[Cite as *Orac v. Montefiore Found.*, 2024-Ohio-4904.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JANA ORAC, EXECUTOR OF THE ESTATE OF THOMAS H. ORAC, A.K.A. THOMAS ORAC, DECEASED, :

Plaintiff-Appellant, :

No. 113514

v. :

THE MONTEFIORE FOUNDATION, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
RELEASED AND JOURNALIZED: October 10, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-955692

Appearances:

Richard L. Demsey Co., L.P.A., and Richard L. Demsey; Flowers & Grube, Paul W. Flowers, and Kendra N. Davitt, *for appellant*.

Bonezzi Switzer Polito & Perry Co., L.P.A., Brian F. Lange, and Bret C. Perry, *for appellees* The Montefiore Foundation, The Montefiore Home, The Montefiore Housing Corporation, and Menorah Park Foundation.

Buckingham, Doolittle & Burroughs, LLC, George M. Moscarino, Katie M. Defino, and Susan R. Massey, *for appellee* Leslie C. Vidmar, APRN, CNP.

EILEEN T. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant, Jana Orac, Executor of the Estate of Thomas H. Orac, deceased ("appellant"), appeals from the trial court's judgment granting summary judgment in favor of defendants-appellees, The Montefiore Foundation, The Montefiore Home, The Montefiore Housing Corporation, Menorah Park Foundation (together "Montefiore"), and Leslie C. Vidmar, APRN, CNP ("Vidmar"). Appellant raises the following assignment of error for review:

> The common pleas court erred, as a matter of law by granting summary judgment in favor of defendant-appellees.

{¶ 2} After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand the matter to the trial court for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶ 3} On November 11, 2021, appellant commenced this wrongful death and survivorship action against defendants TridentCare Clinical Services, L.L.C. ("TridentCare"),[1] Montefiore, Vidmar, and Vidmar's unidentified employer, John Doe, L.L.C. and/or John Doe, Inc. The complaint set forth claims of medical negligence, alleging that the decedent, Thomas H. Orac ("the decedent"), suffered permanent injuries and subsequently died on June 27, 2020, as a direct and proximate cause of the defendants' negligent failure to provide "competent, safe and acceptable medical, nursing, and health care." The complaint further alleged that

[1] The claims against TridentCare were voluntary dismissed without prejudice on May 19, 2022.

the defendants' negligence caused the decedent to "suffer mental anguish and conscious physical pain and suffering prior to his death, for which compensation is sought." Finally, appellant alleged that Montefiore violated the decedent's rights under the Nursing Home Resident's Bill of Rights statute, R.C. 3721.10 et seq., including without limitation, "the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted." R.C. 3721.13(A)(3).

{¶ 4} The complaint incorporated an affidavit of merit completed by David W. Seignious, M.D. ("Dr. Seignious"). In relevant part, Dr. Seignious averred that he reviewed the available medical records and believed the defendants and "their agents and or employees, specifically including [Vidmar]," breached the applicable standards of care resulting in "pain and suffering, and the death of [the decedent]."

{¶ 5} In her answer to the complaint, Vidmar admitted that she was an advanced practice registered nurse and certified nurse practitioner, but denied that she was employed by Montefiore. Similarly, Montefiore explicitly denied that they employed Vidmar.

{¶ 6} Following extensive delays and extensions of the case schedule, appellant filed notice of its submission of Dr. Seignious's expert report on November 17, 2022. In the report, which was completed on October 19, 2022, Dr. Seignious explained that the decedent had been hospitalized for a stroke and was transferred to the Montefiore facility for what "was expected to be a short-term" rehabilitation

stay. The decedent was first diagnosed with pressure ulcers on May 28, 2020, more than one month after his admission to Montefiore. According to Dr. Seignious, the ulcers became infected requiring the decedent to be admitted to University Hospitals "where he was treated for sepsis, which progressed to multi-organ failure and ultimately death on [June 27, 2020]." Based on his review of the relevant medical records, Dr. Seignious opined that "the staff of Montefiore Nursing Home deviated from the standard of care in regard to pressure ulcer prevention and treatment with Mr. Orac." Dr. Seignious explained his opinion as follows:

> [The decedent] was at risk for pressure ulcer development and should have had aggressive pressure reduction interventions in place to prevent the development of these two ulcers. These interventions would have included aggressive turning and floating of feet along with some sort of pressure reduction boots. The Parfo boots that were implemented were not started until after the development of the ulcers. In addition these wounds became infected causing his sepsis. I would not expect this infection if appropriate wound care was being provided. It is also my opinion that even with his diagnosis of [peripheral vascular disease] these two ulcers were avoidable, the infection in one or both ulcers was a proximate cause of his death, and but for these ulcers and the infection present he would not have died when he did. The opinions expressed above are to a reasonable degree of medical probability.

{¶ 7} In January 2023, Montefiore and Vidmar each sought leave to file motions for summary judgment, which the trial court granted.

{¶ 8} In its motion for summary judgment, Montefiore argued it was entitled to judgment as a matter of law pursuant to the Ohio Supreme Court's decision in *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2022-Ohio-4154, because (1) Vidmar was not employed by Montefiore, and (2) plaintiff's complaint failed to name any individual tortfeasor acting as Montefiore's employee or agent.

Montefiore further asserted that plaintiff was prevented from amending its complaint to pursue claims against an individual employee or agent because the applicable statute of limitations period had expired.

{¶ 9} In turn, Vidmar argued she was entitled to judgment as a matter of law because plaintiff "failed to timely produce any qualifying expert opinion to a reasonable degree of medical certainty that [she] deviated from an applicable standard of care that caused injury to plaintiff's decedent." Vidmar noted that Dr. Seignious's expert report did not mention her at all, "let alone contain the requisite expert opinions about negligence and proximate cause to a reasonable degree of medical probability."

