IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PATRICIA CUNEO,	:	No. 21-0717
Plaintiff	:	
vs.	:	CIVIL ACTION – LAW
	:	
UPMC et al.,	:	
Defendants	:	

OPINION AND ORDER

AND NOW, after argument held on November 12, 2021 on Defendants' Preliminary Objections, the Court hereby issues the following OPINION and ORDER.

BACKGROUND

A. Complaint

Plaintiff commenced this case by filing a Complaint on July 20, 2021 against UPMC, a number of related corporate defendants (collectively the "Corporate Defendants") and Defendant Sean T. MacMillen ("MacMillen"). Plaintiff alleges she was diagnosed with bipolar disorder in 1996, and began working for UPMC as a nurse anesthetist in 2017. In June of 2018, she began experiencing a severe depressive episode, and sought assistance from UPMC's Employee Assistance Program to procure counseling. Plaintiff alleges UPMC referred her to MacMillen, an employee of UPMC or one of the other Corporate Defendants, for mental health counseling. Plaintiff contends that, over time, "MacMillen used his position as Plaintiff's counselor to become close to her during counseling appointments," ultimately culminating in repeated sexual encounters beginning in July of 2019 and continuing for a number of months. Plaintiff alleges that MacMillen "maintained control over Plaintiff by threatening to report Plaintiff's mental health condition to the Pennsylvania Department of State's Bureau of Professional Occupation Affairs if she

told anyone about their sexual relationship." Subsequently, Plaintiff alleges, due to "MacMillen's inappropriate sexual relationship with her," her mental health deteriorated and she began harming herself, ultimately requiring inpatient mental health treatment. Plaintiff alleges she reported MacMillen's conduct to UPMC in December 2019, at which time he was fired, and that MacMillen was ordered to "permanently voluntarily surrender his LPC license" in July 2020.

Plaintiff's Complaint includes two counts: Count One – Negligence (against all Defendants); and Count Two – Negligent Hiring, Retention, and Supervision (against the Corporate Defendants).

B. Preliminary Objections

On September 2, 2021, the Corporate Defendants filed Preliminary Objections to the Complaint. The Corporate Defendants' first preliminary objection was in the nature of a motion to strike for insufficient specificity or, in the alternative, a motion for a more specific pleading.[1] Their second preliminary objection was in the nature of a motion to strike "averments regarding actual agents, apparent agents, servants, volunteers and/or employees, in addition to other patients" for lack of sufficient specificity.[2] Their third preliminary objection was in the nature of a motion to strike references to "grossly negligent, careless, wanton or reckless conduct."[3]

On September 13, 2021, MacMillen filed Preliminary Objections to the Complaint. MacMillen's sole preliminary objection asks the Court to strike

[1] Pa R.C.P. 1028(a)(3) permits a preliminary objection for "insufficient specificity in a pleading."
[2] *Id.*
[3] Pa R.C.P. 1028(a)(2) permits a preliminary objection for "failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter."

Paragraphs 51(a) and (d) from the Complaint for lack of specificity or, in the alternative, require Plaintiff to file an Amended Complaint with more specific pleadings.[4]

ANALYSIS

A. Corporate Defendants' First Preliminary Objection

1. Argument

In their first preliminary objection, the Corporate Defendants cite a number of paragraphs of the Complaint that they contend are insufficiently specific, constituting bald conclusions without adequate factual support. The Corporate Defendants first take issue with Paragraph 55 of the Complaint, which alleges that they "had an obligation, the authority, opportunity, and duty to monitor and control the conduct of MacMillen, and were reasonably aware or should have been aware of the need for such control." The Corporate Defendants argue "Plaintiff must allege facts to support the allegation that the defendants knew or should have known of the need to monitor and control MacMillen," but allege that no such facts have been pled.[5] The Corporate Defendants additionally argue that the multiple allegations in the Complaint that Defendants breached their duties to Plaintiff by "other negligent actions and omissions that may be disclosed through the course of discovery" are impermissibly vague.[6]

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[4] Pa. R.C.P. 1028(a)(3).
[5] Corporate Defendants' Brief, p.5.
[6] In their brief, the Corporate Defendants cite *Connor v. Allegheny General Hospital*, 461 A.2d 600 (Pa. 1983) for the general proposition that a defendant who fails to challenge alleged insufficient allegations "waives any argument against late amplification of indefinite allegations."

