

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DAVID YOUNG,  
Plaintiff  
vs.

UPMC WILLIAMSPORT,  
RONALD IAN GROSS, M.D., and  
KEVIN P. KINKEAD, M.D.,  
Defendants

: CV-22-00866  
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FILED  
LYCOMING COUNTY  
2023 APR 11 PM 1:39  
THOMAS D. HEAP  
PROTHONOTARY

**OPINION AND ORDER**

AND NOW, this 11<sup>th</sup> day of April 2023, the Court hereby issues the following Opinion and Order addressing the December 21, 2022 Preliminary Objections of Defendants UPMC Williamsport (“UPMC”) and Ronald Ian Gross, M.D. (“Dr. Gross”) (collectively, “Objecting Defendants”).

**BACKGROUND**

Plaintiff commenced this medical malpractice action by filing a Complaint on September 1, 2022, and filed an Amended Complaint on December 6, 2022. Essentially, Plaintiff alleges that UPMC’s delay in diagnosing and addressing the cause of his gastrointestinal symptoms increased his risk of harm during a March 12, 2021 laparotomy to treat his condition, as did the failure of surgeon Dr. Gross and anesthesiologist Defendant Kevin P. Kinkead, M.D. (“Dr. Kinkead”) to perform appropriate procedures and follow UPMC’s policies concerning laparotomies. Plaintiff contends that these failures resulted in numerous complications during the

laparotomy, seriously injuring Plaintiff and requiring him to undergo additional procedures. The Amended Complaint contains four counts: I) Vicarious Liability against UPMC; II) Professional Negligence against Dr. Gross; III) Professional Negligence against Dr. Kinkead; and IV) Corporate Liability against UPMC.

### ***PRELIMINARY OBJECTIONS***

#### **A. Objecting Defendants' Preliminary Objections**

Objecting Defendants first object to Paragraphs 62, 67(b), 68(b), and 72(b) through 72(d) of the Amended Complaint on the grounds that they do not conform to Pennsylvania's pleading requirements for medical negligence cases or, alternatively, that they are insufficiently specific. Paragraph 62 asserts that "UPMC is liable for their failure to properly diagnose and treat the Plaintiff's bowel obstruction on March 3, 2021, March 6, 2021, March 11, 2021 and March 12, 2021...." Paragraphs 67(b) and 68(b) state that Dr. Gross and Dr. Kinkead, respectively, were negligent in "[failing] to act in accordance with UPMC's policies with regard to exploratory laparotomies," and assert that UPMC is vicariously liable for these failures. Paragraph 72(b) restates this claim of negligence directly against Dr. Gross. Paragraphs 72(c) and 72(d) similarly aver that Dr. Gross was negligent in failing to "act in accordance with UPMC's policies and procedures with regard to patients with bowel obstructions that require surgical intervention" and "with regard to general surgery."

Objecting Defendants contend that these paragraphs “are defectively vague and non-specific, because each averment merely alleges a failure by the doctor/agent to comply with an undefined hospital policy, that may or may not exist, without alleging any specific conduct or omission by the defendant physician....”<sup>1</sup> Additionally, Objecting Defendants note that Paragraph 62 contends that UPMC is vicariously liable for the negligence of medical professionals on March 3, 6, 11 and 12, 2021, but the Amended Complaint pleads facts connecting Dr. Gross and Dr. Kinkead to Plaintiff’s treatment on March 12, 2021 only. Objecting Defendants contend that these averments in the Amended Complaint ultimately fail to satisfy Pennsylvania’s fact-pleading standard.

Objecting Defendants’ second preliminary objection concerns Paragraph 84 of the Amended Complaint, which is the operative paragraph in Plaintiff’s corporate negligence claim. Paragraph 84 asserts that UPMC violated its direct duties to Plaintiff in the following ways:

- “Failing to provide competent physicians to properly evaluate and treat the Plaintiff”;
- “Having in its employ and/or allowing practice privileges to Defendants, Dr. Gross and Dr. Kinkead, who were not competent and/or capable of recognizing that the Plaintiff needed decompression of the stomach prior to administration of anesthesia...”;

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<sup>1</sup> Emphasis in original.

- "Permitting Defendants, Dr. Gross and Dr. Kinkead, to treat Plaintiff, David Young, when they were not competent to care for Plaintiff's condition";
- "Failing to require Dr. Gross and Dr. Kinkead to follow medical standards of care and/or monitor their compliance therewith....";
- "Failing to ensure the enforcement or compliance with policies and procedures regarding the performance of surgery and post-operative surgical evaluations and treatments of patients like [Plaintiff]"; and
- "Failing to ensure the enforcement, existence, and/or compliance with policies and procedures regarding stomach decompression prior to administering anesthesia at the time of exploratory laparotomies."