{¶ 10} After receiving an extension of time, appellant filed separate briefs in opposition to summary judgment in May 2023. With respect to Montefiore, appellant argued that *Clawson* is "inapplicable" to the instant case because the Ohio Supreme Court did not overrule basic agency principles of tort law and its conclusions should be limited to malpractice claims. In support of its position, appellant attached copies of recent decisions from Ohio common pleas courts that rejected analogous arguments pursued by Montefiore in this case. *See Estate of Stephen Tate v. LP Warren, L.L.C.*, Trumbull C.P. No. 2023-CV-00098 (May 5, 2023); *Ann Bugeda v. Maplewood at Chardon, L.L.C.,* Geauga C.P No. 21-P-000743 (May 10, 2023).

{¶ 11} Relatedly, appellant argued that Vidmar should not be granted summary judgment "based on a technicality in the originally filed expert report

regarding who Vidmar's employer was when she negligently treated decedent." To address the concerns raised in Vidmar's motion for summary judgment, appellant submitted the affidavit of Dr. Seignious, dated May 23, 2023, to clarify Vidmar's alleged role in the events leading to the decedent's death. The affidavit provides, in relevant part:

> 1. I understand that the defendant, Leslie Vidmar, has filed a motion for summary judgment based upon my allegedly having failed to criticize her in my report. The defendant is incorrect.
>
> . . .
>
> 4. In my report of October 19, 2022, when I referenced deviations from the accepted standards of care by the staff of Montefiore Nursing Home, I intended that statement to include defendant, Leslie Vidmar. I did not know at that time that defendant Vidmar was not an employee of Montefiore. I assumed that she was one of its employees.
>
> . . .
>
> 7. In my opinion, the standards of care were breached by the defendants, [the Montefiore defendants], and their agents and/or employees, specifically including defendant, Leslie Z. Vidmar, amongst others, and such breaches caused injury, including pain and suffering, and the death of plaintiff's decedent, Thomas Orac.

{¶ 12} On November 28, 2023, the trial court issued a decision granting summary judgment in favor of the defendants. In rendering its judgment, the trial court found, in relevant part:

> 1) Plaintiff cannot make a prima facie case against Defendant Vidmar; 2) Plaintiff did not present evidence of employment or agency between Defendant Vidmar and the Montefiore defendants; 3) absent an employment or agency relationship, no liability can be found against the Montefiore defendants.

{¶ 13} Appellant now appeals from the trial court's judgment.

A. Law and Analysis

{¶ 14} In the sole assignment of error, appellant argues the trial court committed reversible error by granting summary judgment in favor of the appellees. Appellant contends that the trial court "seriously misinterpreted" the law governing the doctrine of respondeat superior and, therefore, erred as a matter of law by preventing appellant from pursuing claims against Montefiore without joining the nurse-employees as party defendants. Finally, appellants argue that "triable issues of fact exist as to whether individual liability may be imposed against defendant Vidmar."

1. Standard of Review

{¶ 15} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, the party being entitled to have the evidence construed most strongly in his or her favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679 (1995), paragraph three of the syllabus; *Zivich v. Mentor Soccer Club,* 82 Ohio St.3d 367 (1998).

{¶ 16} The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). Once the moving party satisfies its burden, 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); *Mootispaw v. Eckstein,* 76 Ohio St.3d 383 (1996).

{¶ 17} We address the claims pursued against Montefiore and Vidmar separately for the ease of discussion.

B. Claims Against Montefiore Defendant

{¶ 18} As stated, appellants complaint against Montefiore set forth causes of action for medical negligence, wrongful death, survivorship, and violations of the Nursing Home Resident's Bill of Rights statute, R.C. 3721.10 et seq.

{¶ 19} To establish a claim for medical negligence and a claim for wrongful death based on a negligence theory, a plaintiff must show (1) the existence of a duty, (2) breach of that duty, and (3) the breach proximately caused injury or death, and (4) damages. *Cromer v. Children's Hosp. Med. Ctr.*, 2015-Ohio-229, ¶ 23 (setting forth the elements of a claim for medical negligence); *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities*, 2004-Ohio-2629, ¶ 14 (setting forth the elements of a claim for wrongful death based on a negligence theory).

{¶ 20} R.C. 3721.13, also referred to as the Ohio Nursing Home Patient Bill of Rights, sets forth an extensive list of enforceable rights afforded to residents of a home. A resident whose rights are violated "has a cause of action against any person or home committing the violation." R.C. 3721.17(G)(1). If the resident can show, by a preponderance of the evidence, that the violation of his or her rights resulted from

a negligent act or omission of the home and that violation was the proximate cause of the resident's injury, the resident may recover compensatory damages. R.C. 3721.17(G)(2)(a). In turn, "[i]f compensatory damages are awarded for a violation of the resident's rights, section 2315.21 of the Revised Code shall apply to an award of punitive or exemplary damages for the violation."

{¶ 21} In this case, the trial court found no merit to appellant's derivative claims against Montefiore and entered judgment in favor of Montefiore on all causes of action, stating:

> Plaintiff sued the Montefiore defendants on a theory of vicarious liability. Plaintiff cannot prevail against the Montefiore defendants without a finding of liability against an individual agent or employee. Such a finding cannot be made in this case because the court finds that plaintiff has not met its burden to succeed on its claim against defendant Vidmar, and no other alleged employee or agent is named in this case.
>
> In *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 170 Ohio St.3d 451, the Supreme Court of Ohio stated "'if there is no liability assigned to the agent, it logically follows that there can be no liability upon the principal for the agent's actions.'" *Id.* at ¶ 21., quoting *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 2009-Ohio-3601, ¶ 22. Plaintiff is unable to establish a prima facie case of medical negligence against the purported agent Defendant Vidmar. Unable to establish a case against the alleged agent, as a matter of law, Plaintiff cannot establish a prima facie case against the Montefiore defendants.

