[Cite as *Rhoads v. Brown*, 2010-Ohio-3898.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

KATHY RHOADS, et al.,	:	Case No. 09CA18
Plaintiffs-Appellants,	:	:
	:	DECISION AND JUDGMENT ENTRY
v.	:	
	:	
TERRY BROWN, et al.,	:	
	:	**Released 8/12/10**
Defendants-Appellees.	:	

APPEARANCES:

Conrad A. Curren, Greenfield, Ohio, for appellant Kathy Rhoads.

Amy S. Thomas and Robert V. Kish, REMINGER CO. LPA, Columbus, Ohio, for appellee Physicians Ambulatory Surgery Center.

Stephen D. Jones and Michael R. Traven, ROETZEL & ANDRESS, LPA, Columbus, Ohio, for appellee Michael Lefkowitz, M.D.

Theodore M. Munsell and Monica L. Waller, LANE, ALTON & HORST, LLC, Columbus, Ohio, for appellee Terry Brown, dba Pickaway Anesthesia Associates.

Harsha, J.

{¶1} Kathy Rhoads filed suit against Terry Brown, dba Pickaway Anesthesia Associates, Michael Lefkowitz, M.D., and the Physicians Ambulatory Surgery Center ("PASC") after she allegedly sustained injuries during a surgical procedure at PASC. Brown, a certified registered nurse anesthetist ("CRNA"), allegedly punctured her lung and caused it to collapse when he performed an interscalene block prior to Lefkowitz operating on Rhoads' shoulder. Rhoads alleged that the collapsed lung went undiagnosed and untreated for more than one week despite her complaints of chest pain to Brown, the PASC nursing staff, and Lefkowitz's physician's assistant. Rhoads

now appeals the trial court's decision to grant PASC's motion to dismiss under Civ.R. 12(B)(6) and to grant Brown and Lefkowitz a summary judgment.

{¶2} Rhoads contends that the trial court erred by dismissing her claim that PASC negligently supervised or trained its nurses based on her failure to include an affidavit of merit in the complaint for that claim. However, an employer cannot be liable for negligent supervision or training unless its employee is individually liable for a tort or guilty of a claimed wrong against the plaintiff. Rhoads claims that PASC nurses failed to "recognize, evaluate or report" her chest pain to the proper medical providers. Because she challenges the professional skill and judgment of the nurses – matters not within the common knowledge and experience of jurors – expert testimony was necessary to establish the nurses' wrongdoing. Therefore, she needed an affidavit of merit regarding the nurses' violation of the standard of care to withstand a Civ.R. 12(B)(6) motion to dismiss. Because she failed to provide such an affidavit, the trial court properly granted PASC's motion to dismiss.

{¶3} Rhoads contends that the trial court erred by dismissing her claims that PASC is vicariously liable for the negligent conduct of Lefkowitz and Brown under the doctrine of respondeat superior. But Rhoads' complaint did not give PASC fair notice of those claims. Because Rhoads makes these allegations for the first time on appeal, we do not address the merits of her argument.

{¶4} Next, Rhoads contends that the trial court erred by granting Brown's motion for summary judgment because genuine issues of material fact remain about whether his conduct fell below the prevailing standard of care for a CRNA and proximately caused her injuries. However, Rhoads failed to submit any expert opinion

to establish Brown's liability. The affidavit of merit she points to from her expert is not summary judgment evidence as defined by the civil rules. Therefore, Rhoads failed to carry her burden to set forth specific facts showing that there is a genuine issue for trial, and the trial court properly granted Brown's motion.

