[Cite as *Dinges v. St. Luke's Hosp.*, 2012-Ohio-2422.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Lisa Dinges, Administratrix
of the Estate of Sara Dinges, Deceased

Appellant

v.

St. Luke's Hospital, et al.

Appellees

Court of Appeals No. L-11-1051

Trial Court No. CI0200808715

DECISION AND JUDGMENT

Decided: June 1, 2012

* * * * *

David A. Kulwicki and Paul W. Flowers, for appellant.

Peter R. Casey, III, and Jeffrey M. Stopar, for appellees.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted summary judgment to appellee, Intermed Associates, Inc. ("Intermed") and dismissed a complaint filed in a wrongful death action by Lisa Dinges, administratrix of the estate of her deceased daughter, Sara Dinges.

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. On December 7, 2006, Sara Dinges arrived at St. Luke's Hospital ("St. Luke's") emergency room passing dark brown urine and complaining of muscle weakness and pain. Sara told the emergency room physician that she recently had undergone gastric-bypass surgery, and that she had lost 78 pounds in the last three months. She gave the emergency room doctor a card issued by her bariatric surgeon, Patrick White, M.D., which stated:

{¶ 3} "Sara Dinges has had gastric-bypass surgery. It is ***critical*** that you call me before performing any gastrointestinal examination or administering any medication." (Emphasis sic.)

{¶ 4} The decision was made to admit Sara into St. Luke's for further treatment, and a copy of the card was placed in Sara's medical chart. At the time, Jeffrey Blood, D.O., an internist and a partner in Intermed, was on call. Although Dr. Blood facilitated Sara's hospital admission, he did not see her or administer any medical treatment. However, Sara was examined the next day by Joel Retholtz, D.O. and several days later by Stanley Orlop, D.O., both of whom are Intermed physicians/partners.

{¶ 5} During the time that Sara was a patient at St. Luke's, numerous tests were performed. Although Sara was treated for symptoms of a urinary tract infection and possible kidney infection, she continued to experience dark urine, muscle weakness and pain. No definitive diagnosis was obtained until December 14, 2006, when Orlop determined that Sara was suffering from rhabdomyolysis, a breakdown of muscle tissue

that results in the release of myoglobin, a protein present in muscle fibers, into the bloodstream.

{¶ 6} At the request of Sara's family members, a nutritional expert was consulted at some point during Sara's hospital stay, but the nutritionist's recommendations were never implemented. By December 16, 2006, the day she died, Sara was reporting excruciating pain, muscle weakness, and numbness in her face. She had difficulty swallowing and could not eat. At the time of her death, Sara was 28 years old.

{¶ 7} On December 16, 2008, Lisa Dinges filed the complaint herein against Blood, St. Luke's, Intermed, and "John Doe M.D.'s number one through five." The complaint contained allegations that, as a result of the negligent acts and/or omissions of all the defendants, Sara "was neither timely diagnosed, nor timely treated for a condition that lead to her premature death * * *."

{¶ 8} The complaint further alleged that:

> the negligent acts, and/or omissions, of the Defendants constituted departures from standard and prudent care. These acts, and/or omissions, consisted, without limitation, of one or more of the following failures of competent safe and acceptable medical, surgical and supportive care and treatment by Defendants:
>
> a. The failure to reasonably evaluate and diagnose Decedent's condition.

b. The failure to utilize appropriate diagnostic measures based upon the Decedent's condition.

c. The failure to initiate timely and appropriate treatment for Decedent's condition.

d. The failure to recognize the Decedent's risk for development of respiratory distress.

e. The failure to protect the Decedent against the occurrence of respiratory failure as a result of her known risk factors.

{¶ 9} The complaint further alleged that, as a direct and proximate result of the defendants' "negligence, inadequate and substandard acts and/or omissions Decedent Sara Dinges came wrongfully to her death on December 16, 2006."

{¶ 10} On February 4, 2009, St. Luke's filed an answer. Dr. Blood and Intermed filed a joint answer on February 12, 2009. On March 13, 2009, Dinges filed an affidavit of merit in which anesthesiologist John W. Schweiger, M.D. stated that, in his opinion, "the standard of care was breached and said breach caused injury to the Plaintiff's Decedent Sara Dinges."

{¶ 11} On November 25, 2009, Dinges filed a motion for leave to amend her original complaint, in order to substitute the names of Stanley Orlop, D.O. and Joel Retholtz, D.O., in place of John Doe, M.D.s No.1 and No.2, which the trial court granted on December 3, 2009. Answers to the amended complaint were filed by St. Luke's on December 11, 2009 and by Blood and Intermed on January 6, 2010.