{¶ 22} "It is a fundamental maxim of law that a person cannot be held liable, other than derivatively, for another's negligence." *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 254-255 (1990), *overruled on other grounds by Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 444-445 (1994). In the employment-law context, "the most common form of derivative or vicarious liability is that imposed

by the law of agency, through the doctrine of respondeat superior." *Id.* at 255. Under this theory, an employer or principal is vicariously liable for the torts of its employees or agents if such acts occur within the scope of the employment relationship. *Ryan v. Ambrosio*, 2008-Ohio-6646, ¶ 29 (8th Dist.). This doctrine of liability depends on the existence of control by a principal (or master) over an agent (or servant), terms that have been used interchangeably. *Hanson v. Kynast*, 24 Ohio St.3d 171, 173 (1986).

{¶ 23} In *Losito v. Kruse*, 136 Ohio St. 183 (1940), the Ohio Supreme Court articulated the pleading rule of respondeat superior, stating:

> For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against *either the master or the servant, or against both* . . . .

(Emphasis added.) *Id.* at 187, citing M*aple v. Cincinnati, Hamilton & Dayton RR. Co.*, 40 Ohio St. 313 (1883); *see also State ex rel. Flagg v. Bedford*, 7 Ohio St.2d 45, 47-48 (1966) ("This court follows the rule that until the injured party receives full satisfaction, he may sue either the servant, who is primarily liable, or the master, who is secondarily liable[.]"); *Holland v. Bob Evans Farms, Inc.*, 2008-Ohio-1487, ¶ 10 (3d Dist.) ("Under the doctrine of respondeat superior, the employer is liable for the actions of the employee and can be sued independently of the employee by the injured party.").

{¶ 24} Likewise, it has been recognized that "[if] the injured third party seeks to recover from the employer, all he need do is prove that the employee was negligent and that the employee was acting within the scope of employment. *There*

is no requirement that the employee be named as a party to the suit in order to prove his negligent acts." (Emphasis added.) *Billings v. Falkenburg*, 1986 Ohio App. LEXIS 8183 (6th Dist. Sept. 5, 1986); *Krause v. Case W. Res. Univ.*, 1996 Ohio App. LEXIS 5784, 17 (8th Dist. Dec. 19, 1996).

{¶ 25} Regardless of who is sued, however, it is well settled that "a principal is vicariously liable only when an agent could be held directly liable." *Natl. Union Fire Ins. Co. v. Wuerth*, 2009-Ohio-3601, ¶ 22. For example, the Ohio Supreme Court recognized in *Losito* that "[a] settlement with and release of the servant will exonerate the master. Otherwise, the master would be deprived of his right of reimbursement from the servant, if the claim after settlement with the servant could be enforced against the master." *Id.* at 188, citing *Herron v. Youngstown*, 136 Ohio St. 190 (1940); *Bello v. Cleveland*, 106 Ohio St. 94 (1922); *Brown v. Louisburg*, 126 N.C. 701 (1900). The Ohio Supreme Court reiterated this position in *Comer v. Risko*, 2005-Ohio-4559, explaining that

> [t]he liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions.

Id. at ¶ 20, citing *Losito* and *Herron*.

{¶ 26} The foregoing principles were discussed by the Ohio Supreme Court in *Wuerth* in resolving the issue of whether "[u]nder Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant

principals and employees have either been dismissed from the lawsuit or were never sued in the first place?" *Wuerth*, 2009-Ohio-3601, at ¶ 1.

{¶ 27} In *Wuerth*, a client was represented by a partner, Richard Wuerth, and an associate until the partner fell ill at which time others in the law firm assisted. The client thereafter filed a legal malpractice suit in federal district court against Wuerth. The client also sued the law firm, alleging that it was directly liable for malpractice and that it was vicariously liable for the negligence of the defendant partner and for the wrongful acts of several individuals in the firm who were not named as defendants. *Id.* at ¶ 7. The United States District Court for the Southern District of Ohio dismissed all claims against Wuerth on summary judgment due to the plaintiff's failure to file the complaint within the statute of limitations. Because there were no longer any cognizable claims against Wuerth, the district court also dismissed the claims for vicarious liability against the law firm. On appeal before the United States Court of Appeals for the Sixth Circuit, the appeals court determined that Ohio law was unsettled on this issue and certified the question to the Ohio Supreme Court.

{¶ 28} In resolving the certified question, the *Wuerth* Court began its analysis by addressing the similarities between legal and medical malpractice claims, stating:

> [I]n the medical context, we have recognized that because only individuals practice medicine, only individuals can commit medical malpractice. For instance, in *Browning v. Burt*, 66 Ohio St.3d 544, 556 (1993), ". . . we explained that (a) hospital does not practice medicine and is incapable of committing malpractice."

Id. at ¶ 14. Applying this rationale to the facts before it, the *Wuerth* Court held that only individuals, not law firms, may practice law. Thus, a law firm cannot directly commit legal malpractice. *Id.* at ¶ 18. The Court further held "that a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." *Id.* at ¶ 26. In reaching this conclusion, the Court reiterated that "'the master's sole liability depends upon a finding of liability on the part of the servant, so he cannot be held accountable where there is no such finding.'" *Id.* at ¶ 22, quoting *Munson v. United States*, 380 F.2d 976, 979 (6th Cir. 1967).