In response, Plaintiff first noted that references to "other negligent actions and omissions that may be disclosed through the course of discovery" were intended merely to preserve Plaintiff's ability to introduce facts not yet known but which would be learned through discovery.

With respect to allegations that the Corporate Defendants "were reasonably aware or should have been aware of the need" for monitoring and controlling the conduct of MacMillen, Plaintiff contends this duty arose not out of any specific incidents, but rather out of the nature of how MacMillen began treating Plaintiff. Unlike a typical situation in which a member of the public presents to a health care provider for treatment, Plaintiff was an employee of UPMC, sought mental health treatment through UPMC's Employee Assistance Program, and was directly referred to MacMillen by her employer. These circumstances, Plaintiff argues, support a heightened responsibility for the Corporate Defendants to ensure that their implementation of the Employee Assistance Program was providing Plaintiff with competent care, rather than resulting in great harm through the actions of the provider to whom the Corporate Defendants chose to refer Plaintiff.

At argument, the Corporate Defendants raised a threshold concern, suggesting the Complaint is not entirely clear as to whether Plaintiff's claims against the Corporate Defendants sound in corporate negligence or vicarious liability. A claim against a hospital for corporate negligence is a claim that the hospital has violated "a nondelegable duty which the hospital owes directly to [the] patient."[7] A claim for vicarious liability, on the other hand, arises from the well-settled principal

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[7] *Thompson v. Nason Hosp.*, 591 A.2d 703, 707 (Pa. 1991).

that "an employer is vicariously liable for the negligent acts of [its] employee which cause injuries to a third-party, provided that such acts were committed during the course of and within the scope of the employment."[8]

According to the Corporate Defendants, allegations in the Complaint that allege a breach of a duty to "monitor and control," for instance, seem to suggest a theory of corporate negligence. The Corporate Defendants note, however, that on August 27, 2021, Plaintiff filed a Certificate Of Merit against the Corporate Defendants, certifying that "the claim that [the Corporate Defendants] deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard…."[9] Thus, the Corporate Defendants understood this to mean Plaintiff's claim was for vicarious liability only. Ultimately, the Corporate Defendants argue that, if any portions of the Complaint are construed as presenting corporate negligence claims, they are not supported by sufficient facts and should be disallowed due to the absence of an appropriate certificate of merit; if the Complaint is construed as bringing vicarious liability claims against the Corporate Defendants, these are not pled at all, or, at best, are pled with insufficient specificity.

At argument, counsel for Plaintiff indicated that the nature of the claims against UPMC were intended to sound in corporate negligence, rather than vicarious liability. Counsel for the Corporate Defendants, at that point, moved for outright dismissal of the case against the Corporate Defendants, arguing that the certificate of

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[8] *Valles v. Albert Einstein Medical Center*, 758 A.2d 1238, 1244 (Pa. Super. 2000).

[9] *See* Pa. R.C.P. 1042.3(2). Rule 1042.3 and the Certificate of Merit requirement is addressed in detail *infra*.

merit only allowed Plaintiff to bring vicarious liability claims, which counsel had just admitted were not in the Complaint.

2. Analysis of Threshold Issue: Corporate Negligence vs. Vicarious Liability

Beyond their oral request for dismissal, the Corporate Defendants have implicitly argued that the proper resolution of their first preliminary objection may be different depending on the nature of Plaintiff's claim. If the claim sounds in corporate negligence, the Corporate Defendants argue, Plaintiff's allegations that the Corporate Defendants breached their duty to "monitor and control" MacMillen may be relevant, but do not have a basis in law and are not supported by sufficient facts pled in the Complaint. If the claim sounds in vicarious liability, however, the same allegations may be wholly irrelevant, and it would thus be unnecessary to even reach a discussion of their legal and factual merits. For this reason – and to address the Corporate Defendants' request for dismissal – the Court must first address the threshold question of whether Plaintiff's claims may proceed under theories of vicarious liability, corporate negligence, both, or neither. This requires a review of Pennsylvania's certificate of merit requirement.

In any "action based upon an allegation that a licensed professional deviated from an acceptable professional standard," the plaintiff must file a certificate of merit "within sixty days after the filing of the complaint…."[10] A certificate of merit must be signed by the attorney (or party) and indicate that either:

> "(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work

[10] Pa. R.C.P. 1042(a).

