[Cite as *Samadder v. Ohio State Univ. Wexner Med. Ctr.*, 2023-Ohio-4633.]

IN THE COURT OF CLAIMS OF OHIO

ANJANA SAMADDER, et al. Plaintiffs v. THE OHIO STATE UNIVERSITY WEXNER MEDICAL CENTER Defendant	Case No. 2021-00536JD Judge Lisa L. Sadler DECISION

{¶1} Pursuant to Civ.R. 56(C), Defendant moves for a summary judgment in its favor on grounds that it is entitled to qualified civil immunity under (2020) Am.Sub.H.B. No. 606.[1] Plaintiffs oppose Defendant's summary-judgment motion. The matter has been fully briefed. For reasons that follow, the Court grants Defendant's motion for summary judgment.

I. Background

{¶2} On September 23, 2021, Dr. Anjana Samadder and her husband, Dr. Gautam Samadder, filed a Complaint against Defendant in which the Samadders assert claims

[1] (2020) Am.Sub.H.B. No. 606 is an uncodified law enacted during a health emergency of the coronavirus disease 2019 (COVID-19). The Ohio Supreme Court has discussed uncodified law as follows:

> As defined by the Ohio Legislative Service Commission, uncodified law is "[l]aw of a special nature that has a limited duration or operation and is not assigned a permanent Ohio Revised Code section number." A Guidebook for Ohio Legislators (10th Ed.2007-2008) 145. "[U]ncodified law is part of the law of Ohio and is filed in the office of the Secretary of State. However, because it is not a law of a general and permanent nature, it does not appear in the statutes in codified form." Id. at 68. In this regard, uncodified law is also occasionally called a temporary law. Id. at 145.

Maynard v. Eaton Corp., 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶ 7.

of medical negligence and loss of consortium.[2] According to the Complaint, on April 7, 2020, Dr. Anjana Samadder "was admitted to [The Ohio State University Wexner Medical Center (OSUWMC)] as a COVID-19 patient." (Complaint, ¶ 6.) Defendant admits that Dr. Anjana Samadder was admitted as "COVID-19 patient." (Answer, ¶ 6.)

{¶3} The Samadders allege that, during Dr. Anjana Samadder's hospital stay, Defendant's employees placed Dr. Samadder on venovenous extracorporeal membrane oxygenation (ECMO), and that, on April 17, 2020, the cannulation was changed from the ECMO to an Avalon catheter. (Complaint, ¶ 7.) Defendant denies these allegations. (Answer, ¶ 7.)

{¶4} The Samadders further allege that, during the placement of the Avalon catheter, Dr. Anjana Samadder experienced a perforation to her right ventricle that required an emergent sternotomy and repair and that, following that procedure, Dr. Anjana Samadder experienced a loss of pulse and swelling in her left arm. (Complaint, ¶ 8.) Defendant denies these allegations. (Answer, ¶ 8.)

{¶5} The Samadders assert that Dr. Mounir Haurani, a vascular surgeon and employee of OSUWMC, was consulted and that Dr. Haurani eventually performed a bedside thrombectomy on Dr. Anjana Samadder's left arm late in the afternoon on April 18, 2020 (Complaint, ¶ 9). Defendant denies these allegations. (Answer, ¶ 9.) Defendant admits, however, that Dr. Haurani was an employee of Defendant at the time medical care and treatment was being provided to Dr. Anjana Samadder for her COVID-19 on or around April 7, 2020. (Answer, ¶ 4.)

{¶6} The Samadders maintain that, following the thrombectomy, Dr. Anjana Samadder developed compartment syndrome, which was not diagnosed until April 27, 2020, and thereafter she promptly had a fasciotomy, but by that time Dr. Anjana Samadder had suffered irreparable and permanent damage to her left arm that rendered it deformed and useless. (Complaint, ¶ 10.) Defendant denies these allegations. (Answer, ¶ 10.)

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[2] In Defendant's summary-judgment motion Defendant represents that Anjana Samadder is a gastroenterologist and that Anjana Samadder's husband, Gautam Samadder, is a pulmonologist. (Defendant's Motion For Summary Judgment, at 4.) Plaintiffs have not disputed these representations. The Court therefore shall use the title Dr., instead of Ms. or Mr., when it refers to Anjana Samadder and Gautam Samadder, respectively, in this Decision.