{¶ 29} Following the release of *Wuerth*, several districts in Ohio began applying the principles announced therein to bar malpractice claims against medical or dental groups where the allegedly negligent doctor or dentist was either not included in the complaint or was not timely sued. *See Moore v. Mt. Carmel Health Sys.*, 2020-Ohio-6695, ¶ 32 (10th Dist.), citing *Hignite v. Glick, Layman & Assocs., Inc.*, 2011-Ohio-1698, ¶ 13 (8th Dist.) (dental malpractice claim against dental office barred because statute of limitations against dentist had expired); *Whitcomb v. Allcare Dental & Dentures*, 2012-Ohio-2195, ¶ 9-10 (8th Dist.) (same); *Rush v. Univ. of Cincinnati Physicians, Inc.*, 2016-Ohio-947, ¶ 23 (1st Dist.) (allegedly negligent doctor was not named in suit); *Wilson v. Durrani*, 2014-Ohio-1023, ¶ 15 (1st Dist.) (release of another party included claims against doctor; therefore, doctor's practice could not be vicariously liable); *Henry v. Mandell-Brown*, 2010-Ohio-3832, ¶ 14 (1st Dist.) (claims against doctor were not filed within the

limitations period); *Smith v. Wyandot Mem. Hosp.*, 2015-Ohio-1080, ¶ 17, fn. 4 (3d Dist.) (same); *Brittingham v. Gen. Motors Corp.*, 2011-Ohio-6488, ¶ 50-51 (2d Dist.) (malpractice claim against General Motors, which hired company doctor, was not allowed where doctor was not timely sued).

{¶ 30} In contrast, a number of districts, including this court, were reluctant to extend *Wuerth* to bar medical claims pursued against hospitals for the alleged negligence of their employees where, as here, the vicarious liability claim was pursued against the hospital within the applicable statute of limitations period. *Moore* at ¶ 33, citing *Stanley v. Community Hosp.*, 2011-Ohio-1290, ¶ 22 (2d Dist.)*; Cope v. Miami Valley Hosp.*, 2011-Ohio-4869, ¶ 21 (2d Dist.); *Taylor v. Belmont Community Hosp.,* 2010-Ohio-3986, ¶ 30-34 (7th Dist.); *Henik v. Robinson Mem. Hosp.*, 2012-Ohio-1169, ¶ 19 (9th Dist.); *Cobbin v. Cleveland Clinic Found.*, 2019-Ohio-3659 (8th Dist.).

{¶ 31} For example, in *Cobbin*, this court recognized "that hospitals can be vicariously liable for the negligence of its nurses even if the nurses are not named in a plaintiff's complaint," so long as there is proof that the nurses breached the applicable standard of care and proximately caused the plaintiff's injuries. *Id.* at ¶ 30; *see also Mickhail v. Garden II Leasing Co., L.L.C.*, C.P. No. CI-21-2737, 2023 Ohio Misc. LEXIS 1721 (Mar. 14, 2023). In making this statement, this court relied extensively on the discussion by the Second District Court of Appeals in *Stanely*.

{¶ 32} In *Stanley*, the plaintiff sued a hospital based on the alleged negligence of its employee, a nurse, in inserting an IV. However, the plaintiff did

not sue any individual employees. The trial court rendered summary judgment to the hospital based on *Wuerth* and the plaintiff then appealed. On appeal, the Second District held that the trial court's interpretation of *Wuerth* was "too expansive" and that *Wuerth* should only be applied to medical and legal malpractice cases, not to "medical claims." *Id.* at ¶ 20-22. The court's holding was based on several factors, including (1) the inherent distinction between a medical malpractice claim under R.C. 2305.11(A) and a "medical claim" under R.C. 2305.113(A), (2) a nurse's inability to commit medical malpractice, and (3) the lineage of binding precedent establishing that respondeat superior against the hospitals do not require suit to also be brought against the employee. *Id.* at ¶ 20-22. As a result, the court reversed the trial court's judgment in favor of the hospital. *Id.* at ¶ 25.

{¶ 33} The Second District later expanded upon its interpretation of *Wuerth*, stating:

> As noted in *Stanley*, nowhere in *Wuerth* does the court conclude that a medical claim brought against a hospital for the alleged negligence of one of its employees constitutes a malpractice claim. *Id.* at ¶ 22. Ultimately, this court's decision to give *Wuerth* a narrow application is supported by the public-policy considerations found at the heart of the "respondeat superior" doctrine, which supports vicarious liability. A hospital employs a wide range of people who provide a variety of medical service to patients. The hospital is in exclusive control of hiring criteria, training, and routine performance evaluation and review. A hospital should be responsible for the negligence of its employees who perform medical services and act in the scope of their employment. To allow a hospital to be shielded from the rule of "respondeat superior" liability due to a court's liberal application of the distinction carved out by *Wuerth* would effectively allow the distinction to swallow the rule.

Cope, 2011-Ohio-4869, at ¶ 25, 37 (holding "*Wuerth* does not preclude a suit against [a hospital] for the negligence of its employee technicians despite the fact the technician or technicians were not named as defendants in the [plaintiff's] complaint."). *See also Weiler v. Knox Community. Hosp.*, 2021-Ohio-2098, ¶ 29 (5th Dist.).

{¶ 34} In 2022, the Supreme Court of Ohio provided additional analysis on this topic when it considered "whether a plaintiff may prevail on a claim of chiropractic malpractice against a chiropractor's employer under the doctrine of respondeat superior when the expiration of the applicable statute of limitations has extinguished the chiropractor's direct liability for the alleged malpractice." *Clawson,* 2022-Ohio-4154, ¶ 1.

{¶ 35} In *Clawson,* the plaintiff-patient sued chiropractor Don Bisesi, D.C., and his employer, Heights Chiropractic Physicians, L.L.C., for medical malpractice. After dismissing her initial claims, plaintiff refiled her lawsuit against the defendants within the time allowed by Ohio's saving statute. During the litigation, Dr. Bisesi was dismissed from the action based on plaintiff's failure to perfect service on him within a year of the refiling of the complaint. Thus, the only claim remaining was against Heights Chiropractic, which was based solely on its status as Dr. Bisesi's employer.