{¶5} Rhoads also argues that the trial court erred by granting Lefkowitz's motion for summary judgment. Rhoads contends that she has a viable claim that Lefkowitz is vicariously liable for the negligent conduct of Brown and the PASC nursing staff under the doctrine of respondeat superior. But even if Brown and the PASC nursing staff qualified as Lefkowitz's employees, we have already found that the trial court properly granted Brown a summary judgment. Moreover, at the trial level Rhoads never alleged that Lefkowitz was vicariously liable for the negligence of PASC's nursing staff. And she points to no expert testimony indicating the nurses fell below the prevailing standard of care in their treatment of Rhoads. Because Rhoads failed to produce evidence that Brown or the PASC nurses committed a tortious act, the doctrine of respondeat superior is inapplicable.

{¶6} Finally, Rhoads claims that a genuine issue of material fact exists about whether Lefkowitz failed to timely diagnose and treat her chest pain. She contends that Lefkowitz's negligent supervision or training of Brown, the PASC nursing staff, and his physician's assistant resulted in their failure to report her chest pain to Lefkowitz, and caused a treatment delay. However, we have already determined that Rhoads failed to produce evidence that Brown or the PASC nurses fell below the prevailing standard of care. And contrary to Rhoads' assertion, her claim regarding the physician's assistant's negligence involves a matter of professional skill and judgment that requires expert

testimony to establish the assistant breached the prevailing standard of care. Moreover, Rhoads needed expert testimony to show that Lefkowitz fell below the standard of care in his supervision or training of his assistant. Rhoads failed to produce such evidence. Likewise, Rhoads failed to provide any expert opinion that Lefkowitz fell below the standard of care by waiting several hours to read the chest x-ray that revealed the collapsed lung. Therefore, the trial court properly granted Lefkowitz's motion for summary judgment. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶7} In August 2003, Rhoads filed a complaint in the Pickaway County Court of Common Pleas against Brown, Lefkowitz, and PASC. Subsequently, she voluntarily dismissed the action under Civ.R. 41(A) and re-filed in the Highland County Court of Common Pleas. Rhoads alleged that in March 2002, Lefkowitz performed shoulder surgery on her at PASC. Before surgery began, Brown performed an interscalene block to help alleviate her post-operative pain. Rhoads claimed that Brown punctured one of her lungs during this procedure, resulting in pneumothorax, i.e. a collapsed lung. Despite her complaints of severe chest pain "during and after" the placement of the block, Brown, Lefkowitz, and the nurses at PASC failed to realize that she had a collapsed lung. Rhoads alleged that after having chest pain for more than a week, she contacted Lefkowitz's office but his physician's assistant told her to wait until her scheduled appointment two days later to talk to Lefkowitz about it. At that appointment, Lefkowitz ordered a chest x-ray but did not read it until later in the day. Rhoads alleged that in the evening, a family member told her the police were looking for her because she needed to go to the emergency room. Apparently the x-ray showed that Rhoads'

right lung had collapsed. Rhoads had surgery to re-inflate the lung and spent five days recovering in the hospital.

{¶8} Rhoads alleged that Brown negligently placed the interscalene block, causing her lung to collapse. She alleged that Brown and Lefkowitz negligently failed to recognize and treat the problem. Rhoads indicated that Lefkowitz negligently trained and supervised the physician's assistant who instructed Rhoads to wait two days to discuss her chest pain with the doctor. Rhoads also alleged that PASC negligently trained and supervised its personnel. She claimed that PASC's nursing staff failed to "recognize, evaluate, or report [her] chest pain to the proper medical providers."

{¶9} PASC filed a Civ.R. 12(B)(6) motion to dismiss based on Rhoads' failure to comply with Civ.R. 10(D)(2) by including an affidavit of merit with her complaint. Brown and Lefkowitz also requested dismissal of the action for this reason. Rhoads argued that she did not need an affidavit of merit because Civ.R. 10(D)(2) took effect after she filed the Pickaway County action. She also argued that based on the proceedings in Pickaway County, her case clearly had merit, so an affidavit of merit was an unnecessary formality. Alternatively, she moved the court for additional time to comply with Civ.R. 10(D)(2). The court granted Rhoads' request for an extension. Rhoads submitted an affidavit of merit for Lefkowitz and Brown but admitted that she was "unable to obtain an Affidavit of Merit that [PASC] breached the standard of care by specifically following the letter of the law in Rule 10(D)." She argued that the other affidavits were sufficient to cover PASC since her complaint argued that all three defendants were "jointly and severally" liable. PASC claimed that this argument had no merit because parties could not be jointly and severally liable for damages "until they

are first determined to have liability." In response the trial court dismissed PASC from the action.