{¶7} The Samadders assert that, at all times relevant, the conduct of Defendant's employees, servants, or agents, including Dr. Haurani, "were within the scope of their express, implied, or apparent authority as agents/employees of OSUWMC, and OSUWMC is therefore liable for the actions of their employees and agents under the doctrine of respondeat superior and/or agency by estoppel." (Complaint, ¶ 17.) Defendant admits that its medical providers' actions were within the scope of their employment with Defendant, but Defendant denies the allegation that it and its employees are liable for injuries alleged by the Samadders. (Answer, ¶ 17.)

{¶8} The Samadders maintain that, as a direct and proximate result of Defendant's negligence, Dr. Gautam Samadder suffered the loss of services and consortium of his wife for which he should be compensated in an amount to be determined at trial. (Complaint, ¶ 19.) Defendant denies these allegations. (Answer, ¶ 19.)

{¶9} The Samadders further maintain that, pursuant to R.C. 2305.113(B)(1), they "sent a letter to [OSUWMC] on March 31, 2021 thereby extending the statute of limitations to bring [their claims] by 180 days." (Complaint, ¶ 11.) Defendant has answered that it "is without direct information and/or knowledge sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraph 11 of Plaintiffs' Complaint and, therefore, denies the same for want of knowledge." (Answer, ¶ 11.) The Samadders "demand judgment against the State of Ohio for economic and non-economic damages in excess of $1 million, attorneys' fees, costs, and any other legal and/or equitable relief that this Court deems just and proper."

{¶10} During litigation of this case, Defendant moved for a judgment on the pleadings in its favor on grounds that it was immune from liability based on (2020) Am.Sub.H.B. No. 606 and a certain federal law. The Court denied Defendant's motion. (Entry dated March 25, 2022.) In denying Defendant's motion, the Court stated:

> Notably, the Samadders have not alleged that OSUWMC's health care providers' provision of medical care to Anjana Samadder was outside the skills, education, and training of OSUWMC's health care providers. Neither have the Samadders alleged that OSUWMC's health care providers provided medical care with a reckless disregard for the consequences so as to affect Anajana [sic] Samadder's life or health, or with intentional, or

> willful, or wanton misconduct. Thus, construing the material allegations in the Complaint, with all reasonable inferences drawn in favor of the Samadders, no material factual issues exist whether OSUWMC's health care providers' provision of medical care to Anjana Samadder was outside the skills, education, and training of OSUWMC's health care providers. And, construing the material allegations in the Complaint, with all reasonable inferences drawn in favor of the Samadders, no material factual issues exist whether OSUWMC's health care providers provided medical care with a reckless disregard for the consequences so as to affect Anajana Samadder's life or health, or with intentional, or willful, or wanton misconduct.

(Decision, at 12.)

{¶11} On September 15, 2023, Defendant moved for a summary judgment in its favor, asserting that the qualified immunity provision of Section (B)(1) of (2020) Am.Sub.H.B. No. 606 applies to Defendant because

> (1) Defendant OSUWMC is a hospital, which is a health care provider pursuant to H.B. 606§ 1 (A)(20) and § I (A)(l5), (2) Ms. Samadder received both emergency professional care and inpatient health care services by medical providers at Defendant's facility, and (3) these services were provided 'as a result of or in response to' the COVID-19 pandemic because Defendant's decisions regarding staffing levels, assignments, assists, triage, seeing patients, and treatment modalities used while treating Ms. Samadder were based upon, and a direct result of, the pandemic. As the health services provided to Ms. Samadder were based upon, and as a direct result, of the pandemic, Defendant is entitled to Immunity and Summary Judgment is warranted.

(Motion For Summary Judgment, 10.) Defendant also asserts that Plaintiffs will be unable to present any evidence to support a finding of intentional misconduct or conscious disregard as an exception to immunity.

{¶12} In response, Plaintiffs contend that, based on the presented evidence, Defendant's failure to meet the standard of care is unrelated to the COVID-19 pandemic

and the lack of a timely fasciotomy was "reckless."[3] In support, Plaintiffs have appended an affidavit of Maseed A. Bade, M.D. In the alternative, Plaintiffs contend that the evidence presented by Plaintiffs demonstrates that the material facts regarding the immunity defense are disputed. And that, in either case, Defendant's summary-judgment motion should be denied.