{¶ 12} On January 19, 2010, Retholtz and Orlop filed a joint motion to dismiss the amended complaint. In an attached memorandum in support, Retholtz and Orlop argued that Dinges failed to obtain personal service on them within one year of the filing of the initial complaint, as required by Civ.R. 3(A) and Civ.R. 15(D). Alternatively, Retholtz and Orlop argued that Dinges did not file an affidavit of merit against them as required pursuant to Civ.R. 10. On March 17, 2010, Dinges filed a memorandum in opposition to the motion to dismiss. Attached to the memorandum was Schwieger's supplemental affidavit of merit in which he stated that, in his expert opinion, Retholtz and Orlop breached the applicable standard of care and that "said breach caused injury to the Plaintiff's Decedent Sara Dinges." Dinges also argued that, pursuant to Civ.R. 3(A), she was required to serve Retholtz and Orlop with notice within one year of the date that the amended complaint was filed, not within one year of the date the original complaint was filed. Dinges' motion concludes with the statement that "[t]here is no legitimate basis for ignoring the plain language of Civ.R. 3(A)," which permits personal service pursuant to Civ.R. 15(D) to be made on a defendant whose name was previously designated as "John Doe" within one year of the filing of the amended complaint.

{¶ 13} On March 19, 2010, Retholtz and Orlop filed a reply, in which they stated that, reading Civ.R. 3(A) and 15(D) together, Dinges was required to obtain personal service on them within one year of the filing of the original complaint or face dismissal of the lawsuit. They further argued that, even if the amended complaint was not time-barred

for failure to comply with Civ.R. 3(A) and 15(D), it is still subject to dismissal because no affidavit of merit against them was filed along with the amended complaint.

{¶ 14} On April 26, 2010, the trial court issued an opinion and judgment entry in which it found that Orlop and Retholtz were not "properly and timely served" with the amended complaint, as required by Civ.R. 3(A) and 15(D). Accordingly, the trial court granted the motion to dismiss the amended complaint as to Orlop and Retholtz. On May 10, 2010, Dinges voluntarily dismissed Blood from the lawsuit.

{¶ 15} On June 7, 2010, Intermed filed a motion for summary judgment in which it argued that, in *National Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, the Ohio Supreme Court, relying heavily on precedent set in medical malpractice cases, held that a law firm cannot be held liable for legal malpractice if none of its employees and/or principals can be held liable for malpractice. Accordingly, Intermed argued, Dinges cannot maintain an action for wrongful death against only Intermed, because "none of its principals or associates are potentially liable."

{¶ 16} St. Luke's filed a separate motion for summary judgment on June 8, 2010, in which it argued that there can be no claim for vicarious liability against a hospital where the lawsuit does not include any person who can be found liable for negligence. In support, St. Luke's cited *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 835 N.E.2d 712, and *Wuerth*, supra.

{¶ 17} On June 21, 2010, Dinges filed a motion in opposition to St. Luke's and Intermed's motions for summary judgment. In a supporting memorandum, Dinges

argued that *Wuerth* did not overturn the principle that an entity can be found vicariously liable for the negligent acts of its employees in a medical malpractice case, even if such individuals were not named in the lawsuit. Dinges further argued that *Comer* is distinguishable from this case because it involved a claim of agency by estoppel, not *respondeat superior* liability for the negligence of an entity's employees. On June 28, 2010, Intermed and St. Luke's filed separate replies in support of summary judgment.

{¶ 18} On July 16, 2010, St. Luke's filed a request to supplement its motion for summary judgment with additional authority. Specifically, St. Luke's sought to bring to the trial court's attention the decision in *Hildebrandt Family Partnership v. Provident Bank*, 12th Dist. Nos. CA2009-06-077 and CA2009-06-084, 2010-Ohio-2712, 2010-WL-2373113, in which a law firm was accused of legal malpractice, but none of its employees or attorneys were accused of negligence. The appellate court, relying extensively on *Wuerth*, first found that a law firm cannot commit legal malpractice. Id. at ¶ 20. Next, the appellate court found that the law firm could not be found vicariously liable for malpractice, unless one or more of its principals or associates could be found liable. Id., citing *Wuerth*, supra. On August 4, 2010, the trial court granted St. Luke's request to supplement its summary judgment motion.