{¶10} Subsequently, Brown and Lefkowitz filed motions for summary judgment. Brown argued that Rhoads lacked an expert who could testify that he breached the prevailing standard of care in any way or that he proximately caused her injuries. In support of his motion, he pointed to testimony from Rhoads' expert anesthesiologist, Jason Brajer, M.D., that he could not conclude whether Brown violated the standard of care. Rhoads argued that Brajer's testimony supported her claim, but the trial court disagreed. Rhoads also claimed that another expert, Thomas A. Renter, CRNA, could testify that Brown deviated from the standard of care. But she did not present an affidavit from him or file his deposition testimony to support this assertion, and the court granted Brown's motion.

{¶11} In his motion for summary judgment, Lefkowitz argued that Rhoads lacked an expert witness to testify that he deviated from the applicable standard of care or proximately caused her injuries. Lefkowitz submitted his own affidavit in support of the motion. In the affidavit, Lefkowitz averred that he was familiar with the appropriate standard of care and opined, to a reasonable degree of medical probability, that he complied with it and did not proximately cause Rhoads' injuries. Rhoads attempted to use an affidavit of merit and a letter from different experts to refute the motion. However, the trial court concluded that neither constituted proper summary judgment evidence. Rhoads also tried to present testimony from Brajer to oppose the motion. But the court agreed with Lefkowitz that Brajer was not qualified to give an opinion on whether an orthopedic surgeon deviated from the prevailing standard of care. Thus the

court concluded that Rhoads failed to submit any evidence to contradict Lefkowitz's affidavit. Rhoads also argued for the first time that she had a viable claim that Lefkowitz supervised Brown and was therefore vicariously liable for Brown's negligent conduct. But the court rejected this argument because Rhoads failed to present any evidence that Lefkowitz actually directed or controlled Brown's actions during the placement of the block. After the court granted the motions for summary judgment, this appeal followed.

II. Assignments of Error

{¶12} Rhoads assigns the following errors for our review:

> The Trial Court erred in dismissing Defendant Physicians Ambulatory Surgery Center as a party to this matter because the Affidavits of Merit submitted in this matter sufficiently comply with Ohio Civ.R. 10(D)(2) to establish grounds for liability against the surgical center under the doctrine of respondeat superior.
>
> The Trial Court erred in granting Summary Judgment in favor of Defendants Lefkowitz and Brown pursuant to Ohio Civ.R. 56(C) because the evidence, when viewed in the light most favorable to the Plaintiff, is sufficient to establish genuine issues of material fact.

III. PASC's Motion to Dismiss[1]

{¶13} In her first assignment of error, Rhoads contends that the trial court erred by granting PASC's motion to dismiss under Civ.R. 12(B)(6) based on her failure to file an affidavit of merit concerning her claims against the center. At the time Rhoads filed her complaint in Highland County, Civ.R. 10(D)(2)(a) provided:

> (a) Except as provided in division (D)(2)(b) of this rule, a complaint that

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[1] In her reply brief, Rhoads argues that we should strike PASC's appellate brief as untimely. However, Rhoads served her appellate brief by mail on December 2, 2009. Thus PASC had 23 days to file its response. App.R. 14(C) & 18(A). However, because the last day of this period fell on December 25, 2009, a legal holiday and a Friday, PASC had until December 28, 2009 to file its brief, i.e. the next day that was not a Saturday, Sunday, or a legal holiday. App.R. 14(A). PASC timely filed its brief on that date.