> that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
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> (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or
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> (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of this claim."[11]

The failure to file a certificate of merit when one is required allows an adverse party to obtain a judgment of non pros.[12] A party seeking to obtain such a judgment must file written notice of its intention to do so.[13] A party filing written notice may do so as early as the thirty-first day after the filing of the Complaint, but a judgment of non pros may not be entered until the sixty-first day.[14]

The note to Rule 1042.3(a)(2) explains that a certificate of merit indicating that "the claim… is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard" is intended "to ensure that a claim of vicarious liability made against a defendant is supported by a certificate of merit."[15] By its plain terms, a Rule 1042.3(a)(2) certificate of merit "is to be used only when the defendant has 'solely' a vicarious liability claim."[16] A plaintiff alleging vicarious liability for the acts of an employee must

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[11] Pa. R.C.P. 1042.3(a)(1)-(3).
[12] Pa. R.C.P. 1042.7.
[13] Pa. R.C.P. 1042.6(a).
[14] *See id*.
[15] Pa. R.C.P. 1042.3(a)(2), *note*.
[16] *Kennedy v. Butler Memorial Hosp.*, 901 A.2d 1042, 1047 (Pa. Super. 2006). In *Kennedy*, the plaintiff brought claims for both direct negligence and vicarious liability against the defendant hospital. The Superior Court concluded that it was appropriate for the plaintiff to file a certificate of merit under the Rule 1042.3(a)(1) subsection, because the claim was not "solely" one of vicarious liability, which is a prerequisite to the filing of a Rule 1042.3(a)(2)

still file a separate Rule 1042.3(a)(1) certificate of merit for the employee, indicating that "an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm."[17]

Here, Plaintiff filed a Rule 1042.3(a)(1) certificate against MacMillen on August 27, 2021. Plaintiff filed a separate certificate of merit against the Corporate Defendants on August 27, 2021, which reads:

> "I, Richard M. Serbin certify that:
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> That the claim that this defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard and an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by the other licensed professionals in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm."

It is clear that Plaintiff's certificate of merit is a Rule 1042.3(a)(2) certificate of merit, which may only be used when the claim "is based solely on" allegations of vicarious liability. This certificate of merit is plainly insufficient to support allegations of corporate negligence against the Corporate Defendants. Plaintiff has obtained a

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certificate. Notably, the Court held that "considering the detailed nature of [the plaintiff's] amended complaint, even were the wrong subsection listed, a timely certificate of merit was in fact filed, and the hospital certainly would know that the certificate referred to the actions of its employees and would not be prejudiced" by the failure to file a separate Rule 1042.3(a)(2) certificate clarifying that plaintiff was bringing a vicarious liability claim.

[17] *Id.*

statement from a licensed professional that MacMillen has violated the professional standard of care owed to the Plaintiff, and Plaintiff has obtained a statement from a licensed professional that her claim against the Corporate Defendants is solely based on MacMillen's deviation from that standard of care. Plaintiff has not obtained – and did not obtain within the 60-day time period dictated by Rule 1042.3 – a statement from a licensed professional that the Corporate Defendants *themselves* violated any direct duty of care owed to Plaintiff.

Plaintiff's certificate of merit filed against the Corporate Defendants, then, is insufficient to support a corporate negligence claim. The question is what remedy is appropriate.

Pennsylvania courts have, at times, excused minor non-compliance with the certificate of merit rules when the party has substantially complied with the requirements.[18] A failure to file a certificate of merit cannot be excused, however, even if the plaintiff has provided the defendant with a full expert report in support of the relevant claim.[19]

The Court holds that Plaintiff has not substantially complied with the certificate of merit requirements with regard to *corporate negligence* claims; rather, she has entirely failed to file the Rule 1042.3(a)(1) certificate of merit that would be required to

[18] *See Womer v. Hilliker*, 908 A.2d 269, 276 (Pa. 2006). In *Womer,* the Supreme Court of Pennsylvania noted that although "Rule 1042.3 itself sets forth no exceptions, equitable or otherwise," the directives of Rule of Civil Procedure 126 that "[t]he rules shall be liberally construed" and "[t]he court… may disregard any error or defect of procedure which does not affect the substantial rights of the parties" would allow, in certain circumstances, courts to overlook minor procedural defects in the filing of certificates of merit.
[19] *Id.* at 278.

support such claims.[20] Plaintiff was required to file necessary certificates of merit within 60 days of the filing of the Complaint – that is, by September 20, 2021 – but based on the clear language of the certificate of merit the Corporate Defendants believed Plaintiff was only bringing a vicarious liability claim until argument on November 12, 2021.

