STATE OF MICHIGAN

COURT OF APPEALS

KELLY SUE SYMONS, Personal Representative of the Estate of DANIEL A. SYMONS,

Plaintiff-Appellee,

v

DR. ROBERT J. PRODINGER, DALE RUSSELL, P.A., and BATTLE CREEK EMERGENCY ROOM PHYSICIANS, P.C.,

Defendants-Appellants,

and

BATTLE CREEK HEALTH SYSTEMS,

Defendant.

UNPUBLISHED
November 13, 2008

No. 269663
Calhoun Circuit Court
LC No. 04-000769-NH

Before: Markey, P.J., and Saad, C.J., and Wilder, J.

PER CURIAM.

Defendants appeal of right the trial court's judgment for plaintiff in this medical malpractice case. We affirm in part, reverse in part, and remand for entry of judgment notwithstanding the verdict for Dr. Prodinger.

I

Decedent, Daniel Symons, presented to the emergency department of Battle Creek Health Systems with complaints of back pain and left arm discomfort. Decedent was seen by admitting nurses and then by defendant Daniel Russell, a physician's assistant (PA). Based on decedent's reported medical history, symptoms, x-rays, a physical examination, and on the fact that decedent's pain was relieved by medication that would not relieve cardiac pain, Russell diagnosed musculoskeletal pain or muscle spasms, and did not conclude that decedent had an acute coronary event. Russell discharged decedent with prescriptions for Motrin and Flexaril. Russell did not consult with the supervising physician, defendant Dr. Robert Prodinger, and Dr. Prodinger did not review decedent's medical chart, as the chart was not presented to the supervising physician for review until after Dr. Prodinger was no longer on duty. The following day, decedent died, apparently of a heart attack.

II

A

Defendants' first argument on appeal is that the trial court erred in denying their motion in limine to limit plaintiff's theories at trial. Since the relief requested under this argument is a new trial, the standard of appellate review is abuse of discretion. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006).

Defendants' arguments under this issue relate only to Dr. Prodinger. Because we find below that Dr. Prodinger is entitled to judgment notwithstanding the verdict, we decline to address this issue.

B

Dr. Prodinger next argues that the trial court erred in denying his motion for a directed verdict. This Court reviews a ruling on a motion for a directed verdict de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 502; 741 NW2d 539 (2007). Since we agree below with Dr. Prodinger that he is entitled to JNOV, we do not address the directed verdict issue.

C

Defendants next argue that the trial court erred in allowing plaintiff's emergency medicine expert, Dr. Barton, to testify regarding the standard of practice for Russell. This issue is unpreserved. Therefore, this Court may decline to address it. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review"); *Coates, supra* at 509-510. Preservation requirements may be disregarded if resolution of the issue is necessary for a proper determination of the case, the claim presents a question of law for which all facts have been presented, or failure to consider the issue would result in manifest injustice. *Herald Co, Inc v City of Kalamazoo,* 229 Mich App 376, 390; 581 NW2d 295 (1998); *Butler v Detroit Automobile Inter-Ins Exch,* 121 Mich App 727, 742; 329 NW2d 781 (1982). Whether Dr. Barton could testify to the standard of practice applicable to Russell is a question of law for which all necessary facts have been presented. But, the failure to consider this issue would not result in manifest injustice, because plaintiff presented the expert testimony of James Van Rhee, a licensed PA who met the criteria of MCL 600.2169(1)(b)(ii). Therefore, we decline to address this issue.

D

Defendants next argue that the trial court erroneously allowed Van Rhee to testify to the standard of practice for Russell because Van Rhee does not specialize in emergency care as a PA, and Russell does. This court recently held in *Wolford v Duncan*, 279 Mich App 631, slip op at 3; ____ NW2d ____ (2008), that under MCL 600.2169, an expert testifying against a physician's assistant need not specialize in the same area as the PA against whom the testimony is offered. "A physician's assistant cannot be a specialist. It is significant that a physician's assistant need have no special certification to work under a physician who is a specialist." *Id*., slip op at 3. *Wolford* is consistent with *McElhaney* and *Brown*, and with *Cox v Flint Bd of Hosp*

Managers, 467 Mich 1, 19; 651 NW2d 356 (2002), which held that the terms "general practitioner" and "specialist," as they appear in MCL 600.2912a, apply only to a person who is "a 'medical practitioner' or engaged in the practice of medicine."

