COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GIVA L. GARDNER,	)	Case No. CV 14-822254
	)	
	)	
PLAINTIFF,	)	JUDGE MICHAEL E. JACKSON
	)	
v.	)	
	)	**JOURNAL ENTRY AND OPINION: BIFURCATION OF NEGLIENCE AND VICARIOUS LAIBILITY CLAIMS.**
	)	
DALE A. BAUR, D.D.S., ET AL.	)	
	)	
DEFENDANTS.	)	

During a July 10, 2015 pretrial telephone conference between the Court and all parties, the Court suggested this dental malpractice case should be bifurcated into two phases and requested the parties to state their positions. Thereafter, Plaintiff Giva Gardner (Gardner) filed a brief in support of the Court's suggestion, which included a motion to bifurcate. Both Defendants, Dale Baur, D.D.S. (Dr. Baur), and University Hospitals Case Medical Center (UH) (collectively, Defendants) opposed the bifurcation as presented by the Court. For the reasons stated in this Journal Entry and Opinion Gardner's motion is granted.

Gardner has asserted a direct claim against Dr. Baur for his alleged dental malpractice arising out of a temporomandibular joint (TMJ) replacement and subsequent removal of the TMJ device Dr. Baur selected. However, Gardner is not making a direct claim against UH. Rather, Gardner's claim against UH is based on vicarious liability. Accordingly, this jury trial will be divided into Phase 1, the dental malpractice negligence claim brought by Gardner against Dr. Baur. If Gardner is successful against Dr. Baur, then Phase 2 would commence regarding Gardner's claim of vicarious liability against UH, including evidence of the employee or independent contractor relationship between Dr. Baur and UH, as well as the exception to the

independent contractor rule as set forth in *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio State 3d. 435, 444-45 (1994), as discussed below.

In UH's motions for summary judgment and reconsideration of summary judgment, which were both denied by this Court in previous Journal Entries and Opinions, UH has repeatedly advocated that Dr. Baur is not an employee of UH, and that UH cannot be vicariously liable for any liability of Dr. Baur regarding his treatment of Gardner. UH relies upon the general rule that "an employer or principal is vicariously liable for the torts of its employees or agents… but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work." *Comer v. Risko*, 106 Ohio St. 3d 185, 188-89 (2005). According to UH, "Dr. Baur is exactly such an 'independent contractor' as described by the Supreme Court of Ohio in *Comer*." The only exception to this rule is when the hospital "holds itself out to the public as the provider of medical services and that the patient looks to the hospital, not a particular doctor, for medical care." *Id*. at 188 (citing *Clark*, at 444-45). UH contends that the Gardner did not "look to the hospital" as the provider of medical services, but rather she looked to Dr. Baur for that medical care, and as a result, the exception does not apply. UH summarized its position very bluntly by stating:

> UH has been an unnecessary, peripheral player in this case from the very beginning, and should have been voluntarily dismissed by [Gardner] long ago.
>
> … [Gardner] is apparently holding UH hostage in this case as a de facto "reinsurer" for Dr. Baur, since [Gardner] has no direct claim against any UH employees. …
>
> Dr. Baur also has his own counsel and his own expert. There is no need to keep UH in this case. UH has expressed this to [Gardner's] counsel and requested voluntary dismissed on multiple occasions without success. UH turns to this Court for relief from the burden and expense of this meritless suit.

This Court denied UH's motions for summary judgment and reconsideration because reasonable minds could come to more than one conclusion concerning whether Dr. Baur was an employee or an independent contractor based on the facts presented, and concerning whether the exception to the "independent contractor" rule as set forth in *Clark* applied in this situation. Nevertheless, UH expresses noteworthy concerns regarding the burden and expense of participating in a dental malpractice case when it asserts - and it may turn out to be true - that UH is an "unnecessary, peripheral player in this case" if the jury returns a verdict in favor of Dr. Baur on the malpractice claims. Should that occur, UH will have participated in this entire case only to find out at the time of the verdict that it has no vicarious liability because Gardner failed to convince the jury of her claim against Dr. Baur. After consideration of this point, this Court chose to address UH's concern by proposing bifurcation during the July 10, 2015 telephone conference with the parties.

By deferring the vicarious liability issue to Phase 2 of this jury trial, Gardner and Dr. Baur would not present any evidence during Phase 1 regarding the employee/independent contractor issue or the exception to this rule under *Clark*. It does mean, as noted by Defendants, that witnesses called by Gardner or Dr. Baur who would have testified as to both the negligence issues and the vicarious liability or *Clark* issues would be testifying in both Phases. UH considers bifurcation "unduly prejudicial", even though it was intended, in part, to address the "burdensome" concerns that were raised by UH in its motion for summary judgment. UH claims it will be:

> … denied the opportunity to call its own expert witness, Dr. Braun, whom UH spent thousands of dollars preparing for trial. UH has defenses in regards to standard of care, causation and damages, supported by Dr. Braun's own expert report, but will be barred from presenting them. At the end of the day, UH may be stuck with a damage award, determined in Phase 1, that it has absolutely no power to influence.