The Corporate Defendants have requested an outright dismissal of all claims against it, arguing that – based on the certificate of merit – corporate negligence claims cannot be brought, and – based on counsel's remark at argument – vicarious liability claims cannot be brought. The Court holds that counsel's telephonic remark, off the record, that Plaintiff did not intend to bring vicarious liability claims cannot carry such force as to forever preclude Plaintiff from bringing such claims, especially when they have some support in the Complaint and a licensed professional has supplied an appropriate certificate of merit.[21] Thus, the Court will strike from the Complaint any claims for corporate negligence, but will allow Plaintiff to amend her Complaint to state with specificity a claim for vicarious liability against the Corporate Defendants.

3. Analysis of First Preliminary Objection

"Pennsylvania is a fact-pleading state. To be legally sufficient, a complaint must not only give the defendant notice of what the plaintiff's claim is and the

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[20] *See*, *e.g.*, *Monger v. Encompass Health Rehabilitation Hospital of Reading, LLC et al.*, 2022 WL 402949 (Pa. Super. Feb. 10, 2022) (unpublished).

[21] As counsel for the Corporate Defendants noted, the Complaint seemed to bring mixed claims of corporate negligence and vicarious liability.

grounds upon which it rests, but the complaint must also formulate the issues by summarizing those facts essential to support the claim."[22]

The Court agrees with the Corporate Defendants that references to "other negligent actions and omissions that may be disclosed through the course of discovery" are insufficiently specific and must be stricken from the Complaint. Should discovery reveal previously unknown additional facts supporting Plaintiff's allegations, these may of course be used as evidence of Plaintiff's existing theories of liability. As presently written, however, these references in the Complaint are broad enough to allow not just the introduction of evidence obtained through discovery, but to arguably allow the introduction of entirely new theories of negligence after the pleading stage. By definition, a complaint cannot satisfy Pennsylvania's requirement of "summarizing those facts essential to support" the underlying claim if that claim has not been discovered.

Similarly, the Court agrees that Plaintiff has not pled sufficient facts to suggest that the Corporate Defendants "were reasonably aware or should have been aware of the need" to control the conduct of MacMillen. As noted above, Plaintiff essentially argues this awareness arose not out of any specific conduct but by virtue of the nature of the relationship between MacMillen, Plaintiff, and the Corporate Defendants as a matter of law. At argument, Plaintiff elaborated that, due to this relationship and the fact that Plaintiff was referred to MacMillen as part of the Employee Assistance Program, the Corporate Defendants should have checked in on Plaintiff, and had a heightened responsibility to determine whether anything untoward was occurring.

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[22] *Catanzaro v. Pennell*, 238 A.3d 504, 507 (Pa. Super. 2020) (internal quotations and citations omitted).

This is not clear from the face of the Complaint, and thus the allegation that the Corporate Defendants "were… aware or should have been aware" of this duty is insufficiently pled. This allegation may not remain relevant in light of the Court's ruling that only a vicarious liability theory may proceed; if Plaintiff retains this allegation, however, she must explicitly plead facts – or at least the legal theory – upon which the Corporate Defendants' awareness of the need to monitor MacMillen, or duty to be aware of that need, is based, and further how that duty fits into a theory of vicarious liability.

B. Corporate Defendants' Second Preliminary Objection

The Corporate Defendants' second preliminary objection is to allegations of "the negligent, grossly negligent, careless and/or reckless conduct of defendants, and their actual or apparent agents, servants, volunteers and/or employees, including, but not limited to, MacMillen…." The Corporate Defendants described this as a classic example of the type of vague pleading forbidden by *Connor v. Allegheny*,[23] and further cited *Rachlin v. Edmison*[24] as an example of what is required when a plaintiff wishes to hold a corporate defendant responsible for the acts of its agents.