Accordingly, even though Van Rhee did not specialize in emergency care, he was not disqualified under § 2169(1)(a) from providing standard of practice testimony against Russell. The trial court did not abuse its discretion in allowing Van Rhee to testify to the standard of practice applicable to Russell.

E

1

Dr. Prodinger next argues that the trial court erroneously denied Dr. Prodinger's motion for JNOV. We agree. This Court reviews a decision on a motion for judgment notwithstanding the verdict de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 131; 666 NW2d 186 (2003). In considering such a motion, the evidence is viewed in the light most favorable to the non-moving party. *Id*.

2

Dr. Prodinger correctly contends that the trial court should have granted his motion for JNOV, because plaintiff never asserted in her complaint that Dr. Prodinger should be held vicariously liable for the acts of Russell. A complaint is required to contain a statement of facts and allegations sufficiently specific to reasonably inform an adverse party of the nature of the claims asserted. MCR 2.111(B)(1); *Smith v Stolberg,* 231 Mich App 256, 259; 586 NW2d 103 (1998). As noted above, it is undisputed that plaintiff's complaint did not plead the theory that Dr. Prodinger should be held vicariously liable for the acts of Russell, and the complaint did not assert any liability as to Dr. Prodinger pursuant to MCL 333.17078. "A plaintiff's . . . proofs must be limited in accordance with the theories pleaded." *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 284; 602 NW2d 854 (1999). Because plaintiff did not plead the vicarious liability of Dr. Prodinger for Russell's actions, Dr. Prodinger was not reasonably placed on notice of such a claim, and the trial court should have granted Dr. Prodinger's motion for JNOV.

3

Despite the failure to plead that Dr. Prodinger was vicariously liable for Russell's actions, Plaintiff nevertheless asserts that Dr. Prodinger's counsel admitted before trial that Dr. Prodinger was Russell's supervisor, and then subsequently admitted that Dr. Prodinger was in a "respondeat superior position" to Russell, and that accordingly, either plaintiff was not required to plead vicarious liability as to Dr. Prodinger, or any such requirement was waived by the alleged stipulation. We disagree with plaintiff's assertions. The stipulation made by counsel before the close of plaintiff's proofs was as follows:

> 1. Russell and Dr. Prodinger were employees of Battle Creek Emergency Room Physicians.

2. Russell and Dr. Prodinger were in the course and scope of their employment.

3. Russell is a licensed PA.

4. Dr. Prodinger is an emergency room physician.

5. Russell was acting under the supervision of Dr. Prodinger at the time of the events in this lawsuit.

Contrary to the plaintiff's argument, Dr. Prodinger's stipulation made no reference to the legal effect of a jury verdict finding that Russell was negligent; specifically, there was no stipulation whatsoever that Dr. Prodinger would be vicariously liable as a matter of law if Russell were to be found negligent, and there was no stipulation prior to the presentation of the evidence that Dr. Prodinger was in a respondeat superior position to Russell. The subsequent statement by Dr. Prodinger's counsel during argument on Dr. Prodinger's motion for directed verdict, that "[t]he stipulation . . . indicates that [Dr. Prodinger] was the supervisor, which would put him in a respondeat superior position . . . ," to the extent that it can be considered an admission, is insufficient as a matter of law to render Dr. Prodinger liable on a theory of respondeat superior liability, because, as a matter of law, Dr. Prodinger was not Russell's employer. As noted by the Restatement (Second) of Agency, § 228, the following relevant elements must be established to impose respondeat superior liability:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master….

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Here, the record was clear that both Russell and Dr. Prodinger were employees of Battle Creek Emergency Room Physicians, P.C., and the record was also clear that Russell was *not* employed by Dr. Prodinger. Because respondeat superior liability and vicarious liability on the basis of agency are two separate doctrines[1], (see, e.g., *Rogers v JB Hunt Transport*, 466 Mich 645, 656;

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[1] Indeed, prior to trial, when discussing plaintiff's claims against Battle Creek Emergency Physicians, plaintiff's counsel expressly acknowledged the difference between the two doctrines:

THE COURT: You're maintaining your theory of vicarious liability, I suppose. Is that what you're saying?

MR. ROYCE: Well, it's respondeat superior. It's the employer.