{¶ 36} Following the trial court's dismissal of plaintiff's claims against Dr. Bisesi, the trial court granted summary judgment in favor of Heights Chiropractic, finding that Heights Chiropractic's vicarious liability was contingent on Dr. Bisesi's

direct liability and that "because the primary claims against Dr. Bisesi were extinguished, so too [was] the secondary claim against" Heights Chiropractic.

{¶ 37} Clawson appealed the trial court's judgment to the Second District Court of Appeals, challenging both the trial court's dismissal of her claim against Dr. Bisesi and its entry of summary judgment in favor of Heights Chiropractic. *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2020-Ohio-5351, ¶ 1 (2d Dist.). The Second District affirmed the trial court's dismissal of Clawson's claim against Dr. Bisesi, but it reversed the trial court's summary judgment in favor of Heights Chiropractic. The court of appeals held that Clawson could pursue her claim against Heights Chiropractic for the negligence of Dr. Bisesi even though the trial court had properly dismissed her direct claim against him. *Id.* at ¶ 23.

{¶ 38} Relying extensively on its prior discussion in *Wuerth*, the Ohio Supreme Court reversed the appellate court's judgment, finding the plaintiff was precluded from bringing a vicarious liability claim against the employer because the plaintiff failed to pursue a claim against the physician within the applicable statute of limitations period. The *Clawson* Court explained its holding as follows:

> In light of this court's reliance in *Wuerth* on basic principles of agency law and the widely acknowledged similarities between legal malpractice and medical malpractice, we agree . . . that *Wuerth* precludes a vicarious-liability claim for medical malpractice against a physician's employer when a direct claim against the physician is time-barred.
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> . . .
>
> In *Wuerth*, we applied basic principles of agency law and held, "A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." 122

> Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, at paragraph two of the syllabus. Not only did we emphasize the similarities between the legal and medical professions with respect to liability for malpractice, but we also stated, "There is no basis for differentiating between a law firm and any other principal to whom Ohio law would apply." *Id.* at ¶ 24. Today, we hold that the rule stated in *Wuerth* applies equally to claims of vicarious liability for medical malpractice.
>
> Because Clawson had failed to timely serve Dr. Bisesi with her refiled complaint, and because the statute of limitations on her claim against Dr. Bisesi had expired, Clawson's right of action against Dr. Bisesi was extinguished by operation of law. As a result, Heights Chiropractic, as Dr. Bisesi's employer, may not be held vicariously liable for Dr. Bisesi's alleged malpractice.

Id. at ¶ 29, 32-33.

{¶ 39} On appeal, Montefiore asserts that *Clawson* "took special care to explain that its holding extends beyond just professional malpractice claims" and should apply "as a general rule to all principal/agent relationships." Thus, Montefiore contends that, applying *Wuerth* and *Clawson*, appellant cannot prevail on the vicarious liability claims against "the employing institutions" because no individual employee or agent of Montefiore is named in the complaint. In contrast, appellant argues the trial court's reliance on *Wuerth* and *Clawson* is misplaced, because those cases are only applicable to professional negligence cases brought against lawyers or physicians, i.e., legal-malpractice and medical-malpractice claims.

{¶ 40} After careful consideration, we decline to interpret *Clawson* as broadly as Montefiore suggests. We recognize that *Clawson* briefly discussed *Hts. Chiropractic's* interpretation of *Wuerth*, and rejected the suggestion that *Wuerth* created a professional-practice exception to the doctrine of respondeat superior.

Clawson at ¶ 23. However, the singular holding of *Clawson* was limited and merely clarified that the *Wuerth* rule "applies equally to claims of vicarious liability for medical malpractice" based on the "the similarities between the legal and medical professions with respect to liability for malpractice." *Id.* at ¶ 32-33. The *Clawson* Court was not required to address the distinctions between a malpractice claim under R.C. 2305.11 and a medical claim brought against a hospital for the alleged negligence of one of its nurse employees. As such, *Clawson* did not expressly, or indirectly undermine the holdings of post-*Wuerth* decisions, which expressly found that *Wuerth* is inapplicable as to claims against hospitals and their nonphysician employees. *Stanley*, 2011-Ohio-1290, at ¶ 22-23 (2d Dist.); *Henik*, 2012-Ohio-1169, at ¶ 18 (9th Dist.) ("[A] suit against a hospital under a theory of respondeat superior may proceed where an alleged negligent employee was not named as a defendant."); *Cobbin*, 2019-Ohio-3659, at ¶ 30 (8th Dist.) ("[I]t is true that hospitals can be vicariously liable for the negligence of its nurses even if the nurses are not named in a plaintiff's complaint[.]").

{¶ 41} Lastly, and perhaps most importantly, reading *Clawson* as broadly as Montefiore would represent "a dramatic shift in Ohio law" that would forever deprive plaintiffs of the right to pursue an action against either the master or the servant, or against both in all instances. *See Mellon v. O'Brien*, 2023-Ohio-2393, ¶ 38 (S. Gallagher, J., concurring.) (8th Dist.). Montefiore's position that employees must be individually sued before respondeat superior liability will apply cannot be reconciled with the *Losito* precedent. And yet, *Clawson* is not a wholesale rejection

of *Losito* or the doctrine of respondeat superior. To the contrary, *Clawson* approvingly quotes *Losito* for the proposition that, in vicarious liability cases, "the plaintiff has a right of action against either the master or the servant, or against both . . . ." *Clawson*, 2022-Ohio-4154 at ¶13. Accordingly, we decline to adopt a position, for the first time, that would overturn existing precedent and fundamentally alter the doctrine of respondeat superior in the state of Ohio. As astutely stated by the Common Pleas Court of Lucas County:

> The implications of [reading *Clawson* broadly] would be profound, particularly in a medical claim such as the instant case. Here, Plaintiff's cause of action arises not from a readily identifiable act or omission by a particular licensed medical practitioner, but rather, is based upon allegations of collective negligence by numerous employees, taking place over several months. Defendants' proposed reading of *Clawson* would require Plaintiff to name as defendants every employee in Defendants' facilities, rather than simply naming Defendants, as permitted by the long-standing doctrine of respondeat superior. Again, if the *Clawson* court intended the scope of its holding to include medical claims as well as medical malpractice, it would have said so.

