable to have believed that the physician's affidavit of merit was sufficient.

Accordingly, vicarious liability cannot flow to Otto based on the conduct of the NPs given the failure to submit an affidavit of merit from an NP, regardless of whether the conduct of the NPs amounted to ordinary negligent conduct or willful and wanton misconduct.

With respect to the conduct of Dr. Sienko, while plaintiff argues that Otto is vicariously liable for the ordinary negligence committed by Sienko, plaintiff does not specifically set forth the reasons why Sienko was negligent in plaintiff's primary brief on appeal, nor does plaintiff expressly argue, in his primary brief, that Sienko's actions constituted willful and wanton misconduct. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) ("Reply briefs may contain only rebuttal argument, and raising an issue for

the first time in a reply brief is not sufficient to present the issue for appeal”). However, because the issue of Sienko’s conduct dovetails into plaintiff’s argument that Otto employs a deficient system relative to the use of the collaboration agreements, and because it may simply be a lack of clarity in plaintiff’s brief that gives the appearance that Sienko’s conduct is unchallenged, we shall explore the issue.

For purposes of Otto’s vicarious liability, we conclude, as a matter of law, that Sienko’s conduct was not negligent. Further, with respect to Sienko’s personal liability, we conclude, as a matter of law, that he is protected by immunity because his alleged misconduct was not willful and wanton. Finally, we hold, as a matter of law, that Otto is not independently or directly liable based on its implementation and execution of the collaboration agreements. Each one of these matters is necessarily tied to the collaboration agreements. Absent consideration of the collaboration agreements, we easily conclude that Sienko’s conduct was not willful and wanton, nor did his actions constitute ordinary negligence. He never rendered any care or treatment relative to plaintiff, he did not review plaintiff’s treatment or his records in the course of plaintiff’s care at Otto, and Sienko had no knowledge or awareness of plaintiff and his medical issues.

When the collaboration agreements are considered, the issue becomes a bit more complicated. However, on review of the agreements, while Sienko may not have been in compliance with some of the provisions in the agreements, we conclude that, *for purposes of a medical malpractice action*, there is nothing in the agreements that would have necessitated direct supervisory review by Sienko as to the specific care provided to plaintiff by the NPs, such that we could find negligent conduct or willful and wanton misconduct on Sienko’s part and then causally connect it to the harm suffered. As indicated above, these collaboration agreements contained guidelines requiring: systematic formal planning and evaluation meetings between Sienko and particular NPs; periodic formal reports, oral or written, that assessed the implantation of the collaborative arrangement, progress toward established objectives, and outcomes; and documented evidence of consultations, as needed, between Sienko and the NP. These broad collaboration agreements simply do not encompass a requirement that Sienko engage in hands-on care and oversight of a particular patient, absent, perhaps, a situation in which an NP makes a direct inquiry for assistance. And there is no evidence that any of the NPs voiced a desire to consult with Sienko in regard to plaintiff’s care and treatment.

With respect to any independent or direct liability of Otto, it is true that “[a] hospital may be 1) directly liable for malpractice, through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff, or 2) vicariously liable for the negligence of its agents.” *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002). Assuming that Otto can potentially be held directly liable in a medical malpractice case for allowing Sienko, and presumably other doctors, to operate under the collaboration agreements in a manner inconsistent with those agreements, we do not find that the agreements necessitated, under the circumstances, involvement by Sienko to such a degree that he should have been aware of the particular facts, care, and treatment relative to plaintiff. And therefore we cannot hold Otto liable on a theory of direct liability for failure to enforce the collaboration agreements.

Plaintiff contends that the fiction of the collaboration agreements which exists when physicians are not acting in compliance with the agreements equates to committing Medicare fraud in billing practices. It may or may not, but we are concerned with an action for medical malpractice, not possible fraudulent billing practices. Plaintiff does not cite any statute or administrative rule pertaining to the scope of practice of NPs and physician oversight that might dictate that the NPs here were practicing medicine without a license or outside of their certification when treating plaintiff, such that Sienko was required to be involved in the care to an extent that might give rise to a claim for medical malpractice. As it is not our job to discover the basis for an appellant's claims and then search for supporting authorities, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), we decline to independently explore that avenue.<sup>2</sup>

Affirmed. Defendants, having fully prevailed on appeal, are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy  
/s/ William C. Whitbeck  
/s/ Christopher M. Murray

---

<sup>2</sup> Given our ruling, it is unnecessary to address Sienko's argument that his position as a county medical director makes him the highest appointive executive official in the county in that department and thus entitles him to absolute immunity under MCL 691.1407(5).