[Cite as *Stanley v. Community Hosp.*, 2011-Ohio-1290.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

GEORGE STANLEY, et al.	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2010 CA 53
v.	:	T.C. NO. 07CV213
COMMUNITY HOSPITAL, et al.	:	(Civil appeal from Common Pleas Court)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 18th day of March, 2011.

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LAWRENCE A. WILKINS, Atty. Reg. No. 0066101, 2661 Commons Blvd., Beavercreek, Ohio 45431
Attorney for Plaintiff-Appellant

SUSAN BLASIK-MILLER, Atty. Reg. No. 0005248 and LINDSAY M. JOHNSON, Atty. Reg. No. 0077753 and ROBERT L. GRESHAM, Atty. Reg. No. 0082151, Fifth Third Center, 1 S. Main Street, Suite 1800, Dayton, Ohio 45402
Attorneys for Defendant-Appellee

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DONOVAN, J.

{¶ 1} Plaintiff-appellant George A. Stanley appeals from a decision of the Clark County Court of Common Pleas, General Division, sustaining the motion for summary judgment of defendant-appellant Community Hospital filed on March 25, 2010. The trial

court filed its decision and entry sustaining Community's motion for summary judgment on April 14, 2010. Stanley filed a notice of appeal with this Court on May 13, 2010.

I

{¶ 2} On or about September 29, 2005, Stanley was admitted to Community Hospital for treatment of a hepatic cyst and an abdominal abscess. Stanley alleged that during the course of his hospitalization, a nurse attempted to inject medication though an IV port which had been placed in his left hand. Stanley further alleged that the needle either became dislodged from and/or punctured his vein resulting in the medication being injected directly into his left hand and thumb. As a result of what the parties referred to as an "IV infiltration," Stanley's left thumb had to be amputated.

{¶ 3} In a complaint filed February 16, 2007, Stanley alleged that Community, as a direct and proximate result of the negligence of its employee nurses, was liable for his injury. Along with Community, Stanley also named Jane and John Doe nurses and physicians as defendants in his lawsuit. It is undisputed that Stanley never amended his complaint in order to specifically name any nurse, physician, or other hospital employee as an individual defendant involved in his treatment.

{¶ 4} On March 1, 2010, Community requested leave to file a motion for summary judgment. The trial court granted Community's motion in an entry filed on March 25, 2010, and the motion was deemed filed as of the date of the entry.

{¶ 5} In its motion for summary judgment, Community argued that a hospital cannot commit medical malpractice, nor is a hospital vicariously liable unless its employees are found to be primarily liable. Community further argued that its nurses are not liable

here because they were never sued and because the statute of limitations had run against them. In support of its argument, Community relied on a recent Ohio Supreme Court decision which held that a law firm does not engage in the practice of law, and therefore, cannot commit legal malpractice. *National Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601. Further, the Supreme Court in *Wuerth* held that a law firm is not vicariously liable for legal malpractice unless one of its principals or associates are first found to be liable for malpractice. Id.

{¶ 6} Relying on the holding in *Wuerth*, the trial court sustained Community's motion for summary judgment in a decision filed on April 14, 2010. In its decision, the trial court noted that Stanley did not file a memorandum in response to Community's motion. Stanley filed a motion for reconsideration on April 20, 2010, arguing that his counsel never received a copy of Community's motion for summary judgment. Stanley also asserted that the Supreme Court's holding in *Wuerth* was inapplicable to the facts of the instant case since nurses, as employees of the hospital, did not have to be individually named as defendants in a negligence lawsuit filed against a hospital. Community filed a response to Stanley's motion for reconsideration on April 29, 2010. Before the trial court could address the motion for reconsideration, Stanley filed a notice of appeal with this Court.

II

Standard of Review

{¶ 7} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and

resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶ 8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶ 9} "(1) No genuine issue as to any material fact remains to be 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that 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. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The non-moving party must then present evidence that some issue of material fact remains for the trial court to resolve. Id.

