

Ms. Scipp underwent surgery on December 11, 2018.⁵ While showing initial signs of recovery, during the latter part of December of 2018 and throughout January of 2019 Ms. Scipp began to experience persistent pain and redness around the surgical incision site, with swelling and drainage that increased over time both in frequency and duration.⁶ She called the office of Dr. DiSimone several times in January of 2019 reporting her physical condition and trying, unsuccessfully, to schedule an appointment.⁷ During one of these phone conversations she spoke with Marc Galin, certified registered nurse practitioner (“CRNP”), describing the condition of her knee and telling CRNP Galin that she believed the knee to be infected. She requested that CRNP Galin schedule an appointment with Dr. DiSimone and prescribe antibiotics to treat the infection.⁸ CRNP Galin purportedly told Ms. Scipp that an appointment would not be necessary, that her condition was a common post-surgical occurrence, and that she would make a full recovery with time.⁹

Ms. Scipp’s condition, however, merely worsened, and she made several additional unsuccessful attempts to schedule a follow-up appointment.¹⁰ In late January 2019, Ms. Scipp saw a cardiologist and showed him the condition of her knee.¹¹ The cardiologist then called Dr. DiSimone’s office and spoke with CRNP Galin, informing him that Ms. Scipp should be seen promptly for follow-up treatment as it appeared she had developed a serious infection in her left knee.¹² CRNP Galin only then arranged an office appointment with Dr. DiSimone, also eventually prescribing an antibiotic on January 31, 2019.¹³ At the office appointment, held on February 4, 2019, Dr. DiSimone examined Ms. Scipp’s left knee and found it inflamed and emitting discharge.¹⁴ On February 5, 2019, Dr. DiSimone performed a follow-up procedure that involved incising, draining, and cleaning the infected knee, with the incision then sutured closed.¹⁵ Ms.

⁵ Complaint ¶ 43.

⁶ See Complaint ¶¶ 45-50.

⁷ Complaint ¶ 51.

⁸ Complaint ¶ 52.

⁹ Complaint ¶ 53.

¹⁰ Complaint ¶¶ 54-55.

¹¹ Complaint ¶ 56.

¹² Complaint ¶ 57.

¹³ Complaint ¶ 58.

¹⁴ Complaint ¶ 59.

¹⁵ Complaint ¶ 63.

Scipp was discharged in satisfactory condition from the hospital on February 10, 2019, returning to Dr. DiSimone's office on February 18, 2019 for removal of her sutures.¹⁶

However, the pain and swelling in Ms. Scipp's left knee recurred. On March 14, 2019, Dr. DiSimone performed an additional surgery removing the left total knee replacement and infected tissue, and inserting an antibiotic spacer.¹⁷ After Ms. Scipp again reported significant swelling in her left knee post-surgery, on June 4, 2019, Dr. DiSimone, along with two surgical assistants, performed yet another procedure removing the antibiotic spacer.¹⁸

On February 16, 2021, Plaintiff initiated the foregoing medical malpractice action by the filing of a Complaint. The Complaint alleges that delayed and negligently administered treatment exacerbated her preexisting knee issues, and that such treatment has caused her pain and suffering, mental anguish, and a decreased quality of life.¹⁹ On March 11, 2021, the above-captioned Defendants collectively filed Preliminary Objections to the Complaint.

I. Defendants' First Preliminary Objection

Defendants' First Preliminary Objection in the nature of a demurrer under Pa.R.C.P. 1028(a)(4), or in the alternative, a motion for a more specific pleading under Pa.R.C.P. 1028(a)(3), objects to various provisions in the Complaint alleging that Dr. DiSimone and CRNP Galin were negligent not only for their individual conduct, but also vicariously negligent for the actions of their "agents, ostensible agents, servants and employees."²⁰ Defendants aver that Plaintiffs have not identified by name or appropriate description any such agent, ostensible agent, servant, or employee, or pled material facts establishing such parties' negligence.²¹ Defendants contend that:

Although a Court will not dismiss a Complaint asserting the vicarious liability of a defendant hospital or other corporate health care provider for

¹⁶ Complaint ¶¶ 65-66.

¹⁷ Complaint ¶ 76.