Objecting Defendants contend that instead of pleading the actual ways in which UPMC deviated from its direct duties of care to Plaintiff in this case, Plaintiff instead recites the general duties hospitals owe to patients under *Thompson v. Nason*<sup>2</sup> and avers in a conclusory fashion that UPMC violated them. This is insufficient to state a claim, Objecting Defendants argue, especially in light of the fact that the two individual Defendants "have different roles and responsibilities in surgery, and thus, a different medical professional standard of care would apply to each...." Objecting Defendants further assert that the Amended Complaint does not plead that UPMC had actual or constructive notice of the defects leading to

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<sup>2</sup> *Thompson v. Nason*, 591 A.2d 703 (Pa. 1991).

Plaintiff's harm, which is an element of a corporate negligence claim in Pennsylvania.<sup>3</sup>

**B. Plaintiff's Response to Preliminary Objections**

In response to Objecting Defendants' first preliminary objection, Plaintiff asserts that the specified paragraphs – when read in the context of the entire Amended Complaint – are sufficient to give Objecting Defendants fair notice of the nature of Plaintiff's claims and the material facts supporting those claims. Plaintiff argues that Objecting Defendants' claim is really a demand that Plaintiff plead evidence, when all Pennsylvania law requires is that a plaintiff aver facts that may then be corroborated or disproven by evidence obtained through discovery. Regarding Paragraph 62, Plaintiff argues that Paragraphs 38 through 60 of the Amended Complaint plead facts that demonstrate why UPMC is liable for its employees' failures on each of the specified dates. With regard to Paragraphs 67(b), 68(b), and 72(b) through 72(d), Plaintiff asserts that it is impossible for him to aver more specific factual allegations, as "hospital policies and procedures... are in possession of [UPMC]," and prior to discovery Plaintiff has not had "the opportunity

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<sup>3</sup> Objecting Defendants argue that permitting corporate negligence claims to survive the pleading stage without an allegation of actual or constructive notice would allow such claims to proceed solely on the basis that employees or agents of the hospital violated duties of care, which is essentially what is alleged in a vicarious liability claim. Objecting Defendants cite *Kennedy v. Butler Mem'l Hosp.*, 901 A.2d 1042, 1046 (Pa. Super. 2006), in which the Superior Court explained that allowing a corporate negligence claim to survive pleadings despite a failure to "allege why [a] hospital necessarily should have known of the alleged breaches... would effectively eliminate any distinction at the pleading stage between claims of corporate negligence and vicarious liability."

to review the policies and procedures [and thus] cannot be any more specific in [his] pleading than as set forth in the Amended Complaint....”

In response to Objecting Defendants' second preliminary objection, Plaintiff again asserts that it is impossible to plead more specifically “without the opportunity to conduct written discovery and depositions.” Nonetheless, Plaintiff asserts that he has “expressly indicat[ed] how Defendant breached... all four of [the *Thompson v. Nason*] elements,” with “each [sub-paragraph of Paragraph 84] containing a factually specific deviation by Defendant and [its] agents/employees.”

**C. Argument**

The Court held argument on the Preliminary Objections on February 13, 2023. Objecting Defendants first argued that the paragraphs in their first preliminary objection were precisely the sort of vague allegations that a party can “amplify” in order to raise new theories of liability on the eve of trial unless objected to, as explained in *Connor v. Allegheny General Hospital*.<sup>4</sup> With regard to Paragraph 62 specifically, Objecting Defendants asserted that the Amended Complaint does nothing to connect the named Defendants to failures on March 3, 6, or 11 of 2021. Plaintiff's assertions that UPMC's employees negligently failed to diagnose and treat Plaintiff's condition on those dates, Objecting Defendants argued, are not factual averments sufficient to state a claim under Pennsylvania law. Objecting Defendants

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<sup>4</sup> *Connor v. Allegheny General Hosp.*, 461 A.2d 600 (Pa. 1983), discussed *infra*.

argued that Paragraph 84 is similarly deficient, containing no specific facts concerning UPMC's violations of duty. Objecting Defendants readily acknowledged that facts exist which, if pled, would cure these defects, and suggested that Plaintiff is already aware of most or all of these facts.

Plaintiff disagreed that he possessed sufficient factual information to augment most of his pleadings. For instance, although Plaintiff contended that he pled sufficient facts concerning the failures of UPMC employees on March 3, 6, and 11 for which UPMC is vicariously liable, Plaintiff asserted that more specific information as to these employees' identities would only be available after discovery. Plaintiff clarified that his claims relating to hospital policies and procedures essentially raised two claims in the alternative: if applicable policies and procedures did not exist, UPMC is liable for failing to develop them; if applicable policies and procedures did exist, UPMC is liable for failing to ensure they were followed, and for the deviations of its employees and agents from those policies and procedures. Plaintiff admitted that the Amended Complaint could have stated this theory with more specificity. Nonetheless, Plaintiff asserted that the Amended Complaint, read as a whole, adequately avers that UPMC had constructive knowledge of its violations of the duties it owed directly to Plaintiff.