{¶13} In reply, Defendant generally maintains that health care services that Defendant provided to Dr. Anjana Samadder "were unquestionably in response to, and as a result of, Covid-19." Defendant also maintains that Dr. Bade's affidavit "is improper and a red herring" and Dr. Bade's "opinion that the Defendant's breach in the standard of care was 'reckless' is simply a veiled attempt to use the adjective 'reckless' in lieu of the "**conscious** disregard for the safety of others" legal definition in hopes that this Court will simply find issues of fact." (Emphasis sic.)

II. Law and Analysis

1. Legal Standards

{¶14} A summary judgment terminates litigation to avoid a formal trial in a case where there is nothing to try. *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982). The Ohio Supreme Court has instructed: "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993), citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 604 N.E.2d 138 (1992). A summary judgment, however, "is appropriate where a plaintiff fails to produce evidence supporting the essentials of its claim." *Welco Industries, Inc.* at 346, citing *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus.

{¶15} Civ.R. 56(C) "provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be

[3] As noted in the Court's Decision denying Defendant's motion for judgment on the pleadings, the Complaint does not contain an allegation of recklessness by Plaintiffs. Accordingly, on motion for summary judgment, the Court is presented with a circumstance in which Plaintiffs have not alleged a claim of recklessness against Defendant, but assert recklessness as a defense to Defendant's contention that it is entitled to qualified civil immunity under (2020) Am.Sub.H.B. No. 606.

litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Grady v. State Emp. Rels. Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997).

{¶16} Under Civ.R. 56 a party who moves for summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A party who moves for summary judgment "must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment." *Dresher* at 292-293. *See* Civ.R. 56(C).[4] If a moving party "fails to satisfy its initial burden, the motion for summary judgment must be denied." *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997). *See Omega Riggers & Erectors, Inc. v. Koverman*, 2016-Ohio-2961, 65 N.E.3d 210, ¶ 69 (2d Dist.) ("unless the movant satisfies its initial burden on a motion for summary judgment, the non-movant has no burden of proof"). But if a party who moves for summary judgment has satisfied its initial burden, then a nonmoving party "has a reciprocal burden outlined in the last sentence of Civ.R. 56(E)." *Dresher* at 293. *See* Civ.R. 56(E) ("[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse 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. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party").

[4] Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule." Any evidence that is not specifically listed in Civ.R. 56(C) "is only proper if it is incorporated into an appropriate affidavit under Civ.R. 56(E)." *Pollard v. Elber*, 2018-Ohio-4538, 123 N.E.3d 359, ¶ 22 (6th Dist.) However, courts "may consider other evidence if there is no objection on this basis." *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 17; *Pollard* at ¶ 22.

{¶17} To prevail on Plaintiffs' civil claims of medical negligence and loss of consortium, Plaintiffs are required to establish these claims by a preponderance of the evidence. *See Merrick v. Ditzler*, 91 Ohio St. 256, 260, 110 N.E. 493 (1915) ("[i]n the ordinary civil case the degree of proof, or the quality of persuasion as some text-writers characterize it, is a mere preponderance of the evidence"); *Weishaar v. Strimbu*, 76 Ohio App.3d 276, 282, 601 N.E.2d 587 (8th Dist.1991). A preponderance of the evidence "is defined as that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 54.

{¶18} "To establish the negligence of a hospital employee, an injured party must demonstrate that a duty of care was owed to the injured party by the employee, that the employee breached that duty, and that the injuries concerned were the proximate result of the breach." *Berdyck v. Shinde*, 66 Ohio St.3d 573, 577. A claim for loss of consortium "is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93, 585 N.E.2d 384 (1992).

{¶19} "[B]ecause only individuals practice medicine, only individuals can commit medical malpractice." *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 14. Under the doctrine of respondeat superior, however, a hospital "is liable for the negligent acts of its employees." *Berdyck* at 577, citing *Klema v. St. Elizabeth's Hosp. of Youngstown*, 170 Ohio St. 519, 166 N.E.2d 765 (1960).

2. Immunity is an exemption from liability. Defendant has the burden of proof to establish immunity under (2020) Am.Sub.H.B. No. 606.

{¶20} Immunity constitutes an exemption from liability. *See Sickles v. Jackson Cty. Hwy. Dept.*, 196 Ohio App.3d 703, 2011-Ohio-6102, 965 N.E.2d 330, ¶ 15 (4th Dist.) ("[i]mmunity is an exception from liability, i.e. a defense, that a party with capacity to be sued can raise. See Black's Law Dictionary, Seventh Edition (1999) at 199, 752"). *Accord Ashcroft v. Iqbal*, 556 U.S. 662, 672, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (qualified immunity is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation).