{¶ 19} On August 10, 2010, the trial court ordered the parties to submit briefs as to the relevance of a recent decision issued by the Ohio Supreme Court in *State ex rel. Sawicki v. Lucas Co. Court of Common Pleas*, 126 Ohio St.3d 198, 2010-Ohio-3299, 931 N.E.2d 1082, in which the issue presented was whether a private employer can be held

vicariously liable for the acts of its employee-doctor, who was employed by both the private entity and the state of Ohio at the time the alleged negligence occurred. On September 8, 2010, St. Luke's filed its brief, in which it argued that *Sawicki* has no effect on this case, which involves the statute of limitations, not statutory immunity. That same day Intermed filed its brief, in which it argued that, in deciding *Sawicki*, the Ohio Supreme Court did not cite *Wuerth* and, therefore, did not overrule or vacate its decision in that case. Accordingly, Intermed argued that *Wuerth* still requires a plaintiff in a medical malpractice case to sue both the physician and his or her medical group within the statute of limitations, or risk dismissal of the action against the physician, the entity, or both. On September 9, 2010, Dinges filed her brief, in which she argued that the decision in *Sawicki* supports her position that an employer may be held vicariously liable for the acts of its employee, even if the employee cannot be held liable for negligence.

{¶ 20} On October 22, 2010, St. Luke's was voluntarily dismissed from the lawsuit, leaving Intermed as the sole defendant. On February 15, 2010, the trial court filed an opinion and judgment entry in which it found that, pursuant to *Wuerth*, Intermed and St. Luke's[1] "cannot commit malpractice because they cannot practice medicine. They can only be found liable for the malpractice of its [sic] employees/agents under the theory of respondeat superior." The trial court further found, after reviewing the allegations made in the amended complaint, that:

[1] The trial court referred to both Intermed and St. Luke's even though, as stated above, St. Luke's was dismissed from the lawsuit.

> Pursuant to Civ.R. 8(A), Ms. Dinges was required to give Defendants fair notice of a respondeat superior claim. Nowhere does the complaint mention respondeat superior nor does it anywhere allege that Defendants were negligently acting by and through its employees/agents.' Rather, Ms. Dinges sued the corporate entities for independent, stand-alone, medical malpractice.

{¶ 21} Based on these findings, the trial court granted summary judgment to St. Luke's and Intermed, and dismissed the amended complaint. A timely notice of appeal was filed in this court by appellant, Lisa Dinges, on March 4, 2011.

{¶ 22} On appeal, appellant sets forth the following assignment of error:

> Assignment of Error No. 1: The trial court erred in granting summary judgment based on the application of *National Union Fire Ins. Co v. Wuerth* to the present matter.

{¶ 23} In her assignment of error, appellant asserts that the trial court erred by finding that the complaint failed to set out a claim of *respondeat superior* and dismissing it on that basis. In support, appellant argues that *Wuerth* does not bar her claim in this case because (1) "Ohio law clearly holds [Intermed] vicariously liable for the negligence of its physicians-employees, regardless of whether the employees were named to this lawsuit in their individual capacity," and (2) the Ohio Supreme Court has refused to expand the holding of *Wuerth*, which was made in the context of a legal malpractice case, to medical malpractice cases. Appellant further argues that the *respondeat superior*

claim set forth in the amended complaint adequately complies with the notice provisions of Civ.R. 15(C) by alleging that Intermed is liable for the acts of Orlop and Retholtz, who "are and were employees, agents/servants, and/or employees of [Intermed], acting within the course and scope of their employment."

{¶ 24} It is well-settled that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 25} The first issue to be addressed is whether the trial court correctly determined that appellant's *respondeat superior* claim against Intermed was not timely asserted. Civ.R. 8(A), which sets forth general rules of pleading states:

> A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief * * *.

{¶ 26} Pursuant to Civ.R. 8(F), pleadings "shall be so construed as to do substantial justice." Ohio courts have interpreted this provision to mean that "pleadings must be construed liberally to serve the substantial merits of the action." *Dicks v. U.S. Health Corp. of Southern Ohio*, 4th Dist. No. 95 CA 2350, 1996 WL 263239 (May 10, 1996), citing *McDonald v. Bernard*, 1 Ohio St.3d 85, 438 N.E.2d 410 (1982). In other words, the complaint is not required to state all the required elements of a *respondeat superior* claim with precision; however, it must set forth all of the basic elements of such a claim. *Morris v. Children's Hosp. Med. Ctr.*, 73 Ohio App.3d 437, 442-443, 597 N.E.2d 1110 (1st Dist.1991), citing 5 Wright & Miller, *Federal Practice & Procedure: Civil*, Section 1216, 120-123 (1969).

