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IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARTIN DUENAS and ELENORITA SANTOS, **Plaintiffs,** **v.** **PACIFIC MEDICAL CENTER, INC., FAHD AL-ALOU and AHMAD AL-ALOU** **Defendants.**	**CIVIL ACTION NO. 10-0295** **ORDER DENYING DEFENDANTS' MOTION TO DISMISS PURSUANT TO NMI. R. Civ. P. 12(b)(6)**

THIS MATTER came before the Court on January 24, 2011 ,on Defendants' motion to dismiss pursuant to NMI R. Civ. P. 12(b)(6). William M. Fitzgerald, Esq., appeared on behalf of Martin Duenas ("Duenas") and Eleornita Santos ("Santos") (collectively, "Plaintiffs"). Robert T. Torres, Esq., appeared on behalf of Pacific Medical Center, Inc. ("PMC"), Fahd Al-Alou ("Fahd") and Ahmad Al-Alou ("Ahmad") (collectively, "Defendants").

I. FACTUAL AND PROCEDURAL BACKGROUND

PMC provides medical services in Saipan through its physician employees. Plaintiffs are suing Defendants alleging that Defendants, even though aware of Duenas' allergy to aspirin, prescribed him ibuprofen which, when consumed, resulted in a severe allergic reaction requiring hospitalization. (Complaint ¶¶ 10-20.) Plaintiffs assert two causes of action against Defendants. In Count I, Plaintiffs allege negligence in various respects to each Defendant. Count II is an action for loss of consortium.

Defendants have moved to dismiss the Complaint for failure to state a claim upon which relief can be granted.

At the hearing for this matter the parties informed the Court as to various matters conceded in the motion which narrowed the issues before the Court. Specifically, Plaintiffs conceded that Ahmad should be dismissed without prejudice as a defendant in this case. As a result, claims for negligent supervision are extinguished from the Complaint. Furthermore, the parties agree that Santos, the alleged common law wife of Duenas, should be dismissed as a plaintiff without prejudice. As a result, Count II for loss of consortium is also extinguished from the Complaint. Accordingly, the remaining issues before the Court concerned whether the Complaint adequately alleged an agency relationship between Fahd and PMC and also whether the negligence claims were sufficient.

II. MOTION TO DISMISS PURSUANT TO NMI R. Civ. P. 12(b)(6)

A. Legal Standard

Under NMI R. Civ. P. 12(b)(6), a complaint or pleading is subject to dismissal where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable legal theory. *See Bolain v. Guam Publications, Inc.*, 4 NMI 176 (1994). In deciding a motion to dismiss under NMI R. Civ. P. 12(b)(6), the court must assume the truth of all factual allegations in the challenged pleading and construe them in the light most favorable to the non-moving party. *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp*. 2 NMI 482, 490 (1992). While the court must construe facts in favor of the non-moving party and draw reasonable inferences therefrom, the court need not strain to find inferences favorable to the non-moving party. *In re Adoption of Magofna*, 1 NMI 449 (1990). Furthermore, a reviewing court need not accept legal conclusions couched as factual statements as true. *Papason v. Allain*, 478 U.S. 265, 286 (1986). "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 570 (2007). A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1937 (citing *Twombly*, 550 U.S. at 555).

B. Discussion

1. Duenas Has Alleged a Sufficient Factual Basis to Support the Claim of an Agency Relationship Between Fahd and PMC.

It is well established that vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756, (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment"); Restatement (Third) of Agency § 7.07(1) (2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting in the scope of employment.").[1]

Whether a party was an employee is a legal issue. The Restatement (Third) of Agency § 7.07(3)(a) defines an "employee" as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . . ." Pleading this issue does not require great detail or a recitation of all potentially relevant facts in order to put the defendant on notice of a plausible claim.[2]

In this case, Duenas alleges that he sought medical advice and treatment at PMC where a nurse took his vital signs and medical history. (Complaint ¶¶ 7-8.) He alleges that Fahd examined him and prescribed ibuprofen. (Complaint ¶¶ 11-12.) The Complaint alleges that Fahd was employed by PMC and that he was acting under the supervision of Ahmad who was the chief physician at PMC. (Complaint ¶ 6.) These facts, construed in the light most favorable to Duenas as the non-moving party, are sufficient to raise a plausible inference that Fahd was a PMC employee. A plaintiff need only allege facts that permit the reasonable inference that the defendant is liable, even if the complaint "strikes a savvy judge that actual proof of the facts alleged is improbable" and recovery "very remote and unlikely." *Braden v. Wal-Mart Stores*, 588 F.3d 585, 594 (8th Cir. 2009) (quotation omitted). Here,

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[1] *See* 7 CMC 3401; *In re Estate of Seman*, 4 NMI 129 (1994) ("In the Commonwealth, the rules of the common law as expressed in the Restatements of the Law as approved by the American Law Institute serve as the applicable rules of decision, in the absence of written or local customary law to the contrary.").

[2] *See e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (stating that a claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged).

the Complaint raises a plausible inference of Fahd's employee status. Whether this inference will prove to be correct is not an issue to be determined by a 12(b)(6) motion to dismiss.