{¶21} Here, Defendant has the burden of proof to establish immunity under (2020) Am.Sub.H.B. No. 606. *See Green v. City of Columbus*, 10th Dist. Franklin No. 15AP-602, 2016-Ohio-826, ¶ 18 (burden of proof is on a political subdivision to establish general immunity). If Defendant establishes immunity, then the burden shifts to Plaintiffs to demonstrate that an exception to immunity applies. *See Green* at ¶ 19.

{¶22} Whether (2020) Am.Sub.H.B. No. 606 applies as a defense to liability in this case is a question of law that is properly raised in a motion for summary judgment. *See Pelletier v. City of Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 12, citing *Conley v. Shearer*, 64 Ohio St. 3d 284, 292, 595 N.E.2d 862 (1992) ("[w]hether a party is entitled to immunity is a question of law properly determined by the court prior to trial pursuant to a motion for summary judgment"); *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St. 3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 17 (noting that immunity determinations are important to the parties' interests, and to judicial economy). The Ohio Supreme Court has held: "The fact that a question of law involves a consideration of the facts or the evidence, does not turn it into a question of fact or raise a factual issue; nor does that consideration involve the court in weighing the evidence or passing upon its credibility." *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph two of the syllabus. To determine whether (2020) Am.Sub.H.B. No 606 affords immunity to Defendant therefore requires the Court to interpret the law while considering the presented evidence without weighing the evidence or passing upon its credibility.

{¶23} The Ohio Supreme Court has stated, "The polestar of construction and interpretation of statutory language is legislative intention." *State ex rel. Francis v. Sours*, 143 Ohio St. 120, 124, 53 N.E.2d 1021 (1944). The Ohio Supreme Court has held: "Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General

Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact." *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 66, 56 N.E.2d 265 (1944), paragraph seven of the syllabus, approving and following *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902). The Ohio Supreme Court has further held,

> The court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act, and in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

Wachendorf v. Shaver, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus. "When a statute includes definitions, those definitions must be given effect; '[d]efinitions provided by the General Assembly are to be given great deference in deciding the scope of particular terms.'" *Baker v. Wayne Cty.*, 147 Ohio St.3d 51, 2016-Ohio-1566, 60 N.E.3d 1214, ¶ 12, quoting *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 175, 503 N.E.2d 167 (1986).

3. Defendant has sustained its burden of proof to establish immunity under (2020) Am.Sub.H.B. No. 606. Plaintiffs have failed to demonstrate that an exception to immunity applies under (2020) Am.Sub.H.B. No. 606.

{¶24} The General Assembly enacted (2020) Am.Sub.H.B. No. 606 to "[m]ake temporary changes related to qualified civil immunity for health care and emergency services provided during a government-declared disaster or emergency and for exposure to or transmission or contraction of certain coronaviruses." Title, (2020) Am.Sub.H.B. No. 606.

{¶25} Section (A)(1) of (2020) Am.Sub.H.B. No 606 contains definitions. As used in (2020) Am.Sub.H.B. No. 606, a "health care provider" means

> a health care professional, health care worker, direct support professional, behavioral health provider, or emergency medical technician or a home health agency, hospice care program, home and community-based services provider, or facility, including any agent, board member, committee member, employee, employer, officer, or volunteer of the agency, program, provider, or facility acting in the course of the agent's, board member's, committee member's, employee's, employer's, officer's, or volunteer's service or employment.

Section 1(A)(20) of (2020) Am.Sub.H.B. No. 606. As used in (2020) Am.Sub.H.B. No. 606, "health care services" means

> services rendered by a health care provider for the diagnosis, prevention, treatment, cure, or relief of a health condition, illness, injury, or disease, including the provision of any medication, medical equipment, or other medical product. "Health care services" includes personal care services and experimental treatments.

Section 1(A)(21) of (2020) Am.Sub.H.B. No. 606.

{¶26} Plaintiffs acknowledge that Defendant satisfies requirements of Section 1(A)(20) to be considered a "health care provider," and that Defendant was providing "health care services" under Section 1(A)(21). (Memorandum in Opposition, 3.) Additionally, Defendant also has admitted that it is "is engaged in the business of providing medical care and treatment for consideration to those individuals in need." (Answer, ¶ 3.) For purposes of determining Defendant's summary-judgment motion, it is therefore undisputed, and the Court finds, that Defendant was a "health care provider," and Defendant provided "health care services" in satisfaction of Section 1(A)(20) and (21) of (2020) Am.Sub.H.B. No. 606, respectively, during Defendant's providers' care of Dr. Anjana Sammader that is at issue in this case.