In *Rachlin v. Edmison*, the plaintiff, complaining of failed laser eye surgery, named Dr. Edmison, Dr. Prince, Focus Eye Centre, Tri-County, and 20/20 Laser Centers as defendants; she did not name Dr. White, who was 20/20 Laser Centers' co-managing optometrist, as a defendant, and the focus of the complaint was

[23] *See note 6, supra*.
[24] *Rachlin v. Edmison*, 813 A.2d 862 (Pa. Super. 2002).

directed at care performed by Dr. Prince.[25] During discovery, Dr. White was deposed, but he was unrepresented and was led to believe the eye care he provided to the plaintiff many months prior to Dr. Prince's care was not at issue, except as it pertained to the plaintiff's medical history.[26] Approximately two years after she commenced the case, the plaintiff produced an expert report alleging for the first time that Dr. White had committed malpractice while providing care to the plaintiff, and sought to hold 20/20 Laser Centers liable for these errors.[27] The court granted 20/20 Laser Centers' motion *in limine* to preclude this expert report, and the testimony of its author, "because his opinions were at variance with the allegations contained in [the plaintiff's] complaint."[28]

On appeal, the Superior Court of Pennsylvania held that the trial court had properly granted the motion *in limine*. The Court noted "[w]hile it is unnecessary to plead all the various details of an alleged agency relationship, a complainant must allege, as a minimum, facts which: (1) identify the agent by name or appropriate description; and (2) set forth the agent's authority, and how the tortious acts of the agent either fall within the scope of that authority, or if unauthorized, were ratified by the principal."[29] Noting "[i]t is well settled that a variance between the pleadings contained in a plaintiff's complaint and the theory the party later attempts to prove at trial may result in preclusion of the new theory if it constitutes a new cause of action and is prejudicial to the defense," the Court concluded that the plaintiff's second

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[25] *Id*. at 864-65.
[26] *Id*. at 865-66.
[27] *Id*. at 866-67.
[28] *Id*. at 867.
[29] *Id*. at 870 (quoting *Alumni Association v. Sullivan*, 535 A.2d 1095, 1100 n.2 (Pa. Super. 1987)).

expert report "set[] forth a new cause of action based upon… care rendered by a non-party physician" and thus prejudiced 20/20 Laser Centers "to such a degree that the motion to preclude" was properly granted.[30]

Plaintiff responds that this case is not like *Rachlin*, but instead is similar to *Estate of Denmark v. Williams*.[31] In *Denmark*, the decedent suffered a fall while recovering from surgery, which resulted in a cascade of complications and errors ultimately leading to his death.[32] The trial court struck "all allegations of vicarious liability against the [corporate] entities for the acts of 'unidentified agents, servants, employees, attending physicians, nursing staff, other support staff, administrators, boards and committees.'"[33]

On appeal, the Superior Court first explained that "[s]imply because employees are unnamed within a complaint or referred to as a unit, i.e., the staff, does not preclude one's claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment."[34] The Court noted that the plaintiff's "amended complaint set forth the material allegations of negligence upon which his claims for vicarious liability against

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[30] *Id.* at 871-72.
[31] *Estate of Denmark v. Williams*, 117 A.3d 300 (Pa. Super. 2015).
[32] *Id.* at 302. Specifically: "In his amended complaint, [the plaintiff]… alleged that after [a] tracheotomy, Denmark was alert and responsive until… he 'was permitted to either attempt to leave his bed unassisted or fell out of his bed.' His fall resulted in the dislocation of a catheter, and surgery had to be scheduled because the catheter could not be replaced at bedside. According to [the plaintiff], during the surgery, which was performed by Dr. Williams, Denmark's bladder was severely lacerated. [The plaintiff] also alleged that following the surgery, Denmark's care was managed by Drs. Williams and Hallur. Gauze was negligently left in Denmark's body after the surgery was complete and the stitches applied, and blood continued to be present in Denmark's urine. [The plaintiff] contends that as a result of the Defendants' negligence, Denmark developed septic shock and died…."
[33] *Id.* at 304.
[34] *Id.* at 306 (quoting *Sokolsky v. Eidelman*, 93 A.3d 858, 865-66 (Pa. Super. 2014)).

the [corporate] entities were based – including Denmark's fall… the surgery during which his bladder was severely lacerated, the gauze left in the wound… all allegedly resulting in… Denmark's death. While [the plaintiff] did not identify the nurses or doctors allegedly responsible (except for Drs. Williams and Hallur), the names of those who performed services in connection with Denmark's care (as described) are either known to the [corporate] entities or could have been ascertained during discovery."[35] The Court thus held that, when read in context, the amended complaint's "references to 'nursing staff, attending physicians and other attending personnel' and 'agents, servants, or employees' were not lacking in sufficient specificity…."[36]