> contains a medical claim * * * as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness * * * [and] shall include all of the following:
>
> (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

{¶14} "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73, 605 N.E.2d 378 (per curiam). Civ.R. 10(D)(2)'s heightened pleading requirement goes directly to the sufficiency of the complaint. *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, at ¶13; see former Civ.R. 10(D)(2)(c) ("An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment.")[2] Thus, "[t]he proper response to the failure to file the affidavit required by Civ.R. 10(D)(2) is a motion to dismiss pursuant to Civ.R. 12(B)(6)." *Fletcher* at paragraph one of the syllabus. We review this type of dismissal de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶5.

{¶15} Rhoads does not challenge the trial court's implicit finding that her claim that PASC negligently supervised or trained its nurses constitutes a "medical claim"

[2] This rule was in effect at the time Rhoads filed her complaint in Highland County. The current version of the rule contains a nearly identical provision. Civ.R. 10(D)(2)(d).

under R.C. 2305.113. Instead, she argues for the first time on appeal that an affidavit of merit is unnecessary because she did not need expert testimony to establish PASC's liability.

{¶16} "[A]n underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer." *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, at ¶23, quoting *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 217, 527 N.E.2d 1235. Here, Rhoads alleged that PASC's nursing staff "failed to recognize, evaluate or report [her] chest pain to the proper medical providers." "In a negligence action involving the professional skill and judgment of a nurse, expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurse's negligence, if any, was the proximate cause of the patient's injury." *Ramage v. Cent. Ohio Emergency Services, Inc.*, 64 Ohio St.3d 97, 1992-Ohio-109, 592 N.E.2d 828, at paragraph one of the syllabus.

{¶17} Rhoads contends the lack of skill or care of the nurses is so apparent it falls within the "common knowledge exception" to this rule. "Under this exception, matters of common knowledge and experience, subjects which are within the ordinary, common and general knowledge and experience of mankind, need not be established by expert opinion testimony." Id. at 103. However, it requires more than common knowledge to conclude that a patient who received an interscalene block in anticipation of shoulder surgery and who complains of chest pain is suffering from pneumothorax or is otherwise experiencing a noteworthy symptom. Rhoads' claim squarely challenges

the professional skill and judgment of the nursing staff in assessing whether her chest pain was significant in relation to her physician's task of diagnosing and treating her. Therefore, to maintain an action against PASC for negligent training or supervision, Rhoads needed expert testimony to establish the nursing staff's wrongdoing. And, she needed an affidavit of merit regarding the nurses' violation of the standard of care to withstand a Civ.R. 12(B)(6) motion to dismiss. Because Rhoads failed to include such an affidavit in her complaint, the trial court properly dismissed her claim against PASC.

{¶18} Rhoads also argues that the court erred in dismissing her claims that PASC is vicariously liable for the negligent conduct of Lefkowitz and Brown under the doctrine of respondeat superior. "Under the doctrine of respondeat superior, a principal or employer may generally be held liable for tortious acts committed by its agents or employees if such acts occur within the scope of the employment relationship." *Pierson v. Rion*, Montgomery App. No. CA23498, 2010-Ohio-1793, at ¶44, citing *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 1994-Ohio-519, 628 N.E.2d 46. Rhoads claims that she submitted affidavits of merit as to the negligence of Lefkowitz and Brown, so a Civ.R. 12(B)(6) dismissal was improper.

{¶19} However, Rhoads' argument ignores the fact that her complaint did not give PASC fair notice of a respondeat superior claim. See *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, 903 N.E.2d 1284, at ¶5 ("Civ.R. 8(A) requires * * * a short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it is based."). Although Rhoads' complaint alleged that Lefkowitz performed her shoulder surgery "at" PASC, she never alleged that Brown or Lefkowitz were employees of the center, let alone indicated that she

intended to claim PASC was responsible for their negligent conduct. Moreover, Rhoads never mentioned a respondeat superior claim against PASC when she opposed the center's motion to dismiss. Thus, she has forfeited this argument and we do not address it.