{¶ 10} Stanley's failure to respond to Community's motion for summary judgment does not, by itself, warrant that the motion be granted. *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.3d 45, 47. Rather, even where the nonmovant completely fails to respond to the summary judgment motion, the trial court's analysis should focus on whether the movant has satisfied its initial burden of showing that reasonable minds could only conclude the case should be decided against the nonmoving party. Id.; *Marshall v. McGlone* (June 16, 2000) Montgomery App. No. 18125. Only then should the court address whether the nonmovant has met its reciprocal burden of establishing that a genuine issue remains for trial. Id.

III

{¶ 11} Stanley's sole assignment of error is as follows:

{¶ 12} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEE COMMUNITY HOSPITAL BECAUSE APPELLANT'S LAWSUIT WAS TIMELY FILED AGAINST SAID HOSPITAL AND APPELLANT'S CHOICE TO SUE THE EMPLOYER, RATHER THAN ANY SPECIFIC EMPLOYEE AND/OR NURSE, WAS IN ACCORDANCE WITH WELL-SETTLED AND LONG-STANDING OHIO LAW."

{¶ 13} In his sole assignment, Stanley contends that the trial court erred when it sustained Community's motion for summary judgment. Specifically, Stanley argues that *Wuerth* is inapplicable to the facts of the instant case because his injuries were the proximate result of the actions of a nurse or nurses who were directly employed by Community, rather than a physician who is generally an independent contractor. Stanley asserts that the doctrine of respondeat superior thereby controls and permits suit to be filed against the employee, the employer, *or* both, and there is no requirement that the employee be named as a party. *Losito v. Kruse* (1940), 136 Ohio St. 183, 187. It is undisputed that Stanley filed suit against Community before the statute of limitations had expired on his negligence claim, and Community did not argue that the statute of limitations regarding the actions of the nurses had already expired at the time of the lawsuit against the hospital. Thus, Stanley asserts that the fact that he chose to file suit against the employer hospital for the negligence of the employee nurses was proper under the law of respondeat superior.

{¶ 14} As previously stated, Community relies upon the Ohio Supreme Court's

decision in *Wuerth*. 122 Ohio St.3d 594, 2009-Ohio-3601. In *Wuerth*, the claim involved a malpractice action against an attorney and his law firm that originated in the United States District Court for the Southern District of Ohio. The district court ruled that the attorney was entitled to summary judgment because the malpractice and misrepresentation claims were barred by the Ohio's malpractice statute of limitations, R.C. 2305.11(A). *National Union Fire Ins. Co. v. Wuerth* (S.D.Ohio 2007), 540 F.Supp.2d 900, 911. The district court also held that the attorney's law firm could not be held directly liable for malpractice, and could not be held vicariously liable without a finding that the attorney was liable. Id. at 914.

{¶ 15} On appeal to the United States Court of Appeals for the Sixth Circuit, the court certified the following question for consideration by the Ohio Supreme Court:

{¶ 16} "Under 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 instance."

{¶ 17} The Ohio Supreme Court began its analysis by noting the similarities between medical malpractice and legal malpractice and by finding the precedent regarding medical malpractice to be instructive. *National Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601. The *Wuerth* court recognized that "because only individuals practice medicine, only individuals can commit medical malpractice." Id. at ¶ 14. Based on past precedent, the *Wuerth* court concluded that hospitals do not practice medicine, and therefore cannot commit malpractice. Id., citing *Browning v. Burt* (1993), 66 Ohio St.3d 544, 556. Rather "only physicians can commit malpractice." Id., citing *Richardson v. Doe* (1964), 176 Ohio St. 370. 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. *Wuerth*, 2009-Ohio-3601, at ¶ 18.

{¶ 18} The court further found that "although a party injured by an agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable." Id. at ¶ 22. Ultimately, the *Wuerth* court answered the certified question in the negative and held that a law firm does not engage in the practice of law and therefore cannot commit legal malpractice directly, and 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 syllabus.