The primary difference between *Rachlin* and *Denmark* is easy to state. In *Denmark*, the complaint specified exactly which actions were alleged to have been improper, and determining who performed those actions was simply a matter of obtaining the decedent's medical chart during discovery. Thus, the failure to provide the names or precise positions of those who furnished the specified care did not render the pleadings insufficiently specific. In *Rachlin*, by contrast, the amended complaint did not simply omit the names and positions of the employees, but did not describe the specific care that was alleged to have been improper. In that case, the

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[35] *Id.* at 306-07.

[36] *Id.* at 307. Plaintiff also cites *Breslin v. Mountain View Nursing Home, Inc.*, 171 A.3d 818, 829 (Pa. Super. 2017). The Superior Court in *Breslin* held that, because "the Amended Complaint… set forth… [the decedent's] inability to care for himself, his complete reliance upon the staff of [the facility]… and that, while under the care of [the facility's] staff, [the decedent] developed several pressure ulcers on his body," references to "nurses, physicians, resident physicians, fellows, attending physicians, therapists, agents, servants, workers, employees, contractors, subcontractors, and/or staff" were sufficiently specific to plead a cause of action for vicarious liability against the corporate defendants.

plaintiff attempted to use a vague reference to unnamed employees as a hook to introduce a new theory of liability at the eleventh hour, and the court rebuffed that attempt.

Here, a full reading of Plaintiff's Complaint shows that the care and conduct specifically alleged to have been improper was committed by one person – MacMillen. The Complaint alleges, in detailed fashion, specific actions of MacMillen which harmed Plaintiff, and advances the theory that the Corporate Defendants were liable for these actions. The Complaint does not allege with specificity, however, which *actions* were performed by unnamed persons in the employ of the Corporate Defendants, whose identities can be ascertained through discovery by looking at Plaintiff's records and seeing who was responsible. Rather, the nature of the complaints against the Corporate Defendants' "actual or apparent agents, servants, volunteers and/or employees," other than MacMillen, is generalized and is clearly centered in the *corporate* actions of the Corporate Defendants, and not the *treatment or care* rendered to Plaintiff.

The Court will sustain the Corporate Defendants' second preliminary objection, and provide Plaintiff the opportunity to amend her Complaint to either remove the references to unnamed "actual or apparent agents, servants, volunteers and/or employees" other than MacMillen OR to plead with specificity the acts and omissions in the care of Plaintiff that she alleges were committed by those unnamed "actual or apparent agents, servants, volunteers and/or employees."

C. Corporate Defendants' Third Preliminary Objection

The Corporate Defendants' third preliminary objection is to Paragraphs 46, 56, 59, 68 and 69 of the Complaint, and specifically their allegations of "grossly negligent, careless, wanton and/or reckless conduct." The Corporate Defendants aver that the Complaint does not contain any facts sufficient to support allegations beyond bare negligence, and direct this Court to its previous decision in *Sweeting v. Muncy Valley Hospital et al.*[37]

Plaintiff argues her allegation of recklessness and other similarly culpable mental states is supported by the specific factual circumstances of the relationship between Plaintiff and the Corporate Defendants. Plaintiff specifically avers that, because she was an employee of UPMC, informed her employer of her mental health issues, and was referred directly by her employer to MacMillen under the Employee Assistance Program, UPMC's failure to monitor MacMillen and ensure that no harm was occurring can support a finding of "grossly negligent, careless, wanton and/or reckless conduct."

As discussed above, Plaintiff's theory that a special duty arose out the Corporate Defendants' referral of Plaintiff to MacMillen as part of the Employee Assistance Program was not specifically pled. Although Plaintiff avers the Corporate Defendants knew or should have been aware that MacMillen was harming her, at present these are general allegations without factual basis. To demonstrate recklessness, Plaintiff must plead facts that show "a conscious choice of a course of action, either with knowledge of the serious danger to others involved… or with

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[37] CV-20-0624, Order of November 9, 2020.

knowledge of facts which would disclose this danger to any reasonable man."[38] Similarly, gross negligence requires evidence of "'want of even scant care' and an 'extreme departure' from ordinary care."[39] Carelessness and wanton conduct likewise require factual averments beyond ordinary negligence. This Court has repeatedly held that general averments that a party knew of and allowed the misconduct of its employees or agents, unsupported by facts, will result in dismissal. Therefore, the Court will sustain the Corporate Defendants' third preliminary objection. If Plaintiff discovers facts during the course of discovery that support culpability beyond mere negligence, she may move to amend to plead such facts.