> Lastly, but certainly not least, UH will not be permitted to object to anything during the Phase 1 trial. Absent an objection, issues are not appealable without plain error, which is a difficult standard to meet. This effectively puts the fundamental right to appeal outside the grasp of UH. For all these reasons, the proposed bifurcation is unduly prejudicial to UH.

UH's earlier characterization that it was an "unnecessary, peripheral player" regarding the dental malpractice issue has been abandoned without explanation. UH has separated itself from Dr. Baur throughout litigation by stating that he "is not a UH employee or agent. … Dr. Baur is … an 'independent contractor', as described by the Ohio Supreme Court in *Comer*. … Dr. Baur also has his own counsel and his own expert. There is no need to keep UH in this case." In other words, UH was advocating that Dr. Baur's alleged malpractice is a matter solely for him to resolve, and UH need not be and should not be involved in that issue. Now, UH pleads to the Court that denying it the opportunity to participate in Dr. Baur's defense is unduly prejudicial to its interests.[1] UH has not provided this Court with any legal support for its assertion that it has a right to participate in the determination of negligence against Dr. Baur when UH is defending only vicarious liability arising out of an employee or independent contractor relationship with Dr. Baur. If UH considered that it must participate in the defense of Dr. Baur, as it now asserts, then UH would not have made all of the statements in its previous arguments to separate itself from Dr. Baur.

Further, other entities who are co-defendants with a physician in a medical malpractice case and who claim an independent relationship with that physician, take the opposite approach as advocated by UH. In a case pending before another judge in the Cuyahoga County Common Pleas Court, case number CV-13-804148, co-defendant Emergency Professionals of Ohio, Inc. (EPO), with the support of an affiliated codefendant (collectively, medical defendants), filed an

[1] A reasonable inference from UH's argument that it will be unduly prejudiced if it is not permitted to participate in Phase I is that UH is acting more like an employer rather than treating Dr. Baur like an independent contractor.

extensive brief in support of its motion to bifurcate the exact same claims based on vicarious liability and the issues raised under *Clark*. These medical defendants, who are in the same position as UH, list the following reasons why bifurcation is necessary and why it will be unduly prejudicial to these medical defendants if not granted; (1) judicial economy, (2) "streamline[s] the medical malpractice trial to allow the jury to focus on evidence that is essential to deciding the underlying medical malpractice case," (3) avoids the time and expense of sitting in trial for the medical malpractice case when those issues do not affect the medical defendants, (4) extends the length of the trial regarding vicarious liability when it may not be necessary if the negligence claim is not established by the plaintiffs, and (5) "the medical issues … are complex enough for the jury to evaluate. Trying these issues side-by-side [with vicarious liability issues] sets the stage for confusion, prejudice, and error."

Most importantly, in a previous medical malpractice case in the Cuyahoga County Common Pleas Court, UH asserted the same position as the medical defendants mentioned above. The previous position taken by UH is the exact opposite of the position it now takes concerning the same issues. In *Clark v. Univ. Hosp. of Cleveland*, 8th Dist. Cuyahoga No. 78854, 2001 Ohio App. Lexis 3832 (Aug. 30, 2001), UH filed a motion for a separate trial on the issue of vicarious liability in the underlying medical malpractice claim in the Cuyahoga County Common Pleas Court[2]. That trial court granted UH's motion to bifurcate these issues, and the Eight Appellate District Court upheld that decision upon appeal by the plaintiff. "Because [UH] cannot be held liable for the alleged negligence of Dr. Lazarus absent a finding that Dr. Lazarus was the apparent agent of [UH], the issues of agency and negligence are amenable to separate trials. We cannot conclude that the trial court abused its discretion by ordering separate trials

[2] The lawyers who represented UH in *Clark v. Univ. Hosp. of Cleveland*, 8th Dist. Cuyahoga No. 78854, 2001 Ohio App. Lexis 3832 (Aug. 30, 2001) are well regarded medical malpractice defense lawyers who started their own law firm after they developed their skills under the guidance of the same law firm currently representing UH in this case.

pursuant to Civ.R. 42(B)." *Id.*, at 13. In summary, this Court agrees with the Eighth Appellate District Court's conclusion to affirm the trial court's decision granting UH's motion to bifurcate the issues of negligence and agency. UH's current position and arguments are not well taken.

Dr. Baur also opposes bifurcation and does so by stating:

> While the only claim against UH is vicarious liability, UH has a vested interest in defending the underlying medical malpractice case against Dr. Baur, and has been expending significant resources in doing so[.] … Also, if UH is to be held responsible for Dr. Baur's conduct. Dr. Baur has the right to have the jury hear evidence and argument from UH that they too support and defend the care rendered by Dr. Baur.[3] …
>
> In this case, most if not all of the evidence to be presented for vicarious liability claim is relevant to the underlying malpractice case, and none of the vicarious liability evidence is of such an inflammatory nature that there is a risk of confusing the jury, or prejudicing them against any party. …
>
> Furthermore, for Dr. Baur, this lawsuit is not only about the claim for monetary damages, but about his reputation as an oral and maxillary surgeon. If UH is to be held responsible for his care, then it is important to him that the jury understand that UH has had this case reviewed independently and finds no merit to the case.