{¶20} Finally, in her complaint and appellate brief, Rhoads claimed that PASC had a duty to provide "proper equipment" for her surgery. But Rhoads gives no indication of how PASC breached a duty in this regard and does not contend that the trial court erred in dismissing this particular claim. Therefore, we need not address the merits of this issue either. Accordingly, we overrule Rhoads' first assignment of error.

IV. Summary Judgment

{¶21} In her second assignment of error, Rhoads contends that the trial court erred in granting Brown and Lefkowitz summary judgment. When reviewing a trial court's decision on a motion for summary judgment, we conduct a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241 (per curiam). Accordingly, we must independently review the record to determine whether summary judgment was appropriate and do not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Summary judgment is appropriate when the movant has established: (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, with the evidence against that party being construed most strongly in its favor, and (3) the moving party is entitled to judgment as a matter of law. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio

St.2d 64, 66, 375 N.E.2d 46. See Civ.R. 56(C).

{¶22} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107, 662 N.E.2d 264. To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate the non-moving party has no evidence to support the non-moving party's claims. Civ.R. 56(C); See, also, *Hansen v. Wal-Mart Stores Inc.*, Ross App. No. 07CA2990, 2008-Ohio-2477, at ¶8. Once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). "If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Id.

A. Discovery from the Pickaway County Case

{¶23} As an initial matter, we address Rhoads' allegation that the trial court improperly ignored summary judgment evidence in the form of discovery materials from the Pickaway County case. She states that the trial court "[o]rdered the transfer of all discovery materials" from the Pickaway County case by journal entry dated May 21, 2009. Rhoads claims these materials included the depositions of two nurses, Ruth Tao and Cynthia Harness, and a CRNA, George Cox. She contends that the court improperly granted summary judgment before the court received or considered these depositions.

{¶24} Rhoads does not explain what relevance these discovery materials had to the court's ruling on either of the summary judgment motions. Moreover, Rhoads misinterprets the trial court's order. The court did not order the "transfer" of these discovery materials but merely issued an order stating that the discovery from the Pickaway County case "may be utilized by the parties for all purposes" in this case. Therefore, if Rhoads wished to use these depositions to support her summary judgment motion, it was incumbent on her to file them in this action, which she failed to do. See Civ.R. 56(C) (limiting a court's consideration of deposition testimony to depositions "timely filed" in the action).

B. Summary Judgment in Favor of CRNA Brown

{¶25} Rhoads claims that Brown negligently performed the interscalene block, causing one of her lungs to collapse, and then negligently failed to recognize and treat the problem. "In a negligence action involving the professional skill and judgment of a nurse, expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurse's negligence, if any, was the proximate cause of the patient's injury." *Ramage*, supra, at paragraph one of the syllabus.

{¶26} Rhoads does not challenge the trial court's finding that Brown met his initial burden to demonstrate entitlement to a summary judgment. And she does not argue that expert testimony is unnecessary to prove her claims against Brown. Instead, Rhoads contends that she put forward sufficient evidence from her experts to create a genuine issue of material fact about whether Brown breached the prevailing standard of care in his treatment of Rhoads and proximately caused her injuries.

{¶27} Rhoads claims that the affidavit of merit she obtained from Thomas A.

Renter, CRNA, created a genuine issue of material fact about whether Brown violated the prevailing standard of care. However, at the time Rhoads filed her complaint, Civ.R. 10(D)(2)(c) provided: "An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment." The current version of the rule contains a nearly identical provision. See Civ.R. 10(D)(2)(d). "Thus, it cannot be used as summary-judgment evidence. See Civ.R. 56(E) (requiring affidavit to set forth facts that are admissible in evidence)." *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, 908 N.E.2d 495, at ¶86. Thus, we reject this argument.