649 NW2d 23 (2002) Kelly, J., dissenting), and because it is also apparent that Dr. Prodinger's counsel confused the two doctrines and made an incorrect legal statement concerning Dr. Prodinger's status, this Court is not bound by this clear misstatement of the law. See *Marbury v James Madison*, 1 Cranch 137, 177; 2 L Ed 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the [applicable] law is"); *Rice v Ruddiman*, 10 Mich 125, 138 (1862) ("…no admission of the parties could bind the court as to the law"); *In re Finlay Estate (Thomas v Finlay)*, 430 Mich 590, 595; 424 NW2d 272 (1988) ("It is well established that a court is not bound by the parties' stipulations of law"); *Mack v City of Detroit*, 467 Mich 1211, 1213; 654 NW2d 563 (2002) (opinion of Young, J., concurring in the denial of rehearing) ([the] "parties [to a case] cannot place the law beyond the reach of the Court by stipulation").

Accordingly, Dr. Prodinger could only be found liable for the negligent conduct of Russell under a theory of vicarious liability. Because this theory was not pled against Dr. Prodinger, JNOV should have been granted on this basis.

4

In arguing that Dr. Prodinger should be held liable for the alleged negligence of Russell, the partial dissent contends that it is axiomatic that a supervisor is vicariously liable for the acts of a subordinate. The partial dissent relies in part on *Wolford v Duncan*, 279 Mich App 631; ____ NW2d ____ (2008), and on various unpublished opinions of this Court. We disagree.

First, *Wolford* is easily distinguishable. In her complaint,[2] plaintiff Drema Wolford specifically alleged that Dr. Duncan, the physician, had a duty to the plaintiff's decedent that "included supervision of [Wilson, the PA] under the theories of agency, vicarious liability, and a statutory duty under MCL 333.17008 et seq." Defendants appeal brief, in describing the treatment that led to the allegations of negligence against Duncan, asserts that Wilson, the PA, initially saw Wolford at the Fenton Medical Center and that after the results of a Doppler ultrasound ordered by Wilson were positive for deep vein thrombosis, Duncan, the supervising physician, then directed Wolford to go to the emergency room, where he was again diagnosed with deep vein thrombosis, and placed on Coumadin. After three and a half months, Duncan ordered that Wolford should stop taking Coumadin, and put him on baby aspirin for six months, because he had blood in his stool. As is apparent, then, from only a cursory review of the facts, in *Wolford*, not only did the plaintiff specifically plead a theory of vicarious liability, but in addition, Duncan, the physician, actually saw the patient and actively participated in treatment decisions. In the instant case, it is undisputed that neither the common law nor statutory vicarious liability of Dr. Prodinger was pleaded, it is further undisputed that Dr. Prodinger never saw the decedent or his medical chart before decedent's departure from the hospital. Thus, the partial dissent's citation to *Wolford* on the basis that it is simply "understood" and "apparently an

[2] In *Wolford*, the following facts are taken from documents that were filed with this Court (including appeal briefs), and which are therefore a matter of public record. These documents include the *Wolford* complaint.

inherent proposition" that a physician is responsible for any potentially negligent acts of a PA whom he supervised is belied by the facts.[3]

Second, regrettably, the dissent confounds the distinction between vicarious liability based on agency, and the doctrine of respondeat superior (an employer-employee doctrine). As noted above, this distinction is noted under Michigan law (see, *Rogers v JB Hunt Transport*, *supra*), and was acknowledged by the plaintiff before trial. In addition, other authorities, including the Second Restatement of the Law of Agency, recognize the distinction. For example, in *Ware v Timmons*, 954 So 2d 545 (Ala, 2006), the plaintiff sought to impose medical malpractice liability on an anesthesiologist (Ware, an orthopedist) and an anesthetist[4] (analogous to the relationship between a doctor and a PA). A jury returned a verdict for the administratrix (Timmons) of the decedent, and the trial court entered a judgment on the verdict. The state supreme court considered the question of whether co-employees can be liable for one another's torts, where one co-employee is a supervisor of another. Reversing the judgment for the plaintiff, the court held that the supervising co-employee, in that circumstance, is not vicariously liable for the fault of the co-employee/subordinate (nurse Hayes). The opinion is worth quoting at length:

