IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Craig Keehn, Plaintiff, v. Advocate Health Care, an Illinois corporation d/b/a Advocate Condell Medical Center; Chicago Surgical Clinic, Ltd., an Illinois corporation; and Giuseppe Gagliardi, M.D., individually, Defendants.	)	No. 18 L 10490

MEMORANDUM OPINION AND ORDER

The existence of an agency relationship is a question of fact a court may decide if only one conclusion may be drawn from the undisputed facts. The facts in this case lead to the conclusion that there existed no actual agency relationship between a hospital and a treating physician. Other facts lead to divergent conclusions as to whether the physician was the hospital's apparent agent. For these reasons, the hospital's summary judgment motion is granted, in part, and denied, in part.

Facts

On January 8, 2018, Craig Keehn presented to the emergency department of Advocate Condell Medical Center complaining of abdominal pain. A computerized tomography scan taken the same day identified acute appendicitis with no perforation. On January 9, 2018, Dr. Giuseppe Gagliardi performed a laparoscopic appendectomy on Keehn. Also on January 9, 2018, Dr. Patricia Kampmeier, a pathologist, examined the specimens surgically removed by Gagliardi and concluded he had not removed the appendix but a portion of the small intestine.

On January 10, 2018, Gagliardi performed an exploratory laparotomy and removed a portion of Keehn's cecum and a portion of the proximal appendix. The same day, Gagliardi was informed he had still not removed Keehn's appendix. On January 11, 2018, Gagliardi performed a diagnostic laparotomy and resected portions of the appendiceal stump and of the terminal ileum. Later the same day, Keehn suffered acute respiratory failure and became septic.

On January 16, 2018, other physicians at Advocate performed an abdominal washout, closed fascial dehiscence, and placed retention sutures. Keehn remained in Advocate's intensive care unit until January 19, 2018 and hospitalized at Advocate until February 3, 2018. On that date, doctors discharged Keehn to the Shirley Ryan AbilityLab, where he received rehabilitation and therapy. On February 27, 2018, AbilityLab discharged Keehn to go home.

On January 6, 2020, Keehn filed a three-count amended complaint against the defendants. Count one is brought in negligence against Advocate and Gagliardi. Keehn alleges that Gagliardi was Advocate's actual or apparent agent. Keehn further alleges that Advocate and Gagliardi owed Keehn a duty of professional care that they breached by, among other things, failing to identify and remove appendix on January 9 and 10, 2018, and failing to perform a timely appendectomy on January 11, 2018. Count two is brought in negligence against Chicago Surgical Clinic and Gagliardi and is not subject to the current motion. Count three is brought in negligence against Advocate for nursing negligence and is also not subject to the current motion.

The case proceeded to discovery. The record shows that between January 8 and 30, 2018, Keehn or his power of attorney signed eleven consent forms related to his hospital visit and surgeries. Paragraph 14 of the consent form Keehn signed on January 8, 2018 states:

> INDEPENDENT PHYSICIAN/PROVIDER SERVICES: I ACKNOWLEDGE AND FULLY UNDERSTAND THAT **ONLY THOSE PHYSICIAN/PROVIDERS WHO ARE CLEARLY IDENTIFIED AS ADVOCATE EMPLOYEES ARE EMPLOYEES OR AGENTS OF ADVOCATE HEATLH CARE. NON-EMPLOYED PHYSICIAN/PROVIDERS ARE INDEPENDENT PROVIDERS WHO ARE PERMITTED TO USE THE HOSPITAL FACILITIES TO RENDER MEDICAL CARE AND TREATMENT.** Non-employed physicians include, but are not limited to, those practicing emergency medicine, trauma, cardiology, obstetrics, surgery, radiology, anesthesia, pathology and other specialties. These independent physicians/ providers exercise their own medical judgment in treating me or otherwise providing professional services to me. I understand that I should ask my physician any questions I may have about his or her employment status. My decision to seek medical care at the hospital is **NOT BASED UPON ANY UNDERSTANDING, REPRESENTATION, ADVERTISEMENT, MEDIA**

CAMPAIGN, INFERENCE, PRESUMPTION, OR RELIANCE THAT THE PHYSICIANS PROVIDING CARE AND TREATMENT TO ME ARE EMPLOYEES OR AGENTS OF THE HOSPITAL OR ADVOCATE HEALTH CARE.

The next day, January 9, 2018, Keehn signed a combined surgery and anesthesia consent forms, both of which contained the following provision:

> INDEPENDENT PHYSICIAN SERVICES: I acknowledge and fully understand that the physicians who provide medical services to me at the hospital/facility ARE NOT EMPLOYEES OR AGENTS OF THE HOSPITAL/FACILITY, BUT RATHER ARE INDEPENDENT CONTRACTORS OR PRACTITIONERS. ONLY THOSE PHYSICIANS WHO HAVE EXPLICITLY AND CLEARLY IDENTIFIED THEMSELVES AS HOSPITAL/FACILITY EMPLOYEES ARE THE EMPLOYEES OR AGENTS OF THE HOSPITAL/FACILITY. Non-employed physicians are independent practitioners WHO ARE PERMITTED TO USE THE HOSPTAL/FACILITY TO RENDER MEDICAL CARE AND TREATMENT. Non-employed physicians include, but are not limited to, those practicing emergency medicine, trauma, cardiology, obstetrics surgery, radiology, anesthesia, pathology and other specialties. I have been told that the hospital/facility does not control the medical decisions made by the independent physicians. These independent physicians exercise their own medical judgment in treating me or otherwise providing professional services to me and are solely responsible for their care and treatment. I understand that I should ask my physician any questions I may have about his or her employment status. My decision to seek medical care at the hospital/facility is NOT BASED UPON ANY UNDERSTANDING, REPRESENTATION, ADVERTISEMENT, MEDIA CAMPAIGN, INFERENCE PRESUMPTION, and OR RELIANCE THAT THE PHYSICIANS PROVIDING CARE AND TREATMENT TO ME ARE EMPOYEES OR AGENTS OF THE HOSPTIAL/FACILITY.

On January 10 and 11, 2018, Keehn signed a second and third set of surgery and anesthesia forms containing the same provision.

Keehn confirmed that he signed the consent forms dated between January 8 and 10, 2018. He testified that the signature on the forms signed between January 10 and 11, 2018 do not look like his normal signature. Keehn's mother and power of attorney, Diane Marsh, and his father, Guy

Keehn, signed the consent form dated January 16, 2018. Keehn also confirmed that on January 30, 2019, he was presented with a final consent form, confirmed that he read the form, and signed it. Yet Keehn testified that he believed Gagliardi was "affiliated and employed by the hospital."

Gagliardi's interrogatories answers admitted that Chicago Surgical Clinic employed him at all times relevant to this lawsuit. He also answered that he was not an Advocate employee or agent. At his deposition, Gagliardi confirmed that he was not an Advocate employee and said he did not tell Keehn otherwise. He confirmed that Chicago Surgical Clinic employed him, and agreed there was nothing at Advocate telling patients he was not an employee. Gagliardi also testified he was free to use his own medical judgment as a physician as to Keehn's care and treatment, and no one at Advocate directed the way in which he treated Keehn. Gagliardi wore a badge stating "MEDICAL STAFF" at the top, Gagliardi's photo in the center, and his name, "GIUSEPPE GAGLIARDI" at the bottom.

Certain advertisements included in the record indicate that Advocate advertised its services and stated that it "employs leading physicians."

Analysis

Advocate brings its summary judgment motion pursuant to the Code of Civil Procedure. Summary judgment is authorized "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

A defendant moving for summary judgment may disprove a plaintiff's case by introducing affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law; this is the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). If the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a

genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.* On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

Advocate argues first that it is not liable through *respondeat superior* for Gagliardi's alleged negligence because he was not an Advocate employee and, thus, not an actual agent. A successful claim of actual agency requires a plaintiff to show: (1) the hospital and physician had a principal-agent relationship; (2) the hospital controlled or had the right to control the physician's conduct; and (3) the physician's alleged conduct was of a type within the agency's scope. *Hammer v. Barth*, 2016 IL App (1st) 143066, ¶ 15 (citing *Wilson v. Edward Hosp.*, 2012 IL 112898, ¶ 18). Physicians not employed by a hospital where they work are generally considered independent contractors for whom the hospital is not liable for their malpractice. *Id.* (citing *Hundt v. Proctor Comm. Hosp.*, 5 Ill. App. 3d 987, 990 (3d Dist. 1972) and *Petrovich v. Share Health Plan of Ill., Inc.*, 188 Ill. 2d 17, 31 (1999)). A physician's independent status may, however, be overcome if the hospital retains sufficient control over the physician's work. *Id.* (citing *Petrovich*, 188 Ill. 2d at 42). In such an instance, the hospital is vicariously liable. *Id.* This type of authority, termed implied authority, is actual authority proved by circumstantial evidence. *Id.* The central factor to be considered in determining actual authority is whether the hospital had the right to control the physician's exercise of medical judgment in delivering medical care to a patient. *Id.* (citing *Petrovich*, 188 Ill. 2d at 45-46).

Gagliardi testified plainly that he was not an Advocate employee but was, instead, employed by Chicago Surgical Clinic. Keehn does not dispute that much, but suggests the evidence establishes Advocate's retained a right to control the way in which Gagliardi handled pathological specimens, surgical scheduling, and post-surgical communications. Even if Keehn is correct in this regard, none of those facts has anything to do with Gagliardi's delivery of medical care to Keehn. Without evidence of Advocate's control or right to control Gagliardi's delivery of medical care to Keehn, there existed no actual agency between Advocate and Gagliardi to make Advocate liable for Gagliardi's alleged malpractice.

Advocate also argues there existed no apparent agency between it and Gagliardi. "Apparent agency is a question of fact." *Petrovich*, 188 Ill. 2d at 33) (citing *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 524 (1993)). For apparent agency to exist in a hospital setting, a plaintiff must show: (1) the hospital or its agent acted in a way that would lead a reasonable person to believe the allegedly negligent independent contractor was the hospital's employee or agent; (2) if the hospital's or agent's acts create the appearance of authority, the hospital must have know of and acquiesced to those acts; and (3) the plaintiff relied on the hospital's or agent's conduct consistent with ordinary care and prudence. *Gilbert,* 156 Ill. 2d at 525. A plaintiff's failure to establish any one element will support summary judgment in favor of the hospital. *Wallace v. Alexian Bros. Med. Ctr.*, 389 Ill. App. 3d 1081, 1086 (1st Dist. 2009). The first two elements go to a hospital's so-called holding out a person to be an employee. *Yarbrough v. Northwestern Mem. Hosp.*, 2017 IL 121367, ¶ 30. It is unnecessary for the hospital to make an express representation that the person alleged to be negligent is an employee. *Id.* The third element goes to the patient's justifiable reliance, which is established if the plaintiff relies on a hospital rather than a specific physician to provide medical care. *Id.* ¶ 31.

Advocate relies heavily on its consent forms Keehn signed to establish that Gagliardi was not an apparent agent. The forms are consistent and plainly state that no physicians were Advocate employees unless so identified. Keehn signed eight consent forms containing similar language.

Consent forms are generally important to consider, but are not necessarily dispositive of the holding out factors. *Wallace,* 389 Ill. App. 3d at 1087. In this instance, the consent forms are not dispositive despite their consistency and plain language. The reason is that Gagliardi wore a badge with his name and photograph and identified him as, "MEDICAL STAFF." A reasonable inference favorable to Keehn may be drawn that, despite the clarity of the consent forms, Advocate, by giving Gagliardi his "MEDICAL STAFF" badge, acted in such a way that could lead a reasonable person such as Keehn to believe Gagliardi was an employee. Further, Advocate certainly knew and acquiesced to this appearance of authority because it supplied the badge.

As to justifiable reliance, it has been held that, if a patient did not select a specific physician to provide treatment, "it follows that the patient relie[d] upon the hospital to provide complete care—including support services . . .—through the hospital's staff." *York*, 222 Ill. 2d at 194. Keehn testified plainly that went to Advocate's emergency department because it was the closest hospital to his home. There is also nothing in the record to

indicate that Keehn had a previous physician-patient relationship with Gagliardi. Further, Gagliardi did not discuss his employment status with Keehn during his admission and acknowledged there was nothing else in the hospital indicating to Keehn that Gagliardi was not an employee. This is certainly a sufficient basis for Keehn to form a belief, as he testified, that Gagliardi was affiliated and employed by Advocate.

Conclusion

For the reasons presented above, it is ordered that:

1. Advocate's summary judgment motion is granted, in part, and denied, in part;
2. Keehn's claims based on Advocate's actual agency are dismissed with prejudice; and
3. Keehn's claims based on Advocate's apparent agency are retained.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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