{¶27} Plaintiffs contend, however, that Defendant fails to satisfy all the requirements for qualified civil immunity under (2020) Am.Sub.H.B. No. 606 because "[t]he evidence will show that while Dr. Anjana Samadder was admitted to OSUWMC during the pandemic for treatment of COVID-19, the negligence that caused her injuries did not occur as a result of that specific treatment. At best, there is an issue of fact

regarding how the healthcare providers' failure to meet the standard of care in this case was impacted by COVID-19, if at all." (Response, 3.)

{¶28} Section (B)(1) of (2020) Am.Sub.H.B. No. 606 grants qualified civil immunity under certain circumstances; it provides:

> Subject to division (C)(3) of this section, a health care provider that provides health care services, * * * including the provision of any medication or other medical equipment or product, as a result of or in response to a disaster or emergency is not subject to professional disciplinary action and is not liable in damages to any person or government agency in a tort action for injury, death, or loss to person or property that allegedly arises from any of the following:
>
> (a) An act or omission of the health care provider in the health care provider's provision, withholding, or withdrawal of those services;
>
> (b) Any decision related to the provision, withholding, or withdrawal of those services;
>
> (c) Compliance with an executive order or director's order issued during and in response to the disaster or emergency.

See Section (C)(3).[5] Section B(2) states: "Division (B)(1) of this section does not apply in a tort action if the health care provider's action, omission, decision, or compliance

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[5] Section (C)(3) states: "This section does not grant an immunity from tort or other civil liability or a professional disciplinary action to a health care provider for actions that are outside the skills, education, and training of the health care provider, unless the health care provider undertakes the action in good faith and in response to a lack of resources caused by a disaster or emergency."

Section 2(A) of H.B. 606 provides:

> No civil action for damages for injury, death, or loss to person or property shall be brought against any person if the cause of action on which the civil action is based, in whole or in part, is that the injury, death, or loss to person or property is caused by the exposure to, or the transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, unless it is established that the exposure to, or the transmission or contraction of, any of those viruses or mutations was by reckless conduct or intentional misconduct or willful or wanton misconduct on the part of the person against whom the action is brought.

See Section D(5) of H.B. 606 ("SARS-CoV-2' means the novel coronavirus that causes coronavirus disease 2019 (COVID-19)").

constitutes a reckless disregard for the consequences so as to affect the life or health of the patient or intentional misconduct or willful or wanton misconduct on the part of the person against whom the action is brought."

{¶29} The presented evidence shows that (1) Dr. Anjana Samadder was a hospitalized patient at The Ohio State University Wexner Medical Center in April 2020 when Am.Sub. H.B. No. 606 was in effect (Deposition of Markus Creachbaum, P.A., at 11), (2) Dr. Anjana Samadder was one of OSUWMC's first "COVID" patients who were severely and critically ill and for whom medical professionals at OSUWMC provided care, (Deposition of Mounir Haurani, M.D., at 11), and (3), at that time, medical providers at OSUWMC were seeing thrombosis and clotting from COVID-19 and were seeing many patients presenting with acute ischemia to extremities, which was more than would have been expected for normal vascular call and normal vascular patients in younger people without the same comorbidities. (Haurani Deposition, 11-12.) Plaintiffs do not challenge that Defendant's medical professionals were dealing with complications arising from COVID-19 in their treatment of patients afflicted with coronavirus disease 2019.

{¶30} Plaintiffs maintain, however, that according to their evidence, "[i]f Dr. Samadder presented with the same symptoms of a blood clot in an upper extremity artery in the absence of the COVID-19 outbreak, or her diagnosis with COVID-19, the standard of care requiring a fasciotomy at the time of brachial thrombectomy would have been the same. As it relates to the performance of the required fasciotomy, the standard of care was not affected by the COVID-19 pandemic. There was nothing about Dr. Samadder's diagnosis of COVID-19, or the outbreak itself, that prevented the exercise of the standard of care of performing a timely fasciotomy which would have prevented her injuries." (Affidavit of Maseed A. Bade, M.D, ¶ 13-14.)