> The *Restatement (Second) of Agency* expressly rejects the idea that co-employees are vicariously liable for one another's torts:
>
> > "The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he is at fault in appointing, supervising, or cooperating with them."
>
> § 358(1). The commentary to § 358(1) illustrates this rule in the context of a supervisor-subordinate relationship, stating that "[t]he doctrine of respondeat superior does not apply to create liability against an agent for the conduct of servants and other agents of the principal appointed by him, even though other agents are subject to his orders in the execution of the principal's affairs."
>
> The requirement of consent negates the finding of a respondeat superior relationship as between co-employees. As *Meyer v. Holley,* 537 U.S. 280, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003), explains:
>
> > "The Restatement § 1 specifies that the relevant principal/agency relationship demands not only control (or the right to direct or control) but also the 'manifestation of consent by one person to another that the other

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[3] Moreover, the verdict form, attached as an exhibit to Wolford's brief, shows that the only question the jury decided was whether "the professional negligence or malpractice of the defendants cause[d] or contribute[d] to the plaintiff's death." Since the facts show that Duncan took affirmative steps in Wolford's care and treatment, there is no way to know if the issue of vicarious liability was even pursued at trial.

[4] The anesthetist was a certified registered nurse anesthetist (CRNA).

> shall act *on his behalf* . . . , and consent by the other so to act.' (Emphasis added [in *Meyer*].)"
>
> 537 U.S. at 286, 123 S.Ct. 824. In the co-employee context, each employee manifests a consent to enter into a relationship with the employer. However, it is the employer that establishes each employee's relationship with the other employees. Thus, because co-employees do not individually agree to act on one another's behalf, their relationship to one another is not consensual. *Therefore, as a matter of law, the doctrine of respondeat superior does not hold supervisors, as co-employees, vicariously liable for the torts of their subordinates*. Supervisors lack the ability to willingly choose to enter into a relationship with their subordinates; likewise subordinates do not have the ability to choose to enter into a relationship with their supervisors.
>
> "He who relies upon the doctrine of respondeat superior to fasten liability for tort has the burden of proving the relation of master and servant . . . ." *Alabama Power Co. v. Key,* 224 Ala. at 287, 140 So. at 233. At a minimum, Timmons's failure to introduce evidence bearing on whether Dr. Ware, in his individual capacity as the supervising anesthesiologist, had a right of selection prevents the conclusion that Dr. Ware, in that capacity, chose Nurse Hayes to assist in Brandi's operation. Thus, Timmons failed to meet her burden of proving that Dr. Ware, in his individual capacity, satisfies the common-law definition of a master. [*Ware, supra* at 555 (emphasis added).]

Similarly, in *Hohenleitner v Quorum Health Resources, Inc.*, 435 Mass 424, 435-436; 758 NE2d 616 (2001), the Supreme Judicial Court of Massachusetts followed the Second Restatement of the Law of Agency on this point. *Hohenleitner* states:

> The right to supervise, without more, has never been enough on which to base vicarious liability. . . . See also Restatement (Second) of Agency, *supra* at § 358(1) comment a, illustration 1 ("A is employed by P as general manager. B, a servant under the immediate direction of A, is negligent in the management of a machine, thereby injuring T, a business visitor. A is not liable to T").

Contrary to the view of the partial dissent, under the Second Restatement of Agency law and case law applying it, it is well established that a supervisor, employed by the same employer as her subordinate, is not vicariously liable for the torts of her subordinate, unless the plaintiff proves that the supervisor was the subordinate's "master." Here, plaintiff neither pleaded nor introduced sufficient evidence of this status.

Finally, the partial dissent relies on *Thomas v Van Tuinen*, unpublished opinion per curiam of the Court of Appeal, issued February 20, 2007 (Docket No. 263613), slip op at 5, and other cases of this Court in support of the notion that as a general proposition, a supervising physician is vicariously liable for the negligence of a subordinate. As is apparent from a careful review of those cases, the vicarious liability of the supervising physician hinges on the question whether the evidence supports a finding that the subordinate was acting as an agent of the supervising physician. As noted by the Second Restatement of Agency, the existence of this relationship is not assumed in the law, but instead is a matter of the proofs presented in each

case. Thus, the mere stipulation that Dr. Prodinger was Russell's supervisor was insufficient evidence to establish the agency relationship necessary to render Dr. Prodinger vicariously liable for Russell's negligence. The pleading and proof of this specific status, on the record, is required, and is not assumed as a matter of law. We respectfully disagree with our partially dissenting colleague that it is beyond the permissible bounds for an appellate court to set aside a judgment entered in favor of the plaintiff on the basis of a theory that was not pleaded by the plaintiff.