{¶ 27} Once it has been determined that a viable claim has been asserted in an amended pleading, the relation back of such an amendment to the original pleading is governed by Civ.R. 15(C) which states, in pertinent part, that:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his

defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. * * *

{¶ 28} "Under the doctrine of *respondeat superior* a principal is liable for the acts of its agent committed within the scope of his or her agency." *Forney v. Elks Grand Lodge*, 10th Dist. Nos. 96APE05-572, 96APE05-578, 1996 WL 737575 (Dec. 24, 1996), citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, fn. 4, 494 N.E.2d 1091 (1986). In the case of a hospital or other provider of medical services, the principal "is vicariously liable under the doctrine of *respondeat superior* for the negligent acts or omissions of its employees over whom the [principal] retains control or has a right of control while they are acting within the scope of their employment." *Smith v. Midwest Health Svc., Inc.* 1st Dist. No. C-910754, 1993 WL 64260 (Mar. 10, 1993).

{¶ 29} In its judgment entry, the trial court cited paragraphs 21 through 26 of the amended complaint, which state that:

21. As a direct and proximate result of the negligent acts and/or omissions on the part of one or more or all of the aforementioned Defendants, Decedent Dinges, was neither timely diagnosed, nor timely treated for a condition that lead to her premature death at the age of 28 years old.

22. These negligent acts, and/or omissions, of the Defendants constitute departures from standard and prudent care. These acts, and/or

omissions, consisted, without limitation, or one or more of the following failures of competent safe and acceptable medical surgical and supportive care and treatment by Defendants.

* * *

24. As a direct and proximate result of Defendants' negligence, inadequate and substandard acts and/or omissions Decedent Sara Dinges came wrongfully to her death on December 16, 2006.

25. As a direct and proximate result of the aforementioned negligent acts and/or omissions on the part of the Defendants, Plaintiff Lisa Dinges, surviving mother of Sara Dinges, has been caused to suffer a loss of services and consortium, including a loss of her daughter's society, companionship, affection, comfort, guidance and counsel.

26. As a direct and proximate result of the aforementioned negligent acts and/or omissions on the part of the Defendants, Decedent's next of kin, including but not limited to surviving brothers and sisters, parents and all surviving heirs have been caused to suffer a loss of services, loss of society, including companionship, assistance, protection, advice, guidance and counsel of the Decedent.

{¶ 30} After quoting the above portions of the amended complaint, the trial court concluded that "[n]owhere does the Complaint mention *respondeat superior* nor does it anywhere allege that Defendants were negligent 'acting by and though its

employees/agents.' Rather, Ms. Dinges sued the corporate entities for independent, stand-alone, medical malpractice." However, in analyzing the amended complaint, the trial court neglected to consider paragraph nine, which states that:

> At all times relevant, Defendants Orlop D.O. and Retholtz D.O. are and were employees, agents/servants, and/or employees of Defendants [sic] Intermed Corp., acting within the course and scope of their employment. Any acts and/or omissions on the part of Defendants Orlop D.O. and Retholtz D.O. that constitute a departure from the standard of care, are and were the responsibility of said Defendants. * * *

{¶ 31} On consideration of the foregoing, as a matter of law, we find that the amended complaint adequately set forth the basic elements of a claim for *respondeat superior* against Intermed. Pursuant to Civ.R. 15(C), the claim relates back to the original pleading and is not time-barred. Having found that the complaint adequately sets forth a claim against Intermed, we now must decide whether such a claim is viable under the facts of this case. In so doing, both parties have urged us to consider the decision of the Ohio Supreme Court in *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939.

{¶ 32} In *Wuerth*, a malpractice claim was brought against both an attorney and the law firm in which he was a partner. Eventually, the claim against the individual attorney was dismissed because it was not filed within the one-year statute of limitations. The law firm then filed a motion for summary judgment in which it argued that the

malpractice claim against the firm should be dismissed because a law firm cannot be held vicariously liable for the acts of a partner where the claim against that partner is barred by the statute of limitations.

{¶ 33} In making its decision, the Ohio Supreme Court, initially drew upon prior determinations that a hospital cannot practice medicine and, therefore, cannot commit medical malpractice. *Id.* at ¶ 14, *citing Browning v. Burt*, 66 Ohio St.3d 544, 556, 613 N.E.2d 993 (1993). Analogizing to the practice of law, the *Wuerth* court held that "a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice." *Id.* at ¶ 18. The Ohio Supreme Court also stated that in an action against an employer for the negligence of a servant, while a plaintiff may sue the servant, the master, or both, he is ultimately entitled to only one settlement of his claim. *Id.* at ¶ 21, citing *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940). Therefore, in cases where "'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 ¶ 22, quoting *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 20. Accordingly, "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." *Wuerth, supra,* at ¶ 26.