Mickhail, 2023 Ohio Misc. LEXIS 1721. *See also Estate of Stephen Tate*, Trumbull C.P. No. 2023-CV-00098 (May 5, 2023) ("*Clawson* [does] not preclude plaintiff's suit against defendants for the negligence of its non-physician employees who were not named in the complaint as defendants."); *Ann Bugeda*, Geauga C.P. No. 21-P-000743 (May 10, 2023) ("[T]he court is persuaded that *Wuerth* and *Clawson* do not overrule basic agency principles of tort law."). *But see Sarah Miller v. Lexington Court Care Ctr.*, Richland C.P. No. 21-CV-388N (May 17, 2023).

{¶ 42} Based on the foregoing, we find *Wuerth* and *Clawson* do not preclude appellant's suit against Montefiore for the negligence of its nonphysician employees.

There being no dispute that appellant's complaint was timely filed against Montefiore within the statute of limitations period applicable to their employees or agents, a suit against Montefiore under a theory of respondeat superior may proceed. Similarly, we find no basis to conclude that the discussion in *Wuerth* and *Clawson* applies to the statutory rights afforded to residents under R.C. 3721.13, or the remedies furnished under R.C. 3731.17(G)(1), including the resident's right to pursue a cause of action against any person *or home* committing the violation." (Emphasis added.) In this case, the trial court's resolution of appellant's claims under the Ohio Nursing Home Residents' Bill of Rights relied exclusively on its interpretation of *Clawson*, and failed to identify any language in the statute to suggest an employee must be named personally in the complaint to pursue a claim against the "home." The trial court further failed to consider the extent to which, if any, appellant's claim under R.C. 3721.13(A) alleged that Montefiore was directly liable for a violation of the statute. *See Slagle v. Parkview Manor, Inc.*, 1983 Ohio App. LEXIS 13143, 10 (5th Dist. Oct. 7, 1983) ("The enactment of Ohio Rev. Code Ann. Ch. 3721 places a direct obligation on nursing home operators and makes them directly liable for violation of a resident's rights both in compensatory damages and punitive damages.").

{¶ 43} Our judgment does not speak to the evidence supporting appellant's claims or appellant's ability to establish Montefiore's liability under a theory of respondeat superior. With the exception of the information provided in the expert report, the factual and evidentiary record is limited in this matter. However, given

our disagreement with the court's broad application of *Clawson*, we vacate the trial court's judgment awarding summary judgment in favor of Montefiore on all claims.[2]

C. Claims Against Defendant Vidmar

{¶ 44} As stated, Vidmar argued below that she was entitled to judgment as a matter of law because appellant failed to establish a prima facie case of medical negligence against her. Noting the deficiencies in Dr. Seignious's expert report, Vidmar asserted that appellant "failed to produce any expert opinions whatsoever relative to (1) the requisite medical standard of care applicable to defendant CNP Vidmar, (2) the failure to meet that standard by defendant CNP Vidmar, and (3) a causal link between the alleged negligent act and Mr. Orac's alleged injury and death." The trial court agreed, stating as follows:

> To establish a prima facie case against defendant Vidmar, plaintiff has the burden to timely produce a qualifying expert opinion to a reasonable degree of medical certainty or medical probability that defendant Vidmar deviated from the applicable standard of care that caused injury to plaintiff's decedent.
>
> Dr. Seignious' report does not mention defendant Vidmar. In fact, by failing to mention the only named individual defendant in this case, the report lacks sufficiency. The report calls into question the expert's knowledge of the facts and participation in this case.
>
> Months after the report was due, on May 23, 2023, plaintiff attempted to cure the defective expert report. While the affidavit fails to cure the report, it does provide the court with sufficient evidence proving that all the parties, as well as the plaintiff's own expert, acknowledge the fact that defendant Vidmar is not employed by the Montefiore defendants, and the record is void of any suggestion of any other agency relationship. The burden is on plaintiff to prove the negligence of the

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[2] The issue presented in this appeal, including our rejection of appellees' broad interpretation of *Clawson*, is not likely to repeat itself in the future following the enactment of R.C. 2307.241, effective October 24, 2024.

> identified defendants as well as any employment or agency relationship.

{¶ 45} It is well settled that "a plaintiff pursuing a medical claim requiring an expert opinion to establish liability is subject to special requirements for both filing and supporting their claim." *Schumacher v. Patel,* 2023-Ohio-4623, ¶ 18 (10th Dist.) First, to properly plead a medical claim, the plaintiff must attach an "affidavit of merit" to the complaint relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Civ.R. 10(D)(2)(a). By rule, the affidavit of merit, which must be provided by an expert witness meeting the requirements of Evid.R. 702 and, if applicable, Evid.R. 601(B)(5), shall include:

> (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.

Civ.R. 10(D)(2)(a).