{¶28} Rhoads also argues that based on her deposition testimony and that of Brajer, a jury could conclude Brown fell below the standard of care when he placed the interscalene block. Rhoads testified that Brown made four attempts to place the block. Apparently the medical records do not support her testimony, and she did not tell Brajer her version of events. Brajer testified:

> Q: Are you saying if a pneumothorax has developed, I have deviated from the standard of care?
>
> A: Not necessarily.
>
> Q: Under – where do you disclose in your consent form when you have deviated from the standard of care versus when you have not deviated from the standard of care?
>
> A: Again, there is a threshold at which the care can become substandard.
>
> Not in this case, but if you have documented five attempts at placing the interscalene and -- block and you got a pneumothorax, I'd say five times was too many. If you can't get it in one or two passes, stop. Either let somebody else do it or abandon the procedure. That did not occur in this case -- this didn't occur, to my knowledge, in this case, but certainly could have occurred.

> Therefore, testimony with the patient would be helpful to know if multiple attempts were taken versus one * * * pass and she took a big cough and it occurred.
>
> Q: Well, then let me understand what you're saying here, as I was a little bit confused by some answers you gave earlier when I was not questioning you.
>
> I did not see in your report where you suggested that Mr. Brown fell below the standard of care insofar as the manner that he performed the interscalene block in this case.
>
> A: And that's partly because there's no -- there's inadequate information to make that judgment.
>
> Q: As we sit here today, you have no opinion -- you cannot form an opinion whether or not he fell below the standard of care when performing the interscalene block?
>
> A: Correct.

And Brajer later testified that he had "no knowledge that [Brown] performed [the block] in an inferior manner because his notation -- it is inadequate for me to get that information. It's certainly possible. I have no information to say whether he did or not."

{¶29} Although Brajer unequivocally testified that he could not form an opinion as to whether Brown fell below the standard of care in performing the block, Rhoads essentially argues that Brajer would have testified differently if he knew that she thought Brown made four attempts to place the block. She points to Brajer's testimony that he would "say five times was too many" and that the procedure should be abandoned or performed by someone else after one or two passes. Rhoads' argument asks us to speculate on the testimony her expert might have given if he had been informed of all the details of the case. This, we may not do. Because Rhoads failed to offer any summary judgment evidence that Brown fell below the prevailing standard of care, the

trial court correctly found that Brown was entitled to judgment as a matter of law.

C. Summary Judgment in Favor of Dr. Lefkowitz

{¶30} Rhoads does not challenge the trial court's finding that Lefkowitz met his initial burden to demonstrate entitlement to a summary judgment. However, she contends that she put forth sufficient summary judgment evidence to create a genuine issue of material fact as to whether Lefkowitz is vicariously liable for Brown's conduct under the doctrine of respondeat superior. But again, the doctrine of respondeat superior provides that "a principal or employer may generally be held liable for tortious acts committed by its agents or employees if such acts occur within the scope of the employment relationship." *Pierson*, supra, at ¶44, citing *Clark*, supra, at 438. We have already determined that the trial court properly granted Brown's motion for summary judgment. And because Rhoads cannot maintain a negligence action against Brown, the doctrine of respondeat superior is inapplicable to Lefkowitz.

{¶31} Although her brief is unclear, Rhoads also seems to argue that Lefkowitz is vicariously liable for the negligence of the PASC nursing staff and that genuine issues of material fact exist regarding that claim. However, Rhoads never made such a claim at the trial level. Moreover, we have already determined that she needed expert testimony to support her allegation that these nurses "failed to recognize, evaluate or report [her] chest pain to the proper medical providers." Rhoads points to no such evidence. Therefore, we reject this argument.