¹⁸ See Complaint ¶¶ 100-101.

¹⁹ See Complaint ¶ 109

²⁰ See Preliminary Objections of Defendants Williamsport Regional Medical Center a/k/a UPMC Williamsport, UPMC Susquehanna, UPMC Susquehanna Health System, Susquehanna Health Innovation Center, Susquehanna Health Foundation, Susquehanna Health Orthopedics, Ronald E. DiSimone, M.D., and Marc Galin, CRNP to Plaintiffs' Complaint ("Preliminary Objections") ¶¶ 12-16 (March 11, 2021).

²¹ See Preliminary Objections ¶¶ 19-21.

failure to provide specific employee names, as the Court will presume that such names are either available to the defendant or will be ascertainable during discovery (see, e.g., Estate of Denmark v. Williams, 117 A.3d 300, 306-07 (Pa. Super. 2015)), this presumption is limited to vicarious liability against corporate providers.²²

Indeed, Defendants cite this own Court's unpublished decision in *Hanson v. UPMC Susquehanna, et al.*, No. 19-1095 (Feb. 20, 2020), in support of this proposition.²³ Plaintiffs counter in response that *Hanson*, in addition to being non-precedential, is distinguishable because this Court found in that case that the Complaint "d[id] not plead any facts demonstrating that an agent or employee of Dr. Betz [the physician Defendant] treated Plaintiff."²⁴ Plaintiffs counter that in this matter, the Complaint is sufficiently specific as to enable Defendants to deduce the members of Dr. DiSimone and CRNP Galin's staff with which Judy Scipp had been in contact.²⁵

For the purpose of clarity, this Court's prior decision in *Hanson* should not be read for the proposition that a vicarious liability claim cannot accrue against an individual physician unless specific agents or employees are identified by name in the Complaint. Rather, the *Hanson* opinion stands for the proposition that when a vicarious liability claim is asserted against a physician defendant, the pleadings must first be sufficient to put the defendant on notice as to which negligent actors purportedly acted as the physician's agents. Further, the pleadings must be specific as to the nature of the agent or employees' purportedly negligent conduct, and the pleadings must establish the factors of a principal-agent relationship between the physician and the agents or employees.

There are no facts pled within the Complaint that would establish that CRNP Galin acted in an employer or supervisory role to another party. Further, the Certificate

²² Preliminary Objections ¶ 23.

²³ See Brief in Support of Preliminary Objections of Defendants Williamsport Regional Medical Center a/k/a UPMC Williamsport, UPMC Susquehanna, UPMC Susquehanna Health System, Susquehanna Health Innovation Center, Susquehanna Health Foundation, Susquehanna Health Orthopedics, Ronald E. DiSimone, M.D., and Marc Galin, CRNP to Plaintiffs' Complaint ("Brief in Support of Preliminary Objections") at pg. 4 (March 31, 2020).

²⁴ Plaintiff's Brief in Support of Answer in Opposition to Defendant's Preliminary Objections ("Brief in Opposition to Preliminary Objections") at pg. 5 (June 9, 2021).

²⁵ *Id.*

of Merit filed as to CRNP Galin on March 29, 2021, supports only a direct liability claim. Consequently, there is no basis to sustain a vicarious liability claim against CRNP Galin.

The initial Certificate of Merit filed as to Dr. DiSimone on March 29, 2021 was also limited to direct liability. However, following the filing of Defendants' Preliminary Objections, Plaintiff filed an updated Certificate of Merit as to Dr. DiSimone on April 16, 2021, which supports both direct and vicarious liability claims.

The Complaint identifies various individuals as employees or agents of Dr. DiSimone, including CRNP Galin.²⁶ Other parties named in the Complaint who supported Dr. DiSimone in Ms. Scipp's treatment include, *inter alia*, Abbey Bower, physician assistance ("PA-C"), Robin Krikorian, PA-C, and Marsha Cunningham, registered nurse ("RN").²⁷ The Court can only infer that the unnamed staff member(s) in DiSimone's office with whom Ms. Scipp spoke in January 2019 are also alleged agents or employees of Dr. DiSimone, as Plaintiffs' vicarious liability claim is predicated, in part, on the failure of CRNP Galin and other unnamed staff member(s) to timely schedule a follow-up appointment or prescribe an anti-inflammatory medication.²⁸ That in fact is the fundamental problem with the drafting of Plaintiff's Complaint. Dr. DiSimone should not be left to guess what or whom he is being asked to defend.