## **ANALYSIS**

### **A. Applicable Law**

"Pennsylvania is a fact-pleading state," which means "a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by summarizing those facts essential to support the claim."<sup>5</sup>

In ruling on preliminary objections in the nature of a demurrer, the Court must determine whether "on the facts averred, the law says with certainty that no recovery is possible.... Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it."<sup>6</sup> In deciding a demurrer, the Court must "accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts."<sup>7</sup>

In *Connor v. Allegheny General Hospital*, the plaintiff's complaint included an allegation that in addition to certain specific violations, the defendant "otherwise fail[ed] to use due care and caution under the circumstances."<sup>8</sup> Shortly before trial, the plaintiff moved to amend the complaint to include a previously unspecified theory of liability, arguing that this did not constitute a new allegation after the statute of limitations because it was fairly encompassed within the allegation that the

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<sup>5</sup> *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. 2008).

<sup>6</sup> *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208-09 (Pa. Super. 2012).

<sup>7</sup> *Raynor v. D'Annunzio*, 243 A.3d 41, 52 (Pa. 2020).

<sup>8</sup> *Connor*, 461 A.2d at 601.



defendant “failed to use due care” in ways other than those explicitly described in the complaint.<sup>9</sup> The Supreme Court of Pennsylvania held that the trial court erred in denying this motion to amend, explaining that if the defendant “did not know how it ‘otherwise failed to use due care and caution under the circumstances,’ it could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the plaintiff’s] complaint.”<sup>10</sup> A party that failed to do so, the Court held, could not later “claim that it was prejudiced by the late amplification of” the general allegation.<sup>11</sup>

Under *Thompson v. Nason Hosp.*,<sup>12</sup> a hospital has: “(1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.”<sup>13</sup> “To establish a claim for corporate negligence against a hospital, a plaintiff must show that the hospital had actual or constructive knowledge of the defect or procedures that created the harm.”<sup>14</sup>

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<sup>9</sup> *Id.* at 601-02.

<sup>10</sup> *Id.* at 602 n.3.

<sup>11</sup> *Id.*

<sup>12</sup> *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991).

<sup>13</sup> *Id.* at 707.

<sup>14</sup> *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997) (*citing Thompson*).

**B. First Preliminary Objection**

The Court agrees with Plaintiff that at this stage Paragraph 62, read in the context of the entire Amended Complaint, is sufficiently specific to satisfy Pennsylvania's fact-pleading standard. The Court agrees with Objecting Defendants that Paragraphs 67(b), 68(b), and 72(b) through 72(d) are insufficiently specific to state claims of vicarious liability against UPMC and professional negligence against Dr. Gross.

Regarding Paragraph 62, the Amended Complaint alleges that Plaintiff presented to UPMC on March 3, 2021 having experienced severe stomach pain and vomiting for days, and at that time UPMC's employees diagnosed him with a stomach virus, prescribed fluids and rest, and discharged him. On March 6, 2021, Plaintiff presented to UPMC again, was diagnosed with a bowel obstruction and admitted; although he remained in the hospital for five days, "UPMC chose not to surgically repair the obstruction" and discharged Plaintiff on March 11, 2021, at which time he "was told by UPMC that the obstruction was no longer present." Plaintiff alleges that this was incorrect, however, as he continued to experience symptoms and was readmitted on March 12, 2021, at which time Dr. Gross performed the "exploratory laparotomy surgery with efforts to repair the bowel obstruction," with Dr. Kinkead serving as anesthesiologist.

Plaintiff contends that UPMC and its employees did not diagnose and treat his condition within a reasonable period of time. The Court finds that Plaintiff's

failure to more particularly state the identities of those UPMC employees who failed to diagnose and treat him does not obscure Plaintiff's theory of vicarious liability. Rather, the Amended Complaint alleges that the employees of UPMC who treated Plaintiff on various days 1) failed to diagnose his bowel obstruction on March 3, 2021; 2) decided not to operate or more appropriately treat the bowel obstruction between March 6 and March 11, 2021; and 3) discharged Plaintiff on March 11, 2021, informing him that his bowel was no longer obstructed. These actions or omissions, Plaintiff contends, violated the standard of care, and thus UPMC is vicariously liable for those actions or omissions to the extent that they were committed by its employees.