F

Defendants next argue that the trial court erroneously denied their motion for judgment notwithstanding the verdict, on the basis that plaintiff presented no competent expert witness testimony regarding the standard of practice applicable to Russell. We disagree. As we concluded above, plaintiff did not fail to present competent expert witness testimony regarding the standard of practice applicable to Russell. Therefore, the trial court did not err in denying defendants' motion for judgment notwithstanding the verdict on that basis.

G

Defendants next argue that the trial court erroneously refused to reduce the judgment by the amount of Social Security survivors' benefits that decedent's survivors have received. This is a question of law. See *Markley v Oak Health Care Investors of Coldwater, Inc,* 255 Mich App 245, 249; 660 NW2d 344 (2003). Statutory interpretation is also a question of law. *Willett v Waterford Charter Twp*, 271 Mich App 38, 56; 718 NW2d 386 (2006). We review questions of law de novo. *Id*.

MCL 600.6306 provides, in relevant parts:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> (a) All past economic damages, *less collateral source payments as provided for in section 6303*.
>
> (b) All past noneconomic damages.
>
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value. [Footnotes omitted.]

MCL 600.6303 provides, in relevant parts:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, *evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be*

> *admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict*. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.
>
> * * *
>
> (4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; *social security benefits*; worker's compensation benefits; or medicare benefits. . . .
>
> (5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits. [Emphases added.]

Whether the issue of collateral sources may, under MCL 600.6303, be raised after entry of a judgment, is an issue of first impression in Michigan. We hold that it cannot. The plain language of MCL 600.6303(1) requires that the issue of collateral source benefits be raised before entry of a judgment on a verdict. Here, because defendants did not raise this issue until after entry of the judgment, the issue was not timely raised. Compare *Principal Life Ins Co & Subsidiaries v The United States*, 76 Fed Cl 326, 327-328 (Court of Federal Claims, 2007) (holding that the government's defense of setoff was untimely and would not be permitted).

H

Defendants next argue that the trial court erroneously refused to reduce the judgment by the settlement amount plaintiff received from Battle Creek Health Systems. This too is a question of law, reviewed de novo. See *Markley, supra* at 249.

We disagree with defendants' argument. It is true that in general defendants are entitled to common-law setoff for any payment plaintiff received from a codefendant who is jointly and severally liable. *Markley, supra* at 250-251. As a general rule, only one recovery for a single injury is allowed under Michigan law. *Id*. at 251, citing *Great Northern Packaging, Inc v Gen Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986). However, it is erroneous for defendants to suggest that the joint tortfeasor's payment must reduce the judgment. Rather, it only reduces the amount defendants would be required to pay to satisfy the judgment. The distinction between the judgment and its satisfaction is alluded-to in *Grand Blanc Cement Products, Inc v Ins Co of North America*, 225 Mich App 138, 150-151; 571 NW2d 221 (1997): "Although plaintiff may recover only one satisfaction of its losses . . . it may pursue separate

judgments against defendants that are jointly and severally liable to pay its damages." (Citations omitted.)

III

We decline to address whether the trial court abused its discretion in denying defendants' motion in limine to limit plaintiff's theories, whether the trial court erred in denying Dr. Prodinger's motion for a directed verdict, or whether the trial court erred in allowing plaintiff's emergency medicine expert to testify regarding the standard of practice applicable to Russell. The trial court did not err in allowing plaintiff's physician's assistant expert to testify regarding the standard of practice applicable to Russell. The trial court did not err in refusing to reduce the judgment by the amount of Social Security benefits received by decedent's survivors, or in refusing to reduce the judgment by the settlement amount that plaintiff received from Battle Creek Health Systems. However, the trial court did err in denying Dr. Prodinger's motion for JNOV as to the sufficiency of the evidence.

Affirmed in part, reversed in part, and remanded for entry of JNOV with respect to Dr. Prodinger, and for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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Before: Markey, P.J., and Saad and Wilder, JJ.

SAAD, J.