{¶31} Whether genuine issues of material fact exist about the applicable standard of care and breach of the applicable standard of care are issues that are not squarely

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Section 4 of H.B. 606 provides: "This act applies to acts, omissions, conduct, decisions, or compliance from the date of the Governor's Executive Order 2020-01D, issued on March 9, 2020, declaring a state of emergency due to COVID-19 through September 30, 2021." In Executive Order 2021-08D, effective June 18, 2021, the Ohio Governor rescinded Executive Order 2020-01D and declared that the state of emergency, as declared for the entire state of Ohio, was ended. https://coronavirus.ohio.gov/static/publicorders/executive-order-2021-08d.pdf (accessed September 25, 2023).

raised by Defendant's summary-judgment motion. Rather, the issue raised by Defendant's summary-judgment motion concerns whether, as a matter of law, Defendant is entitled to qualified civil immunity under (2020) Am.Sub.H.B. No. 606 as to Plaintiffs' claims asserted in the Complaint, because Defendant satisfies requirements for qualified civil immunity under (2020) Am.Sub.H.B. No. 606.

{¶32} Defendant's entitlement to qualified civil immunity under (2020) Am.Sub.H.B.No. 606 depends, in part, on whether Defendant's provision of health care services was "a result of or in response to a disaster or emergency" and whether Plaintiffs' tort action arises from "(a) [a]n act or omission of the health care provider in the health care provider's provision, withholding, or withdrawal of those services; (b) [a]ny decision related to the provision, withholding, or withdrawal of those services; [or] (c) [c]ompliance with an executive order or director's order issued during and in response to the disaster or emergency." (2020) Am.Sub.H.B. No. 606, Section B(1)(a)-(c). Defendant's entitlement to qualified civil immunity under (2020) Am.Sub. H.B. No. 606 also depends, in part, on whether Defendant's providers' actions, omissions, decisions, or compliance constituted a reckless disregard for the consequences of Defendant's conduct, thereby affecting the health of Dr. Anjana Samadder, or whether Defendant's providers' actions constituted intentional misconduct or willful or wanton misconduct.

{¶33} Defendant has admitted that Dr. Anjana Samadder was admitted to OSUWMC "as a COVID-19 patient." (Complaint, ¶ 6.) It may be reasonably inferred from this admission that Dr. Anjana Samadder presented to OSUWMC with signs and symptoms consistent with coronavirus disease 2019 (COVID-19), a disease for which the Ohio governor declared a state of emergency in Executive Order 2020-01D.[6] When Dr. Anjana Samadder presented to OSUWMC in April 2020, the health care services provided by Defendant to Dr. Anjana Samadder therefore was a result of or in response

[6] In Executive Order 2020-01(D), the Ohio governor ordered and directed "that: 1. A state of emergency is declared for the entire State to protect the well-being of the citizens of the Ohio from the dangerous effects of COVID-19, to justify the authorization of personnel of State departments and agencies as are necessary, to coordinate the State response to COVID-19, and to assist in protecting the lives, safety, and health of the citizens of Ohio." chrome-extension: //efaidnbmnnnibpcajpcglclefindmkaj/https://governor.ohio.gov/wps/wcm/connect/gov/79a57015-902d-4e70-a2f1-c489556bb917/Executive+Order+2020-01D.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-79a57015-902d-4e70-a2f1-c489556bb917-n3GDA-k (accessed November 2, 2023).

to the Ohio governor's declaration of a state of emergency due to COVID-19, which, in turn, falls within the qualified immunity provision of Section(B)(1) of (2020) Am.Sub.H.B. No. 606.

{¶34} Plaintiffs contend, however, that an exception to immunity exists since Defendant's alleged failure to timely perform a fasciotomy constitutes a reckless disregard of Dr. Anjana Samadder's health. Plaintiffs have supported their contention of recklessness with sworn evidence. In an affidavit, Maseed A. Bade, M.D. avers: "The delay of performing the fasciotomy was reckless disregard for the safety of Dr. Samadder causing injury." (Bade Affidavit, ¶ 8.) Dr. Bade further avers that, in his opinion, "it was reckless not to perform a fasciotomy at the time of the brachial thrombectomy, as not doing so exposed her to consequences of a reperfusion injury and compartment syndrome." (Bade Affidavit, ¶ 11.)[7]

{¶35} However, as the Court previously noted in its Decision on Defendant's motion for judgment on the pleadings,

> the Samadders have not alleged that [Defendant's] health care providers' provision of medical care to Anjana Samadder was outside the skills, education, and training of [Defendant's] health care providers. Neither have the Samadders alleged that [Defendant's] health care providers provided

[7] In common usage, reckless is defined as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash." *Black's Law Dictionary* 1524 (11th Ed.2019). The Ohio Supreme Court has cited with approval Comment g to 2 Restatement of the Law 2d, Torts (1965) 590, Section 500, which contrasts negligence and recklessness as follows:

> *"g. Negligence and recklessness contrasted*. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."