{¶ 34} Since the Ohio Supreme Court's decision in *Wuerth* was issued, this court has decided *Tisdale v. Toledo Hosp.*, 6th Dist. No. L-11-1005, 2012-Ohio-1110, 2012 WL 929694. In that case a patient, Gary Tisdale, was admitted to Toledo Hospital for abdominal surgery. Post-surgery, Tisdale developed blood clots in his extremities, which

ultimately caused a pulmonary embolism, resulting in brain damage. Tisdale and his wife, Tammy, filed a claim for medical malpractice/medical negligence against Tisdale's physicians and the hospital, in which they claimed that Tisdale's injuries resulted from the nursing staff's collective failure to follow his physicians' orders by placing pressure cuffs on Tisdale's legs after surgery to prevent the formation of blood clots. However, the individual nurses were not named in the complaint and, by the time of trial, all defendants except the hospital had been dismissed from the lawsuit. The jury returned a verdict in favor of the hospital, which the plaintiff appealed on a juror-selection issue. *Id.* ¶ 4. Finding error, this court reversed and remanded the case for a new trial. *See, Tisdale v. Toledo Surgical Specialists, Inc.*, 6th Dist. No. L-07-1300, 2008-Ohio-6439, 2008 WL 5197163.

{¶ 35} While the case was pending on remand, the Ohio Supreme Court decided *Wuerth*, supra. The hospital then filed a motion to dismiss the complaint on the basis that as a result of *Wuerth*: (1) it could not be held vicariously liable for the negligent acts of nurses/employees who were not named in the complaint, and (2) the nurses/employees could not be added to the complaint because of the expiration of the statute of limitations. The trial court granted the hospital's motion based on *Wuerth*, and the plaintiff once again appealed the case to this court.

{¶ 36} On appeal, Toledo Hospital asked us to decide whether the holding in *Wuerth* could be applied in the context of <u>all</u> vicarious liability claims that arise as a result of agency relationships in both the legal and medical fields. *See, Tisdale,* 6th Dist.

No. L-11-1005, 2012-Ohio-1110, 2012 WL 929694,, at ¶ 23. Before answering that question, we reviewed the doctrines of respondeat superior, as expressed in *Losito v. Kruse,* 135 Ohio St. 183, 24 N.E.2d 705 (1940), and agency by estoppel, as expressed in *Comer v. Risko*, supra. We concluded that the relationship of attorney Richard Wuerth to his firm fell into a third category, which was "distinguishable from both respondeat superior and agency by estoppel." *Id.* at ¶ 29. Accordingly, we stated that *Wuerth's* actual holding may best be limited to those types of cases. *Id.* We further stated that the particular result in *Wuerth* wholly turned on the nature of "the *tortfeasor's relationship* to the principal." In other words, "the issue of whether, or if, the statute of limitations applies – *and to whom* – is determined by that relationship." *Tisdale, supra,* at ¶ 33. (Emphasis in original.)

{¶ 37} As set forth above, Intermed moved for summary judgment, which Dinges opposed. The issue presented by both sides was whether Dinges could bring a medical malpractice action against Intermed when such a claim against Orlop and Retholtz was barred by the statute of limitations. At the time the trial court considered that question, the issue was simply whether *Wuerth* applied, and the particular distinction between "employee" and "partner/co-owner" was not seen as critical. In fact, a review of the complete record shows that Orlop, Blood and Retholtz sometimes referred to their relationship with Intermed as that of "employee" and other times as "partners" or "co-owners." However, neither party argued or presented evidence specifically as to the issue

of whether or not Orlop and Retholtz were partners/co-owners, or mere employees, of Intermed.