{¶32} Rhoads also argues that genuine issues of material fact exist about whether Lefkowitz failed to timely diagnose and treat her chest pain. To establish a cause of action for medical malpractice, the plaintiff "must show the existence of a

standard of care within the medical community, breach of that standard of care by the defendant, and proximate cause between the medical negligence and the injury sustained." *Deer v. River Valley Health Systems*, Lawrence App. No. 00CA20, 2001-Ohio-2662, 2001 WL 243492, at *2, quoting *Taylor v. McCullough-Hyde Mem. Hosp.* (1996), 116 Ohio App.3d 595, 599, 688 N.E.2d 1078, in turn, citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131-132, 346 N.E.2d 673. Generally, medical-malpractice cases require expert testimony because the determination of whether a physician's treatment of a patient fell within the appropriate standard of care is beyond the jury's common knowledge and experience. See *Deer* at *2. However, expert testimony is unnecessary when "the lack of skill or care of the physician * * * is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it[.]" *Bruni* at 130.

{¶33} The crux of Rhoads' claim appears to be that 1.) Lefkowitz negligently trained or supervised the people who allegedly knew of Rhoads' chest pain before March 15, 2002 and did not report it to him; and 2.) Lefkowitz negligently failed to immediately read Rhoads' chest x-ray on that date.

{¶34} Rhoads complains that Lefkowitz negligently trained and supervised Brown and the PASC nurses. But again, "an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer." *Natl. Union Fire Ins. Co. of Pittsburgh, PA*, supra, at ¶23, quoting *Strock*, supra, at 217. And we have already concluded that Rhoads presented no evidence that Brown or the PASC nurses violated the prevailing standard of care. In

other words, Rhoads failed to submit evidence that they were individually liable for a tort or guilty of a claimed wrong against her.

{¶35} Rhoads also complains that Lefkowitz negligently trained or supervised his physician's assistant, Jim Castillo. A "physician assistant" is "a skilled person qualified by academic and clinical training to provide services to patients as a physician assistant under the supervision, control, and direction of one or more physicians who are responsible for the physician assistant's performance." R.C. 4730.01(A). Like a negligence action involving the professional skill and judgment of a nurse, we believe that a negligence action involving the professional skill and judgment of a physician's assistant generally requires expert testimony to establish the prevailing standard of care, a breach of that standard, and that the negligence, if any, was the proximate cause of the patient's injury.

{¶36} However, Rhoads argues that this issue falls within the common knowledge of the jury. Rhoads claims that when she told Castillo about her chest pain on March 13, 2002, he simply advised her to wait two days until her scheduled appointment and tell Lefkowitz about the pain then. But Rhoads testified that Castillo also told her to go to the emergency room if she felt that was necessary. And Lefkowitz testified that he and Castillo normally advise patients in this manner if the patients call in with concerns about a symptom they are experiencing. The appropriateness of Castillo's advice involves the exercise of judgment or skill of a physician's assistant and is not within the common knowledge of jurors. Thus contrary to Rhoads' argument, expert testimony was necessary to show that Castillo's conduct fell below the standard of care for a physician's assistant. Moreover, Rhoads needed expert testimony to

establish that Lefkowitz fell below the prevailing standard of care in the supervision or training of his physician's assistant. See *Wright v. Univ. Hosp. of Cleveland* (1989), 55 Ohio App.3d 227, 232, 563 N.E.2d 361. Rhoads' failure to obtain an expert opinion on these issues is fatal to her claim.

{¶37} Rhoads also appears to argue that the lack of skill and care Lefkowitz exhibited by waiting several hours to read her chest x-ray falls within the common knowledge of the jury. However, Lefkowitz's undisputed testimony was that the radiology group at Adena was responsible for reading the x-ray, not him. Moreover, we do not think Lefkowitz's alleged lack of skill or care in this situation is so apparent as to be within the common knowledge of a jury. It is not common knowledge that a patient who complains from chest pain under these circumstances is suffering from pneumothorax or requires such urgent medical attention that a physician acts negligently if several hours elapse before the patient's chest x-ray is read. And because Rhoads failed to provide any expert opinion on this matter, the trial court properly granted Lefkowitz's motion for summary judgment.

{¶38} Accordingly, we overrule Rhoads' second assignment of error.

V. Conclusion

{¶39} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: ___________________________
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.