I concur in result only.

/s/ Henry William Saad

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MARKEY, J. (concurring in part, dissenting in part).

I concur with the majority's opinion except as to that found under Section E pertaining to Dr. Prodinger's motion for JNOV.

As the majority notes, Dr. Prodinger argued that he should have been granted JNOV because plaintiff never pled vicarious liability against him based on the claimed negligence of his PA Russell. I find the majority's decision to reverse the trial court's decision denying Dr. Prodinger JNOV factually and legally incongruous and disingenuous under the particular facts of this case.

Let me first discuss the applicable law. As the majority notes, in considering a motion for JNOV, the trial court was required to review the evidence in the light most favorable to the non-moving party; we, then, as an appellate court, review the trial court's decision de novo.

> We "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305

> (2000); *Forge, supra* at 204, quoting *Orzel v Scott Drug Co,* 449 Mich 550, 557; 537 NW2d 208 (1995). A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Wilkinson, supra* at 391; *Forge, supra* at 204.

Moreover, and most pertinent to this case, is that physician assistants are permitted to practice medicine only as set forth under Michigan statute. Specifically, the Public Health Code (PHC) defines a physician's assistant as "an individual licensed as a physician's assistant under part 170 or part 175." MCL 333.2701(o). The most important part of MCL 333.17001(1), found in part 170 of the PHC, is (f) which provides as follows:

> "Practice as a physician's assistant" means where practice or medicine where osteopathic medicine and surgery *performed under the supervision of a physician or a physicians* licensed under this part or part 175 [emphasis added].

In fact, provisions essentially identical to those in part 170 are also found in part 175. For example, at the time relevant to the malpractice here, MCL 333.17501(e) provided: "'practice as a physician's assistant' means the practice of osteopathic medicine performed under the supervision of a physician licensed under this part or part 170." 2005 PA 264 effective March 30, 2006, amended this section to redesignated § 17501(e) so it now reads: "practice as a physician's assistant' means the practice of medicine, osteopathic medicine and surgery, and podiatric medicine and surgery performed under the supervision of a physician or podiatrist licensed under this article." Thus, it is patent that a physician's assistant may only practice medicine under the *license* and *supervision* of a licensed physician, here, unequivocally, Dr. Robert Prodinger.

The fact that many physicians are employed by professional corporations is irrelevant as to these statutory requirements. Given that professional corporations are the norm for practicing physicians, were the existence of the corporation as the ostensible employer of both the supervising physician and the PA a shield from liability from the requisite supervision the supervising physician must provide a PA practicing under him, the statute would have no practical application. PAs would simply be practicing medicine along with their co-employees, the licensed physicians. But corporations are not required to be licensed, nor are they individuals, so in effect, no one would be responsible for supervising PAs practicing medicine. This argument is patently specious and would create a huge, unintended loophole. Medical professional corporations are comprised of professionally licensed individual physicians. These individuals are and must be the licensed physicians responsible for supervising the PAs who are practicing medicine under the physicians' licenses and with whom they are working. Dr. Prodinger may not have seen Mr. Symons and he may not have discussed his case with PA Russell or reviewed Mr. Symons' chart immediately, but legally and factually Dr. Prodinger was the licensed physician in charge of supervising PA Russell in this case. And it is he who was responsible for PA Russell's care and treatment as such. Neither can there be any serious doubt that BCERP, P.C. and all of its practicing physicians always understood that their PAs could only practice medicine under the physicians' supervision. Indeed, that is one of the main reasons that defendants understood plaintiff's allegations as initially set forth in the notice of intent and later in the subsequent complaint.

Although the majority discusses pleading-notice issues with respect to Dr. Prodinger, the record is replete and clear with the fact that any such issues were forfeited, waived, or simply harmless because upon agreement of all parties. Evidence of this agreement is that the case was ultimately submitted to the jury via a special verdict form only with respect to PA Russell. Moreover, contrary to defendant's argument on appeal and the majority's discussions and analysis, the record evidences that defendant tried this case with the understanding and *agreement* that both Dr. Prodinger and Battle Creek Emergency Room Physicians, P.C., which employed both Dr. Prodinger and P.A. Russell, *only* faced vicarious liability for any negligence the jury might find with respect to PA Russell. That is exactly what the jury did: They found PA Russell negligent. And they did it unequivocally in a detailed special verdict form.