2. Count I (Negligence)

a. Duenas Has Stated a Claim for Negligence Against Fahd.

To state a claim for negligence under CNMI law, a plaintiff must allege that the defendant owed the plaintiff a duty of care, that the defendant breached that duty through a negligent act or omission, and that the breach caused the plaintiff to suffer damages. *See* Restatement (Second) of Torts § 281 (1965).

Defendants attack the sufficiency of the Complaint on two grounds. *First*, Defendants allege that the Complaint fails to state a claim because a key factual allegation defies common knowledge. Specifically, the Complaint alleges that ibuprofen contains the "same components as aspirin." (Complaint ¶ 24.) Defendants contend that it is common knowledge that ibuprofen and aspirin are different drugs and do not have an identical chemical composition.

While ibuprofen and aspirin may indeed be two different drugs, Defendants' own citation indicates that these drugs are composed of the same elements albeit in a different chemical formula. Nevertheless, the crux of the allegation is not that the two drugs are identical, rather that a physician who is aware of a patient's allergy to aspirin acts negligently in prescribing ibuprofen.

Second, Defendants allege that the Complaint fails to state a claim since the allegations blur the duties and actions of the individual Defendants. For example, paragraph 24 of the Complaint states that "Defendants, and each of them, in the face of clear notice that [Duenas] suffered from an allergy to aspirin, prescribed and instructed him to take 600 mg tablets of ibuprofen . . . ." Further, paragraph 25 states that "Defendants, and each of them, in prescribing 600 mg tablets of ibuprofen to plaintiff, acted negligently . . . ."

Although the Defendants are not individually named in paragraph 24, paragraph 13 clearly alleges that "Dr. Fahd Al-Alou issued a prescription for [Duenas] for 600 mg tablets of ibuprofen." Additionally, in light of the concessions stated supra, the only remaining defendants are Fahd and PMC. Therefore, as to paragraph 25 and as discussed in more detail below, PMC may be vicariously liable

for the negligence of Fahd. In this light, paragraph 25 is not so ambiguous as to render the Complaint deficient for a failure to state a claim.

Here, the Complaint sufficiently alleges that Fahd: (1) owed a duty to Duenas to use the ordinary skill and diligence of a physician (Complaint ¶ 25.); (2) the duty was breached when Fahd prescribed ibuprofen to Duenas with knowledge that Duenas was allergic to aspirin (*Id.* ¶ 24.); (3) that because of the breach Duenas suffered a severe allergic reaction (*Id.* ¶ 26); and (4) Duenas suffered damages as a result (*Id.* ¶ 27.). Accordingly, a claim for negligence is adequately pled in the Complaint.

b. Duenas Has Stated a Claim for Negligence, Through Respondeat Superior, Against PMC.

Respondeat superior is a common law doctrine that dictates when a principal is vicariously liable for the acts of its "employees," or "servants," within the scope of their employment. Restatement (Third) of Agency §§ 2.04, 7.03, 7.07-08. Specifically, "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." *Id.* § 2.04.

Defendants assert that liability only attaches where the employer "knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons . . . ." (Defs.' Mot. to Dismiss at 10.) Defendants further contend that the Complaint fails to state a claim for negligence against PMC since there is no allegation that PMC knew or should have known that Fahd was a danger to patients or has engaged in similar acts in the past. (*Id.*)

The Court notes that the Defendants' assertion is support by Section 317 of the Restatement (Second) of Torts. However, Section 317 is only implicated when a servant[3] acts "*outside* the scope of his employment." (Emphasis added). As long as the employee or agent is acting within the scope of their employment, the employer or principal is not required to "know or should know" of the risk to third parties by those actions. Indeed, "[the] theory of vicarious liability [for tortious conduct of an agent] is not based on the fact that the principal is negligent . . . [but rather] as a matter of public policy,

[3] *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 273 (1995) (defining "servant" as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.").

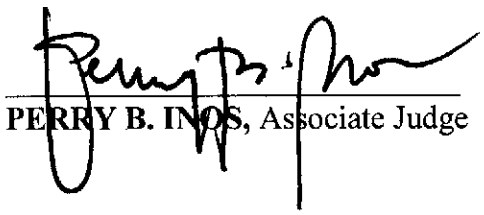
in order to promote safety for third persons." *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 275 n.13 (1995) (quoting *Noble v. Sears, Roebuck and Co.*, 109 Cal. Rptr. 269, 275 (Cal. Ct. App. 1973)).

In this case, the Complaint alleges that Fahd was a physician employed by PMC to provide medical services on Saipan. (Complaint ¶ 6.) Plaintiffs allege that during the course of providing medical services to Duenas, Fahd negligently prescribed ibuprofen to Duenas while knowing of his allergy to aspirin. (*Id.* ¶¶ 13, 24-25.) While these assertions are not conclusive as to liability, the allegations in the Complaint are sufficient to state a claim for negligence against PMC.

III. CONCLUSION

For the forgoing reasons, the Court hereby DENIES the Defendants' Motion to Dismiss.

SO ORDERED this 11th day of February, 2011.



PERRY B. INOS, Associate Judge