{¶ 38} Pursuant to our decision in *Tisdale*, it is now both *genuine* and *material* to the resolution of the second issue presented in this appeal to know whether Intermed, which is a medical professional corporation, not a hospital, is an employer of Orlop and Retholtz in the traditional sense, or whether the doctors are, in fact, partners and/or co-owners of an entity that merely performs administrative functions, such as providing a billing conduit. If the latter is true, as stated in *Tisdale*, *supra*, the relationship of the doctors to Intermed would fall into the third category identified by the Ohio Supreme Court in *Wuerth*. *See, also, Henry v. Mandell-Brown,* 1st Dist. No. C-090752, 2010-Ohio-3832, ¶ 14 (Citing *Natl. Union Fire Ins. Co. v. Wuerth,* Ohio's First District Court of Appeals held that Dr. Mandell-Brown, who was not named in a medical malpractice complaint before the expirations of the statute of limitations, was properly dismissed from the lawsuit and that the remaining *respondeat-superior* claim against the surgery center could not survive the dismissal of "the claims against Mandell-Brown.")[2]

{¶ 39} On consideration of the foregoing, we find a genuine issue of material fact exists as to the relationship between Orlop, Retholtz and Intermed, i.e., whether the doctors were traditional employees or partners/co-owners of Intermed when they treated Sara Dinges. Accordingly, the trial court erred by finding that no genuine issue of

[2] In *Tisdale,* we declined to apply the holding in *Mandell-Brown* because, unlike this case, the original complaint did not adequately state a claim for *respondeat superior*. *Tisdale, supra,* at ¶ 32.

material fact existed and that, pursuant to *Wuerth, supra,* Intermed was entitled to summary judgment as a matter of law. Appellant's assignment of error is, therefore, well-taken.

{¶ 40} The judgment of the Lucas County Court of Common Pleas is hereby reversed. The case is remanded to the trial court for further proceedings consistent with this decision. Pursuant to App.R. 24, costs of this appeal are assessed to appellee, Intermed.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J _____
CONCURS AND WRITES SEPARATELY. JUDGE

YARBROUGH, J.

{¶ 41} I concur in the judgment and with the majority decision to the extent indicated below. I write separately to emphasize certain points that should not be left to implication.

I. The Dinges' Complaint.

{¶ 42} I agree with the majority that paragraph nine of the amended complaint, on its face, adequately effectuates a respondeat-superior claim against Intermed. It plainly asserts that the individuals identified there "are and were *employees*, agents/servants, and/or *employees* of [Intermed], *acting within the course and scope of their employment.*" Through Civ.R. 15(C)'s "relation back" principle, it is also clear that the respondeat-superior claim is not time-barred against Intermed, regardless of whether the employees were named.

II. Relationship of the alleged tortfeasors.

{¶ 43} Because material factual questions exist about the relationship of the alleged tortfeasors to Intermed, I agree that summary judgment was erroneously granted. What record exists about their relation is contradictory at best. On remand, our recent decision in *Tisdale v. Toledo Hosp.*, 6th Dist. No. L-11-1005, 2012-Ohio-1110, should guide the trial court's disposition of that issue.

{¶ 44} As the majority decision discusses, the allegedly negligent acts or omissions relevant here pertain to Joel Retholtz, D.O. and Stanley Orlop, D.O., both Intermed physicians who were named in the amended complaint. Though voluntarily dismissed in May 2010, Jeffrey Blood, D.O., an Intermed internist, had been named in the original complaint. While all are described as "partners" at Intermed, elsewhere they are referred to as "employees." It is unclear whether they were part-owners or co-owners

of this entity or merely subordinate employees working under the control and direction of others at Intermed. Because Retholtz and Orlop appear to be medical professionals who practice in a specialized area and exercise independent judgment, their status as typical medical "employees," such as nurses or technicians, is doubtful.[3] That doubt, however, would not preclude the parties from offering evidentiary submissions, admissible on summary judgment, to resolve the issue.

{¶ 45} If in fact Retholtz and Orlop are partners or co-owners, and not employees, then they would be analogous to attorney Richard Wuerth, the alleged malpractitioner at the heart of the much-debated *Wuerth* case. In relation to his law firm, Lane Alton, Wuerth was *neither* an employee *nor* an independent contractor, but a partner and part-owner. Accurately identifying the tortfeasor's *relationship* to the entity against which imputed liability is sought is critical, for it dictates which joinder/naming rule applies, as we explained in *Tisdale*.[4]

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[3] Yet that is not invariably the case even with physicians. As discussed below, in *State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas*, 126 Ohio St.3d 198, 2010-Ohio-3299, 931 N.E.2d 1082, the alleged tortfeasor, Dr. Temesy-Armos, was identified as a "private *employee*" of a medical corporation and was treated as such in the court's analysis of the corporation's amenability to a respondeat-superior claim. *See id*. at ¶ 3.