Indeed, the notice of intent (NOI) is also straightforward, and it stretches credulity to claim that any of the defendants in this case did not clearly understand it. Paragraph 12 of the NOI sets forth that "the negligence and violations of the applicable standard of care by PRODINGER, an emergency room physician, RUSSELL, a licensed physician assistant, and triage nurses in the emergency room at BCHS, by failing . . .." It then further sets forth the various allegations of negligence. It is, and certainly was not at the time, an unknown fact that PA Russell could only practice under the direct supervision of a licensed physician. Of course, the supervising physician likely changed depending on who was assigned to what shift but, unfortunately, on the day of Mr. Symons' treatment at issue, May 2, 2003, Dr. Prodinger was the emergency room physician on duty, and PA Russell was the physician assistant working under his supervision. There was simply no misunderstanding of any of these facts by any of the defendants in this case.

Eventually, as the case proceeded, and is often the case in litigation, more facts came to light, and trial strategies were refined. Sometimes during the course of this process, parties are released by a settlement or for other reasons, issues actually tried may have evolved and changed. Not only is that trial scenario common place, it is contemplated and legally sanctioned. MCR 2.118(C)(1) provides in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated s if they had been raised by the pleadings.

That is precisely what occurred here. Although, paragraph 12 of plaintiff's complaint also set forth allegations of negligence by Russell and against Prodinger, eventually, both plaintiffs and defendants stipulated that the only issue that would be presented to the jury pertained to whether or not Russell was negligent as a physician's assistant in his care and treatment of Mr. Symons. Again, the record is clear that the defendants *stipulated* that Dr. Prodinger was Russell's supervising physician and on that basis could be held vicariously liable for Russell's actions. A party may not stipulate to a position in the trial court and then argue on appeal that the resulting action was error. *Czymbor's Timber, Inc. v Saginaw*, 269 Mich App 551, 556; 771 NW2d 442 (2006); *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

A precise wording of the stipulation set forth on the record at trial is as follows:

> MR. ROYCE: On May 2, 2003, Russell and Dr. Prodinger and were employees of Battle Creek Emergency Room physicians. Russell and Prodinger were in the course and scope of their employment. Russell is a licensed PA. Dr. Prodinger is an emergency room physician. And Russell was acting under the supervision of Dr. Prodinger at the time of the events in this lawsuit. Thank you.
>
> THE COURT: All right. Is that an accurate statement of the stipulation in which you're willing to agree Mr. Hackney?
>
> MR. HACKNEY: Yes, your Honor.

Initially, defense counsel had argued in a motion in limine that there were no viable allegations against Dr. Prodinger and that "this case should be tried against. . . PA Russell and then the PA should be in here as being vicariously liable for PA Russell but there's no reason to have Dr. Prodinger in here individually . . ." The trial court noted that it would await the proofs to make such a decision. Then, at trial, one of plaintiff's experts testified that Dr. Prodinger violated the standard of care because Russell was "working as a surrogate for Dr. Prodinger," who was "supposed to be supervising the physician's assistant." In essence, Dr. Barton testified that Dr. Prodinger either failed to directly supervise PA Russell or failed to provide him guidance on when to seek help.

After plaintiff rested her case–in chief, defendants then moved for directed verdict with respect to Dr. Prodinger. Defense counsel again referred to the stipulation that Dr. Prodinger was Russell's supervisor and that he was therefore in a respondeat superior position. The trial court ultimately concluded that Dr. Barton's testimony regarding Dr. Prodinger's failure to supervise was sufficient to deny defendants' motion for directed verdict. Under the trial scenario that developed here, it's neither surprising nor unreasonable that both plaintiff and defendant's counsel entered into such a stipulation: PA Russell was simply unable to perform his duties unless he did so under the supervision of a licensed physician, here, again, unequivocally, Dr. Prodinger. This stipulation protected Dr. Prodinger from having to defend further by limiting his exposure to that for respondeat superior, which greatly simplified the case. Ultimately, under these facts, and viewing them in the light most favorable to plaintiff, the trial court's denial of defendant's motion for directed verdict and later JNOV was patently correct.