However, Plaintiffs' vicarious liability claims are not limited to that basis; indeed, Plaintiffs have drafted every allegation of negligence against Dr. DiSimone as potentially either a direct or vicarious liability claim. For example, under the Complaint Dr. DiSimone may be vicariously liable for "[f]ailing to provide and render reasonable medical care under the circumstances."²⁹ Allegations of vicarious liability of this sort are improper, as they fail to identify what negligent act or omission is at issue, and which negligent actor or class of actors were responsible for the act or omission. In this manner, the Complaint fails to apprise Defendants of the claims asserted.³⁰

²⁶ Complaint ¶ 16.

²⁷ See Complaint ¶¶ 87-88.

²⁸ See Complaint ¶ 121(e)-(f).

²⁹ Complaint ¶ 121(c).

³⁰ *Est. of Swift v. Ne. Hosp. of Philadelphia*, 690 A.2d 719, 723 (Pa. Super. 1997) ("While it is not necessary that the complaint identify the specific legal theory of the underlying claim, it must apprise the defendant of the claim being asserted and summarize the essential facts to support that claim.").

There is also the issue of whether Plaintiffs have properly established an agent-principal relationship. Defendants assert that Plaintiffs have failed to provide factual support, as opposed to mere bald assertions, that Dr. DiSimone retained any employees or agents separable from employees or agents of the hospital at-large.³¹

The Court first notes that an individual may simultaneously be an agent of a physician and an agent of the hospital.³² However, there is a higher standard in establishing a principal-agent relationship between an individual physician and subordinates such as would result in the physician's vicarious liability. For example, "[u]nder Pennsylvania law, nurses employed at a hospital are not agents of the physicians when they act in the normal course of hospital services."³³ There are two recognized exceptions to this rule:

- 1) [U]nder the "Captain-of-the-Ship" doctrine, a surgeon may be held liable for the negligent acts committed during the course of the procedure of operating room personnel who are under his immediate control. . .and
- 2) the physician is in control of the nurse by virtue of his physical presence in the room while treatment is being administered, or he actually employs the nurse and has the right to discharge her.³⁴

The Court believes that the latter principal could in theory also apply to receptionists or other administrative staff. However, there is no assertion of facts within the pleadings that Dr. DiSimone supervised or directed CRNP Galin or other staff members as to the scheduling of Ms. Scipp's first follow-up appointment or in the prescribing of anti-inflammatory medication. Nor are there any well-pled facts that Dr. DiSimone had individual hiring or firing authority over any of the staff in his office. Therefore, the Court finds that there is no *prima facie* case of Dr. DiSimone's vicarious liability for the failure of CRNP Galin or other staff to timely schedule a follow-up appointment or prescribe anti-inflammatory medication.

³¹ See Brief in Support of Preliminary Objections at pgs. 3-4.

³² See Pa. SSJI (Civ), §14.60 (2020).

³³ *Tiburzio-Kelly v. Montgomery*, 681 A.2d 757, 772 (Pa. Super. 1996), superseded on other grounds by statute as stated in *Haddad v. Gopal*, 787 A.2d 975 (Pa. Super. 2001) (citing *Muller v. Likoff*, 310 A.2d 303 (Pa. Super. 1973)).

³⁴ *Tiburzio-Kelly v. Montgomery*, 681 A.2d 757, 772 (Pa. Super. 1996), superseded by statute on other grounds as stated in *Haddad v. Gopal*, 787 A.2d 975 (Pa. Super. 2001).

There is also an allegation that Dr. DiSimone was negligent in his performance of the June 4, 2019 knee replacement revision surgery,³⁵ where he was assisted by CRNP Galin and Tanya Marie, certified surgical technologist (“CST”).³⁶ Under the “Captain-of-the-Ship” doctrine, Plaintiffs could assert a vicarious liability claim against Dr. DiSimone for the purported negligence of his assistants, CRNP Galin or CST Marie, in performing the knee revision surgery. However, again the Complaint must be more clearly drafted to apprise Defendants of this specific claim. Pursuant to the foregoing, Defendants’ First Preliminary Objection is SUSTAINED.