{¶ 19} Relying on *Wuerth*, Community argues that it is not directly liable for Stanley's injuries because it cannot practice medicine, and therefore cannot commit medical malpractice. Moreover, Community argues that its nurse-employees cannot be found liable because Stanley's claims against them are time-barred by the statute of limitations since he failed to individually name them as defendants in the complaint. Thus, the issue before us is whether *Wuerth* should be extended to the instant case in order to preclude a suit against Community where the employee nurses were not named as defendants and where the statute of limitations ran against them after suit had been filed against the hospital.

{¶ 20} After a thorough review of the record and the pertinent legal authority, we conclude that Community's interpretation of the Ohio Supreme Court's holding in *Wuerth* is too expansive. Specifically, physicians and attorneys are professionals who are generally hired to perform services for their clientele as independent contractors. Physicians and attorneys are not typically considered "employees" at their respective businesses. The law

partner and attorney in *Wuerth* was a part owner of his firm and worked as an independent contractor for his clients. Physicians, as well, are often not employees of the hospitals where they have privileges. Additionally, "the common meaning and legal definition of the term 'malpractice' is limited to the professional misconduct of members of the medical profession and attorneys." *Hocking Conservancy Dist. v. Dodson-Lindblom Assoc.* (1980), 62 Ohio St.2d 195, 197.

{¶ 21} We note that the Ohio Revised Code also makes distinction between "malpractice" and "medical claims" as discussed in R.C. 2305.11(A) and 2305.113(A) respectively. Specifically, R.C. 2305.11(A) states that "an action for malpractice *other than an action upon a medical *** claim* *** shall be commenced within one year after the cause of action accrued." R.C. 2305.113(A) states that "an action upon a medical *** claim shall be commenced within one year after a cause of action accrued."

{¶ 22} In its brief, Community incorrectly states that pursuant to R.C. 2305.113, the statute of limitations for *medical malpractice,* rather than a medical claim, is one year. While the statute of limitations for malpractice *and* medical claims are both one year, only physicians and attorneys can commit malpractice under R.C. 2305.11(A). *Hocking Conservancy Dist.*, 62 Ohio St.2d 195. The Ohio Supreme Court has held that the negligence of nurses employed by a hospital does not fall under the definition of "malpractice" as discussed in R.C. 2305.11(A). *Lombard v. Good Samaritan Med. Center* (1982), 69 Ohio St.2d 471. Rather, the alleged negligence of a nurse employee falls under the definition of a "medical claim" in R.C. 2305.113(A). Id. The holding in *Wuerth* must be given a narrow application. Nowhere in the *Wuerth* decision does the Supreme Court

conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under R.C. 2305.11. Further, we have held that a suit against a hospital could proceed where the negligent employee nurse was not named as a defendant. *Holman v. Grandview Hosp. Med. Center* (1987), 37 Ohio App.3d 153. Traditionally, claims such as the one brought by Stanley against Community for the negligence of its employee nurses have been governed by the law of respondeat superior. *Taylor v. Belmont Community Hospital*, Belmont App. No. 09 BE 30, 2010-Ohio-3986.

{¶ 23} Simply put, *Wuerth* does not preclude a suit against Community Hospital for the negligence of its employee nurses despite the fact that the nurse or nurses were not named as defendants in Stanley's complaint. Thus, *Wuerth* is inapplicable to the instant case, and there being no dispute that Stanley's suit was timely filed against Community for the alleged negligence of its employee nurses, respondeat superior law applies and the trial court erred when it sustained the hospital's motion for summary judgment.

{¶ 24} Stanley's sole assignment of error is sustained.

IV

{¶ 25} Stanley's sole assignment of error having been sustained, the judgement of the trial court is reversed and this case is remanded for proceedings consistent with this opinion.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

Lawrence A. Wilkins
Susan Blasik-Miller
Lindsay M. Johnson
Robert L. Gresham
Hon. Richard J. O'Neill