{¶ 46} In addition to meeting the threshold requirement of presenting proper affidavits of merit to establish the adequacy of the complaint, a plaintiff is required to present competent expert testimony to establish a prima facie case of medical negligence. *See Cromer v. Children's Hosp. Med. Ctr. of Akron*, 2015-Ohio-229, ¶ 40, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131-132 (1976). The plaintiff may not simply rest upon the allegations of medical negligence as stated in

his or her complaint. *Saunders v. Cardiology Consultants, Inc.*, 66 Ohio App.3d 418, 420 (1st Dist. 1990). Thus, to sustain a medical negligence claim, a plaintiff is required to produce evidence by expert testimony to demonstrate all of the following (1) the acceptable medical standard of care, (2) the defendant's breach of that standard, and (3) that plaintiff's injuries were proximately caused by defendant's breach. *Bruni* at 131; *Hubbard v. Laurelwood Hosp.*, 85 Ohio App.3d 607 (11th Dist. 1993); *see also Stanley v. Ohio State Univ. Med. Ctr.*, 2013-Ohio-5140, ¶ 19 (10th Dist.); *Vactor v. Franklin Blvd. Nursing Home, Inc.*, 2021-Ohio-945, ¶ 19 (8th Dist.).[3]

{¶ 47} "Where the plaintiff fails to present expert testimony that [the defendant] breached the applicable standard of care and that the breach constituted the direct and proximate cause of the plaintiff's injury, a court may enter summary judgment in favor of the defendant." *Korreckt v. Ohio Health*, 2011-Ohio-3082, ¶ 12 (10th Dist.). Similarly, the "[f]ailure to provide expert testimony establishing the applicable standard of care is fatal to the presentation of a prima facie case of medical negligence." *Grieser v. Janis*, 2017-Ohio-8896, ¶ 20 (10th Dist.), citing *Reeves v. Healy*, 2011-Ohio-1487, ¶ 38 (10th Dist.), citing *Bruni* at 130.

{¶ 48} Consistent with the foregoing Civ.R. 26(B)(7)(c), provides that

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[3] In a negligence action involving conduct within the common knowledge and experience of jurors, expert testimony is not required. Examples of the latter are allegations of negligence with regard to patients who fell from their hospital beds while unattended. *See Jones v. Hawkes Hosp. of Mt. Carmel*, 175 Ohio St. 503 (1964). In this case, the negligence action brought involves the professional skill and judgment of medical personnel, expert testimony is required to prove the relevant standard of conduct.

> a party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. The report of an expert must disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify. . . . Unless good cause is shown, all reports and, if applicable, supplemental reports must be supplied no later than thirty (30) days prior to trial. An expert will not be permitted to testify or provide opinions on matters not disclosed in his or her report.

{¶ 49} Preliminarily, we note that there is no dispute that appellants filed a timely affidavit of merit that referenced Vidmar explicitly. Moreover, this is not the case where the plaintiff failed to produce an expert report in accordance with the time schedule established by the trial court. Although the trial court noted the deficiencies in the original expert report, the report was not stricken and was considered during the summary-judgment proceedings. Accordingly, we reject Vidmar's reliance on decisions from this district holding that a defendant is entitled to summary judgment as a matter of law where the plaintiff failed to file a timely expert report in a medical negligence case. *See Kinasz v. Diplomat Healthcare*, 2016-Ohio-2949 (8th Dist.); *Adkins v. Women's Welsh Club of Am. Found.*, 2021-Ohio-1084 (8th Dist.).

{¶ 50} Vidmar argues, nevertheless, that even if Dr. Seignious's expert report was timely filed, it was insufficient to raise an issue of fact as to her liability because the "report failed to provide an opinion that Vidmar was negligent and caused injury." Vidmar further asserts that the expert report was deficient because "it did not set forth any facts or analysis to support the conclusions stated therein." In support of her position, Vidmar relies on this court's prior decisions in *Berlocker-*

Carlo v. Tower, 1994 Ohio App. LEXIS 3331, *6 (8th Dist. July 28, 1994) ("[W]here the plaintiff fails to present competent expert testimony based on reasonable probability that (1) a physician breached the medical standard of care; and (2) this breach constituted the direct and proximate cause of plaintiff's injury, the grant of summary judgment to defendant physician is proper."), *Harris v. Mt. Sinai Med. Ctr.,* 1998 Ohio App. LEXIS 2341 (8th Dist. May 28, 1998) (granting summary judgment in favor of defendant-physician because the expert report "failed to state any specific criticisms of the care rendered by [the physician]."), and *Paul v. MetroHealth St. Luke's Med. Ctr.*, 1998 Ohio App. LEXIS 4964 (8th Dist. Oct. 22, 1998) (granting summary judgment in favor of defendant-hospital because plaintiff's expert "failed to sufficiently demonstrate any of [the hospital's] employees' actions were more likely than not the proximate cause of either the decedent's death or any other specific injury to the decedent.").

{¶ 51} In this case, a plain reading of Dr. Seignious's original expert report unequivocally demonstrates that he failed to mention Vidmar by name or otherwise state her specific dealings with the decedent prior to his alleged injuries and subsequent death. Appellant argues on appeal, however, that Vidmar's reliance on *Berlocker-Carlo*, *Harris*, and *Paul* is misplaced because the expert in this case clarified the scope of Vidmar's liability in an affidavit attached to the brief in opposition to summary judgment. Appellant contends that taken together, "Dr. Seignious's initial expert report and summary judgment affidavit sufficiently explained how Vidmar, along with the rest of the Montefiore staff, cost a resident

his life by failing to identify and treat the relatively common pressure ulcers he was suffering that, all too predictably, developed into a fatal infection." Appellant submits that under Civ.R. 56(E), "there's nothing wrong with submitting such a sworn statement to furnish additional details to an expert report to establish triable issues of fact."

{¶ 52} Civ.R. 56(E) provides that

> [t]he court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When 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.

{¶ 53} Affidavits filed under Civ.R. 56(E) must also comply with the Rules of Evidence pertaining to opinion admissibility. *Id.* Evid.R. 702 requires an expert to testify as to matters beyond knowledge of a layperson, be qualified as an expert regarding the subject matter, and base his or her testimony on reliable information. Evid.R. 703 allows expert opinion to be admitted when it is based on facts or date admitted into evidence or perceived by expert.