II. Defendants’ Second Preliminary Objection

Defendants’ Second Preliminary Objection in the nature of a demurrer, or in the alternative, a motion for a more specific pleading, raises *Connor* objections to purportedly “general, vague, and boilerplate” allegations of negligence in the Complaint.³⁷ Defendants specifically object to paragraph 121 (a), (c), (d), (l), 132 (a), (c), (d), (l), and 144 (d), (e), (f), (i). Plaintiffs assert in response that to determine whether a particular averment is pled with sufficient specificity, the averment must be read in conjunction with all other averments in the Complaint. Plaintiffs contend that the eighty-six paragraph factual recitation within the Complaint is more than sufficient to place Defendants on notice.³⁸

Paragraph 121 falls under the Count I Negligence claim against Dr. DiSimone. In relevant part, this provision asserts that Dr. DiSimone was negligent for:

- (a) Failing to conform to the requisite standard of medical care;
- (c) Failing to provide and render reasonable medical care under the circumstances;
- (d) Failing to perform a complete and thorough investigation;
- . . .
- (l) Substantially increasing the risk of harm to the Plaintiff.³⁹

Paragraph 132 falls under the Count III Negligence claim against CRNP Galin. The objected to provisions are effectively identical as those previously cited. The Court

³⁵ Complaint ¶ 121(g).

³⁶ Complaint ¶ 101(c).

³⁷ See *Connor v. Allegheny Gen. Hosp.*, 461 A.2d 600 (Pa. 1983).

³⁸ See Brief in Opposition to Preliminary Objections at pg. 6.

³⁹ Complaint ¶ 121(a), (c)-(d), (g).

is in accord with Defendants that the cited provisions in paragraphs 121 and 132 are “boilerplate” allegations, too general to apprise Defendants of the scope of Plaintiffs’ claims. These provisions could also be amplified to allow Plaintiffs to add new causes of action past the expiration of the statute of limitations, as occurred in *Connor*.

Paragraph 144 falls under the Count V Corporate Negligence claim against Defendants Williamsport Regional Medical Center a/k/a UPMC Williamsport, UPMC Susquehanna, UPMC Susquehanna Health System, Susquehanna Health Innovation Center, and Susquehanna Health Foundation. The objected to provisions provide that these corporate entities were negligent for:

- (d) Failure to formulate, adopt, and/or enforce adequate rules and policies to ensure appropriate supervision of medical trainees and other medical personnel and health care workers by attending physicians;
- (e) Failure to use reasonable care to maintain safe and adequate facilities and equipment for patients such as Judy Scipp; []
- (f) Failure to promptly oversee and supervise Judy Scipp’s care providers in their treatment and management of her medical condition, and post-operative care and treatment;

...

- (i) The corporate Defendants knew of should have known of the breach of its duties as aforesaid which breach was a substantial factor in bringing about the further harm, damages and injuries to Judy Scipp.⁴⁰

The Court likewise finds that provisions 144(d) and (f) also require greater specificity in pleading. Provision 144(e) is similarly overbroad; further, there are no allegations in the Complaint suggesting that the facilities or equipment used in Ms. Scipp’s procedure were inadequate. However, provision 144(i) merely asserts Defendants’ actual or constructive knowledge of their breach of duties. The Court does not find this objectionable. Therefore, Defendant’s Second Preliminary Objection is SUSTAINED as to paragraph 121 (a), (c), (d), (l), 132 (a), (c), (d), (l), and 144 (d), (e), (f). It is OVERRULED as to paragraph 144(i).

Plaintiffs shall have twenty (20) days from the date of this Order to file an Amended Complaint remedying the deficiencies in the Complaint.

⁴⁰ Complaint ¶¶ 132(d)-(f), (i).

IT IS SO ORDERED this 23rd day of July 2021.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

cc: Brian J. Bluth, Esq.
835 W. 4th St., Williamsport, PA 17701
John R. O'Rourke, Jr., Esq.
11 E. Airy St., Norristown, PA 19401
Gary Weber, Esq. / Lycoming Reporter