D. MacMillen's Preliminary Objection

Defendant MacMillen's sole preliminary objection is to Paragraph 51 of the Complaint, and specifically subparagraphs 51(a) and (d). Paragraph 51(a) alleges that MacMillen breached his duty to Plaintiff by "engaging in behavior that is inappropriate for licensed mental health professionals." Paragraph 51(d) alleges a breach for "causing plaintiff to suffer physical and emotional injuries as a result of MacMillen's behavior." MacMillen argues that, under *Connor*, these allegations are so vague as to allow for later amplification of the causes of action.

Plaintiff responds that, read as a whole, the Complaint specifies the conduct alleged to have violated MacMillen's duty to Plaintiff. Specifically, Plaintiff notes that Paragraph 49 of the Complaint specifies four different statutory duties licensed professional counselors owe to their patients, and Paragraph 50 alleges "[t]hese duties were required of MacMillen in order to ensure that his conduct did not

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[38] *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1201 (Pa. 2012).
[39] *Feleccia v. Lackawanna College*, 215 A.3d 3, 20 (Pa. 2019).

endanger patients or cause further risks to their mental health." Plaintiff argues that, in context, it is clear that the "inappropriate behavior" referred to in Paragraph 51(a) is behavior in violation of the duties listed in Paragraph 49, and the "physical and emotional injuries" referred to in Paragraph 51(d) are the results of MacMillen "endanger[ing] patients or caus[ing] further risks to their mental health" as described in Paragraph 50.

The Court agrees that, as written, the allegations that MacMillen "[e]ngag[ed] in behavior that is inappropriate for licensed mental health professionals" and "caus[ed] Plaintiff to suffer physical and emotional injuries as a result of [his] behavior" are overly broad, inasmuch as they are not tethered to any statutory provision or specific type of behavior complained of. The Court agrees with Plaintiff that these provisions would be pled with sufficient specificity if they were read as referring to the provisions and behaviors described elsewhere in the Complaint; therefore, the Court will sustain MacMillen's preliminary objection and allow Plaintiff to amend the Complaint to specify, either explicitly or by reference, the duties allegedly violated and the inappropriate behaviors allegedly committed by MacMillen.

ORDER

AND NOW, for the foregoing reasons, the Court hereby ORDERS as follows:

1. The Corporate Defendants' First Preliminary Objection is SUSTAINED. As the certificate of merit filed by Plaintiff on August 27, 2021 indicates that all claims against the Corporate Defendants are "based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard," Plaintiff is precluded from bringing a

claim for corporate negligence. Plaintiff shall have twenty (20) days from the date of this Order to file an amended complaint specifically summarizing those facts necessary to support her claim for vicarious liability against the Corporate Defendants.

2. The Corporate Defendants' Second Preliminary Objection is SUSTAINED. Plaintiff shall have twenty (20) days from the date of this Order to file an amended complaint either removing references to "actual or apparent agents, servants, volunteers and/or employees" other than MacMillen OR pleading with specificity those actions or omissions that form the basis for these claims against "actual or apparent agents, servants, volunteers and/or employees" but whose identities can be ascertained through discovery.
3. The Corporate Defendants' Third Preliminary Objection is SUSTAINED. All references to "grossly negligent, careless, wanton and/or reckless conduct" are STRICKEN from the Complaint. Plaintiff may move to amend her complaint during or at the close of discovery should she discover specific facts and evidence supporting liability beyond mere negligence.
4. Defendant MacMillen's Preliminary Objection is SUSTAINED. Plaintiff shall have twenty (20) days from the date of this Order to file an amended complaint stating with specificity the "behavior that is inappropriate for licensed mental health professionals" and "physical and emotional injuries as a result of [this] behavior." Plaintiff may do so by reference to statute or other provisions of the complaint.

IT IS SO ORDERED this 3rd day of March 2022.

By the Court,

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Eric R. Linhardt, Judge

ERL/jcr

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