[Cite as *Hunter v. OhioHealth Corp.*, 2012-Ohio-717.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph Hunter, Sr. et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 11AP-639 (C.P.C. No. 09CVA-08-11836)
OhioHealth Corporation et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 23, 2012

Leeseberg & Valentine, Anne M. Valentine and *Susie L. Hahn*, for appellants.

Baker & Hostetler, LLP, John H. Burtch and *Robert J. Tucker*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiffs-appellants Joseph Hunter, Sr. and Sharon Hunter appeal the decision of the Franklin County Court of Common Pleas granting defendants-appellees OhioHealth Corporation's ("OhioHealth") and Lindsey Rowan's motion for summary judgment. For the following reasons, we reverse and remand the decision.

{¶ 2} Appellants assert the following assignments of error:

I. THE TRIAL COURT ERRED IN HOLDING THAT COMER V. RISKO APPLIES TO THE INSTANT ACTION.

II. THE TRIAL COURT ERRED IN HOLDING THAT APPELLEES WERE NOT INDEPENDENTLY NEGLIGENT.

{¶ 3} This is a medical malpractice case. In March 2008, Joseph Hunter was receiving physical therapy following surgery for his torn quadricep muscle. The physical therapist assigned to Mr. Hunter was appellee, Lindsey Rowan, who is employed by OhioHealth. Mr. Hunter would receive treatment from Ms. Rowan but would also occasionally be stretched by physical therapist assistant, Jennifer Riley. Ms. Riley is an independent contractor and not an employee of OhioHealth.

{¶ 4} On March 3, 2008, Mr. Hunter was being stretched as part of his physical therapy by Ms. Riley. There is no dispute that it was this stretch that injured Mr. Hunter. The next day, Mr. Hunter went to the doctor complaining of immobility and discomfort in his leg. It was discovered that Mr. Hunter had a fractured patella and a re-torn quadricep for which he underwent surgery on March 11, 2008. Appellants argue that not only did Ms. Riley perform the critical stretch, but that Ms. Rowan was also stretching or assisting in the stretch of Mr. Hunter at that critical moment.

{¶ 5} On August 6, 2009, Mr. and Mrs. Hunter ("Hunters"), filed an action for medical malpractice against OhioHealth, Lindsey Rowan, as well as several John Doe defendants. The Hunters filed an amended complaint on April 7, 2010 substituting Jennifer Riley and her employer Jackson Therapy Partners for two of the John Does.

{¶ 6} Jackson Therapy Partners and Ms. Riley moved for summary judgment on the grounds that the claims against them were time barred by the statute of limitations. The trial court granted this motion on January 3, 2011 and dismissed the claims brought against Jackson Therapy Partners and Jennifer Riley. Appellees, OhioHealth and Lindsey

Rowan then filed a motion for summary judgment, arguing that pursuant to *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, they cannot be held liable for the actions of Ms. Riley on the theory of agency by estoppel because the statute of limitations had expired.

{¶ 7} In their response to OhioHealth's motion for summary judgment, the Hunters argued that *Comer* was not applicable to this case. The Hunters further argued that OhioHealth was negligent for failing to properly supervise Ms. Riley. The Hunters allege that they also made a claim against Ms. Rowan for negligently providing treatment to Mr. Hunter not just for negligently supervising Ms. Riley. The trial court granted OhioHealth's motion on June 16, 2011 finding that *Comer* barred claims brought through agency by estoppel and that the Hunters never made a claim of negligent supervision in their complaint. The trial court did not address whether there was a claim that Ms. Rowan provided negligent treatment. The Hunters timely appealed the trial court's decision.

{¶ 8} The trial court's decision resulted from OhioHealth's motion for summary judgment. Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he 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.

{¶ 9} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving

party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992). Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

{¶ 10} De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court, are found to support it, even if the trial court failed to consider those grounds. See *Dresher v. Burt*, 75 Ohio St.3d 280 (1996); *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (1995).

{¶ 11} The Hunters' second assignment of error asserts that the trial court erred in finding that appellees were not independently liable. The trial court found that the Hunters failed to make a claim of negligent supervision. The Hunters contend that they did make a claim in their second amended complaint filed April 7, 2010 that Ms. Rowan not only negligently supervised Ms. Riley, but that she also negligently provided care to Mr. Hunter when he was injured during the stretch. We find the pertinent complaint included a claim for negligence, whether supervision or performance, leveled against Ms. Rowan and her employer OhioHealth.

{¶ 12} Civ.R. 8(A) and (E) require that sufficient operative facts be concisely set forth in a claim so as to give fair notice of the nature of the action and they permit as many claims for relief, legal or equitable, to which a party may be entitled under the

operative facts in the statement of claim. *DeVore v. Mutual of Omaha Ins. Co.*, 32 Ohio App.2d 36, 38 (1972).