[4] If the alleged tortfeasor is genuinely an employee, then the disjunctive pleading rule of respondeat superior would apply, and the employee need not be named in an otherwise timely complaint asserting that theory against the employing entity. *Id.* at ¶ 14-15. If the alleged tortfeasor is an independent contractor (e.g., a physician to whom the hospital has extended privileges by contract), then the conjunctive pleading rule of *Comer's* agency-by-estoppel would apply, and the contractor would have to be timely named along with the entity. *Tisdale* at ¶ 18, citing *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E. 2d 712, ¶ 28-29. *Wuerth* disturbed neither of these derivative doctrines of vicariously liability. *Tisdale* at ¶ 25-27. But if the alleged tortfeasor is not either of the former, because he owns (or partially owns) the entity, then to this third category *Wuerth*

III. *Henry v. Mandell-Brown* is inapposite.

The joinder/naming requirement, however, is distinct from whether - in the case of an employee - the complaint in the first instance has even *properly pled* recovery under respondeat superior. Because paragraph nine of the Dinges' amended complaint timely and adequately alleged a respondeat-superior claim against Intermed, that fact distinguishes *Henry v. Mandel-Brown, M.D.* 1st *Dist.*, No.C-090752, 2010-Ohio-3832. In *Henry*, the first complaint was filed pro se. It did not assert a respondeat-superior claim against the entity, a plastic-surgery firm, nor was the surgeon named. The complaint was later dismissed. Some 22 months after the one-year statute expired, a second (attorney-drafted) complaint was filed. This complaint alleged medical malpractice and negligence, named the surgeon and the firm, *and* contained a respondeat-superior claim against the firm. The First Appellate District, predictably, found all the claims barred. Thus, *Henry* does not aid Intermed's position here. Indeed, in *Tisdale* we likewise rejected Toledo Hospital's attempted reliance on *Henry*, because the Tisdale's complaint had timely asserted negligence against the hospital under respondeat superior for the allegedly injurious omissions of its nurses. *Id.* at ¶ 30-32. Just as *Henry* was not factually persuasive authority for *Tisdale*, so it is not for this case. The only similarity between this case and *Henry* is that the named entities are not hospitals. But that is a

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appears to have extended *Comer*, and he would need to be named as well. And although attorney Wuerth *had* been named in the federal district court complaint for legal malpractice, he was not *timely* named under the parameters of Ohio's *Zimmie* test for determining the accrual of a legal malpractice claim. *See*. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 540 F.Supp.2d 900, 911 (S.D.Ohio 2007).

similarity without substance. The *type* of employing entity matters not; what matters is the *relationship* of the alleged tortfeasor to the entity.[5]

IV. *Sawicki* ignores *Wuerth*.

{¶ 46} The majority cites, and the parties have argued, *State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas.* In my view, *Sawicki's* affirming treatment of the respondeat-superior doctrine demonstrates that its vitality as a vicarious theory continues in the post-*Wuerth* era. On this issue *Sawicki* is fully consistent with *Tisdale* and with decisions, after *Wuerth*, from the First, Second, Seventh and Ninth Appellate Districts.[6]

{¶ 47} In *Sawicki*, the patient's medical-malpractice complaint named as defendants the doctor, Temesy-Armos, and his employer, "Associated Physicians of MCO, Inc." The complaint also asserted respondeat-superior liability against Associated,

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[5] Worse, the status of the tortfeasor-surgeon in *Henry*, Dr. Brown, and his relation to the plastic-surgery firm, was not entirely clear. In ¶ 7 of the opinion, he is described as "*contractually connected* to the surgery center as its chief executive officer and statutory agent." By being "contractually connected," Dr. Brown was perhaps an independent contractor serving as the entity's "chief executive officer" rather than a medical "employee." *Compare infra, State ex rel. Sawicki*, 126 Ohio St.3d 198, 2010-Ohio-3299, 931 N.E.2d 1082, ¶ 3. If true, and given that the one-year period within which to name him had long expired, the First District simply could have applied *Comer's* pleading rule and not discussed *Wuerth* at all. However, because Dr. Brown's status is uncertain, *Henry* cannot be relied on for that reason as well.