On appeal, our Court, while reviewing the evidence de novo must use the same perspective, but then reach the difficult conclusion that the evidence "fails to establish a claim as a matter of law." I completed disagree with the majority's conclusion that the trial court erred and question their full application of the requisite standard of review. Unfortunately, I must conclude that the majority's decision usurps the legal judgment and decisions of the attorneys and judge trying the case, side-steps the law and the determination of a jury that had listened to all the evidence and had been properly instructed. In our system jury verdicts are, and should be, nearly sacrosanct, overturned in only the rarest of situations. So, in my view, the majority has rendered a decision far beyond our permissible bounds as appellate court judges in overturning the trial court's decision that JNOV was unwarranted.

Additionally, case law in general supports the contention that Dr. Prodinger was appropriately deemed to be in a position of a respondeat superior for PA Russell's actions. Frankly this legal proposition seems so basic as to not require any detailed analysis. Surely a supervising physician of a PA is in a position of respondeat superior. Indeed, the most recent case involving a physician's assistant, *Wolford v Duncan*, 279 Mich App 631 (2008) presents a factual scenario of a supervising physician and a PA wherein it is simply understood and apparently an inherent proposition that the physician is responsible for any potentially negligent acts of the PA whom he is supervising. Although nothing in either MCL 333.17076 or MCL 333.17078 plainly imposes vicarious liability on a supervising physician for the acts of a physician's assistant, they need not because the common law of agency remain in effect. (See *Barnes v Mitchell*, 341 Mich 720; 67 NW2d 208 (1954), which held a chiropractor vicariously liable for the negligent acts of one of his employees. The Court determined the employee had (1) acted within the scope of her employment and also (2) had acted "to further the interest of the defendant rather than her own interest.") Even though both Russell and Prodinger were employed by BCERP, P.C., case law supports that Prodinger is vicariously liable for Russell: "As a general rule, a supervising physician is vicariously liable for the negligence of subordinate physicians acting as his agent." *Thomas v Van Tuinen*, unpublished opinion per curiam of the Court of Appeal, issued February 20, 2007 (Docket No. 263613), slip op at 5. Although unpublished cases are not precedential, they may persuade and guide us. The *Thomas* Court relied on several authorities, including *Barnes*, *supra*, and *Whitmore v Fabi*, 155 Mich App 333; 399 NW2d 520 (1986). In the later case, this Court opined:

> Physicians and surgeons, like other persons, are subject to the law of agency. *Barnes v Mitchell*, 341 Mich 7, 19; 67 NW2d 208 (1954). A physician or surgeon may be liable for the negligence or malpractice of another physician or surgeon acting as his agent. *Barnes, supra*, pp 18-19; see, also, Anno: *Liability of one physician or surgeon for malpractice of another*, 85 ALR2d 889. A physician who calls in or recommends another is not liable for the other's malpractice where there is no agency, concert of action or negligence selection. *Rodgers v Canfield*, 272 Mich 562, 564; 262 NW 409 (1935); *Hitchcock v Burgett*, 38 Mich 501 (1878). Likewise, physicians who are independently employed or acting independently in a case cannot be held vicariously liable. *Brown v Bennett*, 157 Mich 654, 658; 122 NW 305 (1909). Vicarious liability has been recognized, however, where the physicians are jointly employed or acting jointly on a case. See 85 ALR2d 889, 904 and the cases cited therein. [*Whitmore*, *supra* at 338-339.]

The following statutes regulating supervision of physician's assistants also suggest that the duty is not delegable. MCL 333.17048(4) (governing the practice of medicine), and MCL 333.17548(4) (governing the practice of osteopathic medicine and surgery), each provides: "A physician shall not delegate ultimate responsibility for the quality of medical care services, even if the medical care services are provided by a physician's assistant." See, also, *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005), in which the vicarious liability of the physician for the negligence of the physician's assistance is assumed but not an issue in the case. Hence, it appears evident that Dr. Prodinger was vicariously liable for PA Russell. But, again, the

majority erred in even reaching this issue because defense counsel stipulated at trial that Dr. Prodinger would be vicariously liable for any negligence found in respect to PA Russell.

In conclusion, in my opinion, the trial court properly denied defendant Prodinger's motion for JNOV[1], and its decision should be affirmed. Otherwise, I agree with the majority's conclusions.

/s/ Jane E. Markey

[1] My analysis, of course, would also apply to any prior motions pertaining to this and related subject matter, e.g. the motion for directed verdict.