This Court disagrees with Dr. Baur's view concerning what UH's "vested interest" is in this case. It is clear that UH has a vested interest in having its strongly held position that Dr. Baur is an independent contractor of UH, and that UH has no legal responsibility whatsoever if the jury determines that Dr. Baur is negligent. In addition, UH has a stake in confirming its strongly held view that the *Clark* exception to the independent contractor relationship does not apply to the facts of this case. However, UH does not have a vested legal interest concerning whether Dr. Baur is negligent. Like UH, Dr. Baur has also not provided any legal support for his "vested interest" theory.

[3] This statement also suggests a relationship more closely aligned to that of employer/employee, rather than an independent contractor relationship.

This Court also disagrees with Dr. Baur's view that most of the evidence concerning vicarious liability issues also applies to the negligence claim. There simply is no relationship concerning the negligence claim regarding treatment and dental care provided by Dr. Baur to Gardner, and the vicarious liability issues with UH. The vicarious liability issues involve evidence concerning; (a) whether the duties and responsibilities of Dr. Baur as the Division Chief of Oral and Maxillofacial Surgery at UH Case Medical Center make him an employee or an independent contractor including, for example, whether his duties are managerial in nature, and (b) whether all of the facts and circumstances are such that Gardner establishes that the *Clark* exception applies to the independent contractor relationship. This evidence is not minor or limited in evidentiary scope. Rather, these examples suggest that numerous witnesses may be called to provide this evidence. The question is not whether a jury has the ability to distinguish and consider separate claims, alleged negligence, and the alleged matters related to vicarious liability. The issue is whether it is more efficient and whether judicial economy may be better served by bifurcating these claims into the two phases.

It is understandable that Dr. Baur believes that "… it is important to him that the jury understands that UH reviewed this case independently and finds no merit to the dental malpractice claim against him." It is hard to imagine any party in a case who would not want another expert testifying in the party's favor, as well as another law firm arguing that no malpractice was committed. However, Dr. Baur's reliance is more akin to that of an employee seeking support from his employer; Dr. Baur is ignoring his status as an alleged independent contractor that UH requires for him to practice at UH. This Court agrees with UH's succinct argument in its motion for summary judgment, "Dr. Baur also has his own counsel and his own expert;" and can therefore defend himself against the dental malpractice claim.

Defendants assert that they will each be unduly prejudiced if they are not permitted to present their own expert testimony. Dr. Baur's reliance on the importance of UH's expert testimony raises an important issue – whether it is unduly prejudicial to Gardner for the Court to permit both Defendants' experts to testify with the same opinion especially when one party, UH, is not directly liable to Gardner for the dental malpractice claim. The Court has ruled in a separate Journal Entry that two defense experts offering the same opinion is duplicative and needlessly cumulative. Evid.R. 403(B). Only one defense expert on the issue of medical/dental malpractice will be permitted to testify during Phase I because both experts offer the same opinion based on a review of the same records. There is no need for the jury to hear duplicative testimony, particularly when UH may only be vicariously liable, and not directly liable. Accordingly, Dr. Baur will have to select between his own expert, Dr. McCain, or UH's expert, Dr. Braun, both of whom are listed on his witness list, to testify during Phase 1. There is no undue prejudice to the parties by bifurcating the legal issues into separate phases, and having only one defense expert testified.

In addition to the issue of undue prejudice raised by UH and Dr. Baur, they also argue that bifurcation in this circumstance is not efficient, does not preserve resources, and will not expedite the trial. They cite specific examples, such as opening statements and closing arguments in each phase, some witnesses testifying twice, particularly Dr. Baur who uses these busy schedule as a factor, and two jury deliberations. However, these examples will not create a significant delay, if there is any delay at all. If there is one trial, the opening statements and closing arguments will be longer to cover both aspects of the direct liability and vicarious liability issues, the testimony will be longer because both issues will be testified to by witnesses, and the deliberations will be longer because the jury will be considering both aspects of this case.

Finally, there is no dispute that if Phase 1 is limited to the dental malpractice claim, and the jury finds in favor of Dr. Baur, then this trial will be materially shorter because there will be no evidence regarding vicarious liability. The Court has considered all of Defendants' arguments, and determines that this trial will not be materially longer, if at all, because of bifurcation.

For all the reasons set forth above, this Court orders that bifurcation will occur as described in this Journal Entry and Opinion. At the beginning of the trial, the Court will instruct the jury concerning bifurcation. UH is permitted to take part in jury selection, and other details regarding these procedures may be set forth in a subsequent Journal Entry if necessary. The parties may file briefs regarding any bifurcation issues, but only after having a conference with the Court to discuss these matters.

IT IS SO ORDERED.

DATED: _____ **JUDGE MICHAEL E. JACKSON**

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.