{¶ 13} The Hunters' second amended complaint of April 7, 2010, paragraph 11, states:

> Defendants, individually or by and through agents or employees, were professionally negligent and fell below the accepted standards of physical therapy care in that they failed to exercise the degree of care required of reasonably skillful and prudent health care professionals under similar circumstances by improperly performing physical therapy on the left leg of Plaintiff Joseph Hunter, Sr.

This is the claim of negligence made in the complaint and it is sufficient to give fair notice of the nature of the action.

{¶ 14} Finding that the Hunters have leveled a claim of negligence, we now examine the evidence of Ms. Rowan and OhioHealthe whether it be negligent supervision or negligent performance of the stretch.

{¶ 15} There is a question of whether the critical stretch that injured Mr. Hunter was performed entirely by Ms. Riley. Mr. Hunter stated in his deposition:

> Q. Okay. I'm sorry. What did you say [Lindsey Rowan] might have done?
>
> A. I don't remember correctly, but somebody -- either Jennifer [Riley] put her leg on my thigh or somebody put their hands on my thigh when they did it.
>
> I don't remember who it was.
>
> So to my knowledge, I'm not sure if she had anything to do with me that day or not.
>
> Q. So are you saying there might have been three people that were involved in this exercise?

> A. There was Jennifer, and there was a lady on my behind, and I'm not real sure. I think Jennifer [Riley] put her knee on my thigh, but there could have been somebody else that put their hands on my thigh to hold it.

(Joseph Hunter's deposition, at 74.)

{¶ 16} Ms. Riley's deposition tends to show that Ms. Rowan was assisting in performing the stretch on March 3, 2008:

> Q. Well, on the 3rd were you just giving aid, since Lindsey's name appears and yours is underneath it?
>
> A. Yes. On the 3rd I actually performed the entire stretch. Lindsey [Rowan] was still present there with me, but I did the majority of the work; and because there was a scar tissue release and the sounds were made, I did document because I did have, you know, the hands-on, was right there.
>
> * * *
>
> Q. All right. So when you were helping -- or actually performing the stretch, you were by yourself performing the stretch, right? Lindsey [Rowan] is off doing other things on the 3rd?
>
> A. On the 3rd with Mr. Hunter, no, Lindsey was there with me.
>
> Q. Was she hands on the patient?
>
> A. Yes.
>
> Q. At the same time you were?
>
> A. Yes.
>
> Q. So when this injury occurred or when this stretch was being done for Mr. Hunter, you both were performing the stretch for him?
>
> A. I -- we weren't performing the same movement. I was actually the one that was trying to flex the knee, and she was

> just kind of guarding at the hip so that the hamstring length or the quad length wouldn't be a factor in the stretch.

(Jennifer Riley's deposition, at 31, 41-42.)

{¶ 17} From reading these depositions, reasonable minds can come to differing conclusions as to whether Ms. Rowan was supervising Ms. Riley while performing part of the stretch, merely assisting in stretching, or performing some other task completely on March 3, 2008. Construing the evidence most strongly in favor of the Hunters, we cannot conclude, as a matter of law, that Ms. Rowan did not negligently supervise, or perform the March 3, 2008 stretch on Mr. Hunter. There are issue of fact regarding whether Ms. Rowan and OhioHealth may be independently liable. The trial court's granting of OhioHealth's summary judgment is not appropriate in this case.

{¶ 18} The Hunters' second assignment of error is sustained.

{¶ 19} The Hunters' first assignment of error asserts that the trial court erred in holding that *Comer* applies to this case and that OhioHealth cannot be held liable through a theory of agency by estoppel.

{¶ 20} The narrow issue before the Ohio Supreme Court in *Comer* was whether a viable claim exists against a hospital under a theory of agency by estoppel for the negligence of an independent contractor physician when the physician cannot be made a party because the statute of limitation has expired. *Comer* at 185. The trial court here construed the holding in *Comer* to include independently contracted physical therapist assistants. We cannot say the trial court erred in its application of *Comer*. However, OhioHealth may be independently liable through the alleged negligence of Lindsey Rowan who was an employee of OhioHealth and not an independent contractor.

{¶ 21} The Hunters' first assignment of error, as written, is overruled.

{¶ 22} In summary, we overrule the first assignment of error, but sustain the second assignment of error. As a result, we reverse the judgment of the trial court and remand the case for further appropriate proceedings.

Judgment affirmed in part;
remanded for further appropriate proceedings.

KLATT and FRENCH, JJ., concur.

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