Marchetti v. Kalish, 53 Ohio St.3d 95, 100, 559 N.E.2d 699 (1990), fn. 3.

> medical care with a reckless disregard for the consequences so as to affect Anajana [sic] Samadder's life or health, or with intentional, or willful, or wanton misconduct. Thus, construing the material allegations in the Complaint, with all reasonable inferences drawn in favor of the Samadders, no material factual issues exist whether [Defendant's] health care providers' provision of medical care to Anjana Samadder was outside the skills, education, and training of [Defendant's] health care providers. And, construing the material allegations in the Complaint, with all reasonable inferences drawn in favor of the Samadders, no material factual issues exist whether [Defendant's] health care providers provided medical care with a reckless disregard for the consequences so as to affect Anajana Samadder's life or health, or with intentional, or willful, or wanton misconduct.

(Decision, 12.)

{¶36} In *Munday v. Village of Lincoln Hts.*, 1st Dist. Hamilton No. C-120431, 2013-Ohio-3095, ¶ 46, a case concerning immunity under the Political Subdivision Tort Liability Act, the First District Court of Appeals held that a complaint "must contain allegations suggesting malice, bad faith, or wanton or reckless conduct for a plaintiff to raise these issues in opposing the employee's motion for summary judgment based on the immunity found in R.C. 2744.03(A)(6)." In *Munday*, the First District Court of Appeals further stated: "Accordingly, because Munday's complaint alleged only negligence, and no other exception to the immunity of a political subdivision employee applies, Begley established his immunity from liability for Munday's claim." *Munday* at ¶ 46. *Accord Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 26 ("[b]ecause a school district can act only through its employees, R.C. 2744.03(A)(5) affords a defense to liability. In this instance, Elston's injury resulted from the judgment or discretion of the coach in determining how to use equipment or facilities. No claim is presented suggesting reckless conduct. Thus, the school district successfully asserted this defense in this instance").

{¶37} Following *Munday*'s reasoning, and absent allegations in Plaintiffs' Complaint that Defendant's health care providers provided medical care with a reckless

disregard for the consequences so as to affect Dr. Anjana Samadder's life or health, or with intentional, or willful, or wanton misconduct, Plaintiffs may not raise recklessness or intentional, willful, or wanton misconduct in opposing Defendant's motion for summary judgment based on the immunity found in (2020) Am.Sub.H.B. No. 606. Because Plaintiffs' Complaint alleges only negligence, and no other exception to immunity in (2020) Am.Sub.H.B. No. 606 applies based on the presented evidence, Defendant has established its immunity from liability for Plaintiffs' claims. *See Digiorgio v. City of Cleveland*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 51 (loss of consortium is a derivative claim that can only be maintained if the primary cause of action is proven. A derivative claim fails when a primary claim fails).

{¶38} Accordingly, the Court finds that Defendant has sustained its burden of proof to show an entitlement to qualified civil immunity under (2020) Am.Sub. H.B. No. 606 and that Plaintiffs have failed to demonstrate that an exception to immunity applies under (2020) Am.Sub.H.B. No. 606.

III. Conclusion

{¶39} The Court grants Defendant's motion for summary judgment filed on September 15, 2023, for reasons set forth above.

LISA L. SADLER
Judge

[Cite as *Samadder v. Ohio State Univ. Wexner Med. Ctr.*, 2023-Ohio-4633.]

ANJANA SAMADDER, et al. Plaintiffs v. THE OHIO STATE UNIVERSITY WEXNER MEDICAL CENTER Defendant	Case No. 2021-00536JD Judge Lisa L. Sadler JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶40} For reasons stated in the Decision filed concurrently herewith, the Court GRANTS Defendant's motion for summary judgment filed on September 15, 2023. All future court events are VACATED. Court costs are assessed to Plaintiffs equally. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

LISA L. SADLER
Judge

Filed November 29, 2023
Sent to S.C. Reporter 12/20/23