{¶ 54} After careful consideration of the parties' competing arguments, we find the trial court did not error in granting summary judgment in favor of Vidmar. Even if this court were to assume that the affidavit attached to appellant's brief in opposition was both timely and filed in accordance with Civ.R. 56(E), we find the affidavit failed to cure the defective expert report with respect to Vidmar's alleged liability. Specifically, we agree with Vidmar's argument below and find the expert's

report and supplemental affidavit failed to set forth the applicable standard of care for certified nurse practitioners in Vidmar's position.

{¶ 55} As mentioned, Vidmar argued in her motion for summary judgment that appellant failed "to establish a prima facie case of medical negligence against her because plaintiff failed to provide any expert opinions whatsoever relative to the requisite medical standard of care applicable to CNP Vidmar." Under R.C. 4723.01(J), a "certified nurse practitioner" is defined as "an advanced practice registered nurse who holds a current, valid license issued and is designated as a certified nurse practitioner in accordance with section 4723.42 of the Revised Code and rules adopted by the board of nursing." A certified nurse practitioner "may provide to individuals and groups nursing care that requires knowledge and skill obtained from advanced formal education and clinical experience." R.C. 4723.43. Relevant to this appeal, a nurse practitioner's scope of practice in Ohio is limited by R.C. 4723.43(C). The statute provides, in pertinent part:

> A nurse authorized to practice as a certified nurse practitioner, in collaboration with one or more physicians or podiatrists, may provide preventive and primary care services, provide services for acute illnesses, and evaluate and promote patient wellness within the nurse's nursing specialty, consistent with the nurse's education and certification, and in accordance with rules adopted by the board. A certified nurse practitioner may, in collaboration with one or more physicians or podiatrists, prescribe drugs and therapeutic devices in accordance with section 4723.481 of the Revised Code.

{¶ 56} Under R.C. 4723.431, however, a "certified nurse practitioner may practice only in accordance with a standard care arrangement entered into with each

physician or podiatrist with whom the nurse collaborates." A standard care arrangement shall be in writing and shall contain all of the following:

> (1) Criteria for referral of a patient by the clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner to a collaborating physician or podiatrist or another physician or podiatrist;
>
> (2) A process for the clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner to obtain a consultation with a collaborating physician or podiatrist or another physician or podiatrist;
>
> (3) A plan for coverage in instances of emergency or planned absences of either the clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner or a collaborating physician or podiatrist that provides the means whereby a physician or podiatrist is available for emergency care;
>
> (4) The process for resolution of disagreements regarding matters of patient management between the clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner and a collaborating physician or podiatrist;
>
> (5) Any other criteria required by rule of the board adopted pursuant to section 4723.07 or 4723.50 of the Revised Code.

R.C. 4723.431(B).

{¶ 57} In the original expert report, Dr. Seignious broadly opined that "the staff of Montefiore Nursing Home deviated from the standard of care in regard to pressure ulcer prevention and treatment with Mr. Orac." Dr. Seignious's expert report did not, however, identify the applicable standard of care that was allegedly breached. Thereafter, Dr. Seignious generally stated in his sworn affidavit that he "is familiar with the standards of care in this case." He did not, however, (1) identify Vidmar's specific profession or licensure, (2) identify the standard of care applicable

to certified nurse practitioners, or (3) express his understanding of Vidmar's standard of care arrangement with Montefiore.

{¶ 58} We recognize that an expert's familiarity with the applicable standard of care is usually sufficient to establish his or her qualifications as an expert in his or her field. *See* Evid.R. 601; Evid.R. 702; *Smith v. Promedica Health Sys.*, 2007-Ohio-4189, ¶ 16 (6th Dist.). However, where, as here, the qualifications or competency of the expert is not disputed, the expert is still required to identify the requisite standard of care to survive summary judgment in a medical negligence case. *Bruni*, 46 Ohio.St.2d at 131-132 ("Proof of the recognized standards must necessarily be provided through expert testimony."). As applicable to this case, the materials authored by Dr. Seignious failed to comply with this requirement. Accordingly, we find the affidavit authored by the appellant's expert was insufficient to raise a question of fact because it failed to provide expert testimony establishing the applicable standard of care, which "'is fatal to the presentation of a prima facie case of medical negligence.'" *Grieser*, 2017-Ohio-8896, at ¶ 20 (10th Dist.). *See also Reeves*, 2011-Ohio-1487, at ¶ 43 (10th Dist.) ("Plaintiff's failure to establish the standard of care applicable to a physician assistant is fatal to her medical malpractice claim against [defendant]."); *Schumacher v. Patel*, 2023-Ohio-4623, ¶ 21 (10th Dist.) ("[A] plaintiff's failure to produce adequate expert reports to support the elements of the asserted medical claim may serve as a basis for summary judgment in favor of the defendant."); *Fairrow v. OhioHealth Corp.*, 2020-Ohio-

5595, ¶ 43 (10th Dist.); *Myers v. John A. Hudec Cleveland Dental Ctr. Inc.*, 2022-Ohio-80, ¶ 23 (8th Dist.).[4]

{¶ 59} The sole assignment of error is sustained in part; overruled in part. The matter is remanded for the trial court to proceed with the claims alleged against Montefiore.

{¶ 60} Judgment affirmed in part; reversed in part; remanded.

It is ordered that appellee and appellant share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

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

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MICHAEL JOHN RYAN, J., CONCUR

[4] Montefiore did not raise any specific challenges to the sufficiency of Dr. Seignious's expert report or affidavit below. Accordingly, we decline to address the implications of Dr. Seignious's written opinions as applicable to Montefiore.