Conversely, Paragraphs 67(b) and 68(b), even when read in the context of the entire Amended Complaint, only aver that Dr. Gross and Dr. Kinkead "fail[ed] to act in accordance with UPMC's policies with regard to exploratory laparotomies." The Amended Complaint does not establish whether those policies exist or what they might say. Furthermore, the Amended Complaint does not specify what actions Dr. Gross and Dr. Kinkead improperly took, or failed to take, that violated UPMC's policies, save for a single act on March 12, 2021: the "[failure] to decompress [Plaintiff's] stomach prior to the initiation of anesthesia...." In short, the factual averments in the Amended Complaint support only a single theory of vicarious liability for the actions of Dr. Gross and Dr. Kinkead – the failure to decompress Plaintiff's stomach – but the allegations of negligence are far broader.

As written, Paragraphs 67(b) and 68(b) assert that UPMC is liable for any violation of (an unspecified, and possibly non-existent) hospital policy by Dr. Gross and Dr. Kinhead, whether that violation is the single act explicitly described or some other, unspecified failure. Under *Connor*, UPMC is entitled to insist that Plaintiff either 1) confine its allegations of vicarious liability to those narrow factual averments specifically pled, or 2) plead sufficient facts to support its broad allegations of vicarious liability.

Similarly, Paragraphs 72(b) through 72(d) assert that Dr. Gross “[failed] to act in accordance with UPMC’s policies with regard to” 1) “exploratory laparotomies”; 2) “patients with bowel obstructions that require surgical intervention”; and 3) “with regard to general surgery.” For the same reasons described above, these allegations would allow Plaintiff to assert theories of liability against Dr. Gross that go far beyond the single allegation that he failed to decompress Plaintiff’s stomach prior to the laparotomy. Dr. Gross is thus left to guess as to other acts or omissions Plaintiff contends form the basis of his direct liability.

**C. Second Preliminary Objection**

The Court concludes that Paragraph 84 of the Amended Complaint is insufficiently specific to support Plaintiff’s claim of corporate negligence against UPMC. Plaintiff alleged (at argument) that UPMC had at least constructive notice of the circumstances alleged in Paragraph 84, specifically that 1) its physicians were not competent to treat Plaintiff; 2) Dr. Gross and Dr. Kinhead were not “competent

and/or capable of recognizing that the plaintiff needed decompression of the stomach prior to administration of anesthesia”; 3) Dr. Gross and Dr. Kinkead “were not competent to care for Plaintiff’s condition”; 4) it did not “require Dr. Gross and Dr. Kinkead to follow medical standards of care and/or monitor their compliance therewith”; 5) it failed to ensure the enforcement of or compliance with policies and procedures concerning patients like Plaintiff; and 6) it failed “to ensure the enforcement, existence, and/or compliance with policies and procedures regarding stomach decompression prior to administering anesthesia at the time of exploratory laparotomies.”

The Amended Complaint contains no factual averments that support a contention that UPMC knew or should have known that it failed in any of these duties. The allegation these duties were breached during the course of Plaintiff’s treatment is insufficient to establish that UPMC either knew or should have known of the circumstances prior to Plaintiff’s treatment. Notice necessarily requires some antecedent knowledge, whether actual or constructive. Here, a fair reading of the Amended Complaint contains no factual allegations concerning UPMC’s adherence to its duties prior to Plaintiff’s initial presentation; rather, the Amended Complaint suggests that the first sign that UPMC was violating its duties was the negative outcome Plaintiff suffered on March 12, 2021, which is no notice at all. Plaintiff may not proceed on a corporate negligence claim unless he pleads some basis upon

which UPMC would have, or should have, known that its doctors were incompetent or its policies were not being enforced, *prior* to Plaintiff's treatment.

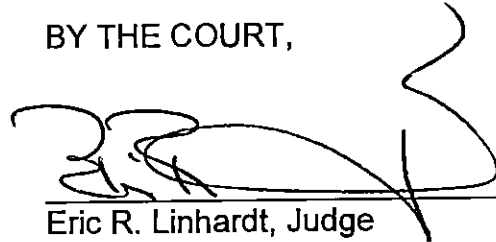
**ORDER**

For the foregoing reasons, the Court **sustains** Objecting Defendants' preliminary objections concerning Paragraphs 67(b), 68(b), 72(b) through 72(d), and 84 of the Amended Complaint. The Court **overrules** Objecting Defendants' preliminary objection concerning Paragraph 62 of the Amended Complaint.

Plaintiff shall file an Amended Complaint within twenty (20) days from the date of this Order either removing those allegations insufficiently supported by the factual averments in the Amended Complaint or alleging a sufficient factual basis to support those allegations.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

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