IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RICKY M. LUEBBERT,

Appellant,

v. Case No. 5D19-2824

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., D/B/A FLORIDA HOSPITAL AND SYED ABDUL MALIK, M.D.,

Appellees.

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Opinion filed February 5, 2021

Appeal from the Circuit Court
for Orange County,
Keith A. Carsten, Judge.

Ovide Val, of Law Offices of Ovide Val, P.A., Miami, for Appellant.

Philip J. Wallace, and Samantha L.Stevens, and Kristen L. Nasser, and Patrick H. Telan, of Grower, Ketcham, Eide, Telan & Meltz, PA, Orlando, for Appellees.

HARRIS, J.

Ricky Luebbert appeals the trial court's order granting final summary judgment in favor of Advent Health System/Sunbelt, Inc., d/b/a Florida Hospital. Count two of Luebbert's complaint alleged that Florida Hospital was liable on a theory of vicarious liability. Because we agree with Luebbert that genuine issues of material fact exist with

respect to this claim that would preclude summary judgment, we reverse that portion of the trial court's judgment. We affirm on all other issues raised in this appeal.

Luebbert first visited Florida Hospital in November 2011 after suffering severe abdominal pain. He was diagnosed with appendicitis and a periappendiceal abscess, which required an appendectomy. At approximately 4:00 a.m., while waiting in the pre-operative holding area, Luebbert met Dr. Syed Malik, the on-call general surgeon. Dr. Malik wore a white coat that included his name and the words "general surgeon," along with a Florida Hospital badge. Something about Dr. Malik caused Luebbert to feel uneasy, and he inquired about the availability of another surgeon. Luebbert was advised that the next available surgeon would not be in until 9:00 a.m. Not willing to wait five hours, Luebbert opted to "take his chances" with Dr. Malik.

Following the surgery and out of an abundance of caution, Luebbert requested to be given antibiotics, but Dr. Malik assured Luebbert that antibiotics were not necessary. Unfortunately Luebbert then suffered a significant post-operative abdominal infection, as a result of which he filed a medical negligence suit against Florida Hospital and Dr. Malik.[1] In count two of his lawsuit, Luebbert alleged that Florida Hospital was vicariously liable for Dr. Malik's negligence, claiming that Dr. Malik was either an employee or an agent of Florida Hospital.

Florida Hospital eventually moved for summary judgment, arguing that Dr. Malik was neither an employee nor an agent of the hospital but rather an independent contractor, evidenced by a written agreement between Florida Hospital and Dr. Malik.

[1] Dr. Malik was dismissed pursuant to a settlement agreement, leaving Florida Hospital as the only remaining defendant.

Florida Hospital also relied on Dr. Malik's deposition testimony, including his statements that he was not paid by Florida Hospital, that he billed insurance companies directly, that Florida Hospital did not influence his treatment decisions, and that he considered himself an independent contractor of the hospital. In opposing summary judgment, Luebbert also relied on portions of Dr. Malik's deposition testimony, specifically where he acknowledged that he maintained staff privileges at Florida Hospital, that virtually all of the medical care he provided was rendered at Florida Hospital, and that he maintained a private office at the hospital (where he in fact met with Luebbert following surgery).

Following the hearing on the motion for summary judgment, the court found that the uncontroverted record evidence established that Dr. Malik was not an employee or agent, actual or apparent, of Florida Hospital. The court then entered a judgment in favor of Florida Hospital on all of Luebbert's claims, including his theory of vicarious negligence. While we agree that there is nothing in the record to support the argument that Dr. Malik was an employee or actual agent of Florida Hospital, we find sufficient evidence in the record from which a jury could conclude that an apparent agency relationship existed. Therefore, it was error to enter judgment in favor of Florida Hospital on Luebbert's theory of vicarious liability.

The theory of vicarious liability holds employers liable for the negligence of their employees committed within the scope of employment. Cintron v. St. Joseph's Hosp., Inc., 112 So. 3d 685, 686 (Fla. 2d DCA 2013). If a hospital retains an independent contractor to provide medical services, it may still be liable for the negligence of that independent contractor if the hospital "cloaked her with apparent authority to act on its behalf." Godwin v. Univ. of S. Fla. Bd. of Trs., 203 So. 3d 924, 929 (Fla. 2d DCA 2016).

An apparent agency exists if all three of the following elements are present: (1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance on the representation. Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003). Thus, where a hospital held out a particular physician as its agent or employee, and a patient has accepted treatment from that physician and reasonably believed that treatment was rendered on behalf of the hospital, the hospital will be liable for the physician's negligence. Kristensen-Kepler v. Cooney, 39 So. 3d 518, 520 (Fla. 4th DCA 2010); Irving v. Doctors Hosp. of Lake Worth, Inc., 415 So. 2d 55, 59 (Fla. 4th DCA 1982).