[6] *See, Tisdale* at ¶ 33; *Meehan v. AMN Healthcare, Inc*., 1st Dist. No. C-110442, 2012-Ohio-557, ¶ 11; *Stanley v. Community Hosp.*, 2d Dist. No. 2010-CA-53, 2011-Ohio-1290; *Cope v. Miami Valley Hosp*., 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034 (2d Dist.); *Taylor v. Belmont Community Hosp*., 7th Dist. No. 090BE30, 2010-Ohio-3986. *Henik v. Robinson Mem. Hosp*. 9th Dist. No. 25701, 2012-Ohio-1169, ¶ 18-19. And as we noted in *Tisdale*, the Eighth Appellate District reached essentially the same conclusion in a pre-*Wuerth* case. *See, Van Doros v. Marymount Hosp*., 8th Dist. No. 88106, 2007-Ohio-1140, ¶ 20-22. *See Tisdale* at, fn 7.

which was not a hospital, but "a private [medical] corporation," similar to Intermed here. *Id.* ¶ 2. Dr. Temesy-Armos' employment status was not in dispute; in fact, at ¶ 3 of the opinion he is identified as "a private employee of Associated." While treating the patient, Dr. Temesy-Armos was also a state employee at the Medical College of Ohio. In effect, he was a "dual status" employee. *Id.* ¶ 7. The complaint, however, did not name the state hospital as a party. *Id.* ¶ 2-3.

{¶ 48} *Sawicki's* direct holding rejected Associated's argument that because the doctor had statutory immunity as a public employee, it could not be held liable under a respondeat-superior theory. Regarding the claimed effect of the doctor's *immunity* on Associated's *liability*, the Supreme Court stated tersely: "No reasonable purpose is served by requiring litigants *with respondeat superior claims against a private employer* to first have the Court of Claims determine the employee's immunity as a state employee *when that determination is immaterial to the private employer's vicarious liability*." (Emphasis added.) *Id.* at ¶ 21. Further, "[a] determination of immunity *is not a determination of liability*," and therefore the fact that an employee has an immunity defense to suit does not bar "an employer's liability *under respondeat superior."* (Emphasis added.) *Id.* at ¶ 29.

{¶ 49} With the immunity issue aside, the *Sawicki* Court then identified and affirmed the basic tenet of respondeat-superior that even without the employee, "the doctrine * * * operates by imputing to the employer *the acts of the tortfeasor*, not the tortfeasor's liability." (Emphasis added.) *Id.* at ¶ 28. But whether he names the

employee or not, the plaintiff's evidentiary burden under respondeat superior still remains: the employee's tortious acts must be *proven* - in *Sawicki,* the claimed malpractice by Dr. Temesy-Armos. Hence, we find *Sawicki* stating: "*if* Temesy-Armos *has* committed tortious acts, [despite his immunity] the conduct itself remains actionable" against his employer. (Emphasis added.) *Id.* at ¶ 29.

{¶ 50} As we held in *Tisdale,* "[e]stablishing the agent's active liability in tort is always a prerequisite to reaching the principal's passive liability. The latter is necessarily dependent on proving the former." *Id*. at ¶ 27. *See also, Pretty v. Mueller*, 132 Ohio App.3d 717, 725, 726 N.E.2d 503 (1st Dist.1997) (Jury verdict "finding Dr. Mueller not negligent * * * likewise absolved [his medical employer and principal] of liability.") Proof of the employee's negligence is a predicate *evidentiary requirement* for the plaintiff to reach the employer - whose liability is secondary (or passive) - the same *as if* the plaintiff had sued the employee alone. It does *not* mean that the tortfeasor-employee must be *named* in an otherwise timely suit against the employer for imputed negligence under respondeat-superior. *Henik, supra,* at ¶ 19. Given the doctrine's disjunctive pleading rule, the *Sawicki* plaintiff *could* name the employee-doctor (as he did), but was not *required* to do so. *See Cope, supra,* at ¶ 18. ("Claims for the negligence of a hospital's *employee* * * * are still governed by the law of respondeat superior and indeed *Wuerth* acknowledges that a plaintiff *may sue* a master, *or* servant, *or* both." Emphasis added.)

{¶ 51} Finally, it bears observing that *Sawicki, a medical malpractice case*, was decided slightly less than one year after *Wuerth* - now the proverbial white elephant lumbering across the landscape of medical malpractice lawsuits and appeals. Yet nowhere in the majority opinion is *Wuerth* ever mentioned. It is quite improbable that the parties did not argue *Wuerth* in their briefs and even more so that *Sawicki's* authoring justice and those joining her were somehow unaware of it. This *sub silentio* treatment is significant, for it further indicates that *Wuerth* neither defines the present contours of respondeat superior nor is it controlling precedent for negligence suits arising in the medical *employer-employee* context.

{¶ 52} Accordingly, I concur in finding the assigned error well-taken, reversing the trial's summary judgment dismissing Intermed and remanding this case for further proceedings consistent with *Tisdale.*