

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JEAN M. DUNN, Personal Representative :
of the Estate of TERESA M. BRADLEY, :
Deceased, RICHARD F. BRADLEY, JR., :
Individually, and SHANNON J. PALMER, :
Individually, :

C.A. No. 05C-02-041 WLW

Plaintiffs, :

v. :

ATLANTIC SURGICAL ASSOCIATES, :
LLC, a Delaware Limited Liability Corp., :
DUANE F. TULL, M.D., Individually, :
DAVID J. CLONEY, M.D., Individually, :
ATLANTIC WOMENS CARE, LLC, a :
Delaware Limited Liability Corp., ALBERT :
H. FRENCH, II, M.D., Individually, :
BAYHEALTH MEDICAL CENTER, INC., :
a Delaware corporation, SURGICAL AND :
CRITICAL CARE ASSOCIATES, P.A., a :
Delaware corporation, PANJAK H. PATEL, :
M.D., Individually, and CHRISTINA CARE :
HEALTH SERVICES, INC., a Delaware :
corporation, :

Defendants. :

Submitted: January 19, 2007

Decided: April 27, 2007

ORDER

Upon Bayhealth Medical Center, Inc.'s
Motion for Summary Judgment.
Granted in part; Denied in part.

William D. Fletcher, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware
and Christian A. Lodowski, Esquire of Weiner & Weltchek, P.A., Baltimore,
Maryland; attorneys for the Plaintiffs.

Bradley J. Goewert, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorneys for Defendant Atlantic Surgical Associates, LLC and David J. Cloney, M.D.

Richard Galperin, Esquire of Morris James, LLP, Wilmington, Delaware ; attorneys for Duane F. Tull, M.D.

Anne L. Naczi, Esquire of Griffin & Hackett, P. A., Georgetown, Delaware; attorneys for Bay Area Womens Care, LLC and Albert H. French, II, M.D.

Mason E. Turner, Esquire of Prickett Jones & Elliott, Wilmington, Delaware; attorneys for Bayhealth Medical Center, Inc.

John D. Balaguer, Esquire of White & Williams, Wilmington, Delaware; attorneys for Christiana Care Health Services, Inc. and Duane F. Tull, M.D.

WITHAM, R.J.

FACTS

Alleging that Theresa Bradley's ("Mrs. Bradley") untimely death was the result of negligent medical care and treatment by a variety of health care providers, the Plaintiffs instituted this medical malpractice and wrongful death action in February of 2005. Before the Court is a motion for summary judgment filed by Defendant Bayhealth Medical Center, Inc., d/b/a Milford Memorial Hospital (hereinafter "Bayhealth Medical Center" or "Hospital") pursuant to Superior Court Civil Rule 56.

Following a visit to her primary care physician, the decedent, Mrs. Bradley, was referred to Duane Tull, M.D. ("Dr. Tull"), a general surgeon. After an initial evaluation, Dr. Tull referred Mrs. Bradley to Albert French, II, M.D. ("Dr. French"), a gynecologic surgeon, for a second opinion. On March 21, 2003, Mrs. Bradley had scheduled surgery to remove a mass in her abdomen. The surgery was performed at Bayhealth Medical Center by Dr. Tull and Dr. French. Complications arose following the procedure and Mrs. Bradley was forced to undergo follow-up surgery on April 2, 2003. During the follow-up surgery, performed at Bayhealth Medical Center by David Cloney, M.D. ("Dr. Cloney"), a general surgeon, the presence of bowel perforations were revealed. Thereafter, Mrs. Bradley was transferred to Christiana Hospital where she remained a patient for several months. Due to the continued deterioration of her health, Mrs. Bradley was eventually transferred to the University of Maryland Hospital where she died on December 9, 2003.

At all times relevant to this litigation, Dr. Cloney and Dr. Tull were employed by Defendant Atlantic Surgical Associates and Dr. French, in addition to having his

own practice, Bay Area Women's Care, LLC, was the Chief of Staff of the Department of Obstetrics and Gynecology ("OB-GYN Department") at Bayhealth Medical Center.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.¹ The facts must be viewed in the light most favorable to the non-moving party.² Summary judgment must be denied "if there is a material fact in dispute, or inferences which might be drawn therefrom,"³ or if the record indicates a need to inquire more thoroughly into the facts to clarify the application of law to the circumstances.⁴

DISCUSSION

Whether Bayhealth Medical Center can be liable for the allegedly negligent conduct of Dr. Tull, Dr. Cloney, and/or Dr. French rests on whether an actual or apparent agency relationship can be established between Dr. Tull, Dr. Cloney, and/or

¹Superior Court Civil Rule 56(c).

²*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

³*Fulton v. Quinn*, 1993 Del. Super. LEXIS 11 at *8 citing *Schagrin v. Wilmington Medical Center, Inc.*, 304 A.2d 61, 63 (Del. Super 1973).

⁴*Murphy v. Bayhealth, Inc.*, 2005 Del. Super. LEXIS 72 at *9.

Dr. French and Bayhealth Medical Center at the time of the alleged negligence.⁵

Actual Agency

“It is well settled under Delaware law that general agency principles apply to hospitals and physicians.”⁶ “In order to establish actual agency, it must be shown that the employer/hospital controlled or had the right to control the physical conduct of the servant/physician in the performance of the servant/physician’s work.”⁷ “Where there is sufficient evidence establishing the requisite right of control, the trier of fact may find that the physician is an agent of the hospital and thus impose vicarious liability on the hospital.”⁸ “However, if the requisite right of control does not exist, the physician is considered an independent contractor and the hospital is generally not liable for the negligence of an independent contractor.”⁹ “Consequently, the level of control a hospital has over a physician becomes dispositive in the determination of a physician’s status.”¹⁰

Dr. Tull and Dr. Cloney

⁵Whether Dr. Tull, Dr. French, and/or Dr. Cloney were in fact negligent is not at issue in this motion.

⁶*Fulton*, 1993 Del. Super. LEXIS 11 at *9.

⁷*Id.*

⁸*Id.* at *9-10.

⁹*Id.* at *10.

¹⁰*Id.*

Citing Bayhealth Medical Center's allegedly excessive control, the Plaintiffs contend that an actual agency relationship between Bayhealth Medical Center and the Dr. Tull and Dr. Cloney can be established. First, the Plaintiffs argue that the doctors' privileges to practice medicine at the Hospital were at the discretion of Bayhealth Medical Center. However, the fact that the doctors' privileges to practice at Bayhealth Medical Center was at the Hospital's discretion in no way evidences the Hospital's right to control any manner of the defendant doctors' work. In fact, an independent contractor's right to perform work at a place of business is almost always at the discretion of that business.

The Plaintiffs further contend that the Hospital controlled multiple areas of practice, including the placement of patients. To support this contention, the Plaintiffs point to Dr. Cloney's deposition testimony which states that following surgery, the Hospital places patients where it deems proper. Again, this fact has little to do with Bayhealth Medical Center's right to control the physical conduct of Dr. Tull or Dr. Cloney's work.

The Plaintiffs additionally claim that by admitting that they participate in the Medicare Program, Bayhealth Medical Center acknowledges their responsibility and control over the defendant doctors pursuant to 42 C.F.R. § 482.12(e), which states that "the governing body must be responsible for services furnished in the hospital, whether or not they are furnished under contract." Mere participation by a Hospital in the federally mandated Medicare Program is insufficient to show the control necessary to establish an actual agency relationship. To accept the inverse

proposition, that participation by a Hospital in the Medicare Program establishes the control necessary to create an actual agency relationship, would require a finding that every independent contractor practicing in that Hospital is a servant/agent of that Hospital. The Court is unwilling to so find.

Finally, the Plaintiffs point out that the Hospital had policies in effect requiring physicians to dictate, verify, and sign their records, including operative notes. To the extent that this demonstrates control over the defendant doctors' work, it is insufficient in-and-of itself to allow a trier of fact to find that Dr. Tull or Dr. Cloney was an actual agent of the hospital at the time of the alleged negligence.¹¹

Even when viewed in the light most favorable to the Plaintiffs, there is insufficient evidence for a trier of fact to conclude that Dr. Tull and Dr. Cloney were actual agents of the Hospital and not in fact, independent contractors. In the instant case, the record indicates that Dr. Tull and Dr. Cloney were physicians employed by Atlantic Surgical Associates at the time of the alleged negligence and that neither Dr. Tull or Dr. Cloney kept an office, held any position, or were compensated in any way by Bayhealth Medical Center.

Moreover, the alleged control cited by the Plaintiffs is insufficient to establish an actual agency relationship between Dr. Tull or Dr. Cloney and Bayhealth Medical Center. Consequently, the Court concludes that Dr. Tull and Dr. Cloney were independent contractors and not actual agents of the Hospital at the time of the

¹¹Noteworthy is that this type of minimal control is clerical in nature and important for the Hospital to maintain its own, independent patient records.

alleged negligence as a matter of law.

Dr. French

With regard to Dr. French, the Plaintiffs reiterate the alleged control articulated above. In addition, the Plaintiffs highlight Dr. French's position as Chief of Staff of the OB-GYN Department at Bayhealth Medical Center at the time of the alleged negligence. Dr. French's duties as Chief of Staff included conducting departmental meetings, attending medical executive committee meetings, review, amend and develop departmental policies, schedule emergency room on-call obstetrics and gynecology coverage and departmental chart review. Further, Dr. French wore an identification badge while making rounds at the Hospital that included his name, title, department and picture, underneath the name "Bayhealth."

Given Dr. French's position with the Hospital at the time of the alleged negligence, there seems to remain some dispute as to whether Dr. French was an actual agent of the Hospital on March 21, 2003. In any event, not enough specific facts exist with regard to the relationship and amount of control and direction Bayhealth Medical Center exercised over Dr. French to permit a decision on this issue as a matter of law at this time.

Apparent Agency

"Although a hospital is generally not liable for the negligence of physicians who are independent contractors, an exception to this rule has been recognized by the

Delaware courts.”¹² “Under this exception, which has been generally denominated by courts as the ‘apparent agency’ theory, a physician who is in fact an independent contractor may, nonetheless, under the facts of each case be considered in law an agent of the hospital with respect to a patient.”¹³ The exception has been articulated as follows: “One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused that a lack of care or skill of the one appearing to be a servant or other agent as if he were such.”¹⁴

In opposition to the Defendant Bayhealth Medical Center’s motion for summary judgment, the Plaintiffs maintain that Bayhealth Medical Center held out Dr. Tull, Dr. Cloney, and/or Dr. French as agents and that Mrs. Bradley reasonably relied on that representation in seeking, continuing, and consenting to treatment.

In order to establish an apparent agency relationship between any of the defendant doctors and Bayhealth Medical Center, the Plaintiffs must first establish that Bayhealth Medical Center represented or held out any of the defendant doctors as an agent to Mrs. Bradley and second, that Mrs. Bradley reasonably relied on that

¹²*Fulton*, 1993 Del. Super. LEXIS at *11 citing *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 722 (Del. Super. 1970).

¹³*Id.* at *11-12.

¹⁴*Id.* at *12 citing *Vanaman*, 272 A.2d at 722; see *Restatement (Second) of Agency* § 267; *Old Guard Ins. Co. v. Jimmy's Grille, Inc.*, 2004 Del. LEXIS 417 at * 10 ("Apparent authority may be defined as that authority which, though not actually granted, the principal knowingly or negligently permits the 'agent' to exercise or which he holds him out as possessing.")

representation.

To the extent the Plaintiffs' assert that the Hospital "held out" the defendant doctors as agents because of the location of the defendant doctors' private offices; that contention is without merit. Dr. Tull and Dr. Cloney's private practice, Atlantic Surgical Associates, is not located in the Hospital itself, but in a building owned by the Hospital and within the boundaries of its parking lot.¹⁵ This arrangement is an exceedingly common practice today. A Hospital does not hold out a physician as an agent simply because that physician's private practice is located in a building owned by the Hospital and in its vicinity.¹⁶ To so find could open up a Hospital to a plethora of liability for negligence completely unrelated to its own operation.

To show that Mrs. Bradley may have believed that Dr. Tull and Dr. Cloney were agents of the Hospital due to the location of their office, the Plaintiffs stress Dr. Tull's deposition testimony. When asked if a reasonable person would believe that his office was part of the medical campus of the hospital, Dr. Tull responded: "it was in the physical block of the Hospital so I guess possibly." However, holding out by the principal/Hospital is a prerequisite to any reasonable reliance and the Hospital did not "hold out" Dr. Tull or Dr. Cloney as an agent by leasing the doctors office space for their private practice in a building separate from the Hospital itself. Therefore,

¹⁵Presumably, the building houses a number of private practices.

¹⁶Dr. French's office, Bay Health Women's Center, is not located in a building owned by the Hospital or on its premises, but is located across the street. The location of Dr. French's office in no way evidences any "holding out" by Bayhealth Health Medical Center that Dr. French was its agent.

any subjective belief that Mrs. Bradley had that Atlantic Surgical Associates was part of the Hospital, due to its location, is immaterial.¹⁷

The Plaintiffs also contend that the consent form signed by Mrs. Bradley, in the office of Atlantic Surgical Associates, could have lead to her belief that Dr. Tull and Dr. Cloney were agents of the Hospital. The consent form signed by Mrs. Bradley was titled “Bayhealth Medical Center, Inc. *Milford Memorial Hospital* Consent for Surgery, and Other Medical Services.” Under the circumstances, this contention is unpersuasive. Mrs. Bradley was on notice of Dr. Tull and Dr. Cloney’s status as independent contractors prior to the time she read and signed the consent form; therefore, any subjective belief she may have developed upon signing the consent form would be unreasonable.

Finally, the Plaintiffs contend that an apparent agency relationship can be established between Dr. French and Bayhealth Medical Center because of Dr. French’s position as the Chief of Staff of the OB-GYN Department at Bayhealth Medical Center. As stated above, Dr. French wore an identity badge that had his name, title, department and picture, underneath the name “Bayhealth” while doing rounds at Bayhealth Medical Center.

Whether Mrs. Bradley knew of or relied in any way on Dr. French’s position at the Hospital is not clear; therefore, summary judgment on the issue is inappropriate at this juncture. With regard to Dr. French, the record indicates a need to inquire

¹⁷Of note, there is no evidence in the record that Mrs. Bradley had any reliance that the defendant doctors were associated with the Hospital in any way.

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more thoroughly into the facts to clarify the application of law to the circumstances.¹⁸

CONCLUSION

The Court concludes for all the reasons set forth in this Opinion, (1) that Dr. Tull and Dr. Cloney were independent contractors and not actual agents of Bayhealth Medical Center at the time of the alleged negligence, (2) that an apparent agency relationship between Dr. Tull or Dr. Cloney and Bayhealth Medical Center cannot be established at the time of the alleged negligence, and (3) that the record indicates a need to inquire more thoroughly into the facts to determine whether Dr. French was an actual or apparent agent of Bayhealth Medical Center at the time of the alleged negligence.

Therefore, Bayhealth Medical Center's motion for summary judgment is *granted* in part and *denied* in part.

IT IS SO ORDERED.

/s/ William L. Witham, Jr. _____

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

¹⁸*Murphy*, 2005 Del. Super. LEXIS 72 at *9.