Apparent agency does not arise from the subjective understanding of the patient or from appearances created by the purported agent himself. Guadagno v. Lifemark Hosps. of Fla., Inc., 972 So. 2d 214, 218 (Fla. 3d DCA 2007). Apparent authority only exists where the principal creates the appearance of an agency relationship. See id. (finding no apparent agency where principal hospital expressly disavowed an agency or employee relationship, conveyed that information to claimant, and claimant acknowledged this by signing the admission documents).

Here, Luebbert acknowledged and signed a consent agreement, which stated:

> I understand that not all of the services rendered at the hospital are services offered directly by the hospital or an employee of the hospital. Many physicians and care providers utilizing the facilities and equipment of the hospital are independent contractors and engage in the business of rendering services at the hospital for their own benefit. Physicians and care providers who provide services at the hospital as independent contractors, are not employed by, nor are they agents of, the hospital. This may include, but is not limited to, emergency room physicians, radiologists, pathologists, anesthesiologists, surgeons, cardiologists, pulmonologists and neonatologists. This means that the

> hospital is not responsible for, and does not agree to accept the liability for, services provided to me by independent contractor physicians and/or care providers.

The agreement did not specifically state that Dr. Malik, or even more generally the on-call surgeon, was neither an employee nor agent of Florida Hospital. The agreement did not specify which services in particular were in fact independent from the hospital. Thus, it is unclear whether Florida Hospital expressly disavowed an agency relationship as to Dr. Malik in the consent agreement.

In Ginsberg v. Northwest Medical Center, Inc., 14 So. 3d 1250, 1251 (Fla. 4th DCA 2009), the patient signed a similar consent form that contained the following clause:

> I acknowledge and agree that the surgeon and physician associates are independent contractors and are not employees or agents of Northwest Medical Center and that Northwest Medical Center does not control the manner or methods by which such procedures are performed.

The trial court granted summary judgment in favor of the hospital, finding that the consent agreement expressly disavowed an agency relationship with the physician treating the patient. Id. at 1252. In reversing the summary judgment, the Fourth District held that, because the consent form alone failed to quiet all genuine issues of material fact, summary judgment was improper. See id. Here, like Ginsberg, the consent form is vague as to whether Florida Hospital expressly denied an agency relationship.

Additionally, even if a hospital does not make representations to the public or to patients concerning the physician's employment status, it may still be liable on a theory of apparent agency where there is lack of choice on part of the patient. Orlando Reg'l Med. Ctr., Inc. v. Chmielewski, 573 So. 2d 876, 879 (Fla. 5th DCA 1990); Jones v. Tallahassee Mem'l Reg'l Healthcare, Inc., 923 So. 2d 1245, 1248 (Fla. 1st DCA 2006);

Cuker v. Hillsborough Cty. Hosp. Auth., 605 So. 2d 998, 1000 (Fla. 2d DCA 1992). The element of reliance is met where a patient relies on the hospital to provide health care services rather than relying upon a specific physician while merely looking to the hospital as a "conduit through which the [patient] receives medical care." Ramos v. Preferred Med. Plan, Inc., 842 So. 2d 1006, 1010 (Fla. 3d DCA 2003); see also Chmielewski, 573 So. 2d at 879 (acknowledging that jury should determine apparent agency where patients assume physician worked for hospital because physician was furnished to them once they arrived in hospital's emergency room); Jones, 923 So. 2d at 1248; Roessler, 858 So. 2d at 1163 (reversing summary judgment where patient did not attempt to secure specialist on his own and instead accepted physician provided to him by hospital).

Although Luebbert had the option to accept treatment from another on-call physician, he was selecting between physicians that the hospital provided to him, rather than selecting a doctor of his choosing. See Jones, 923 So. 2d at 1248–49 (noting where hospital has "many interrelated independent contractors working side-by-side for the same customers, the patient does not usually have the option to pick among several independent contractors . . . and has little ability to negotiate and bargain in this market to select his or her preferred health care provider" (internal quotation marks omitted)). Luebbert relied on Florida Hospital to provide him with a physician. This lack of choice on part of Luebbert, coupled with the other factors previously discussed, is sufficient to create a jury question regarding apparent agency. Because Luebbert's testimony established he wanted to get the surgery as quickly as possible, he likely would not have changed his position even if he knew Dr. Malik was independent from the hospital. However, this remains a question for the fact finder. This Court in Chmielewski ruled in favor of the

patient even though the patient testified he would have still accepted treatment if he knew the doctor was not employed by the hospital. 573 So. 2d at 879.

Accordingly, there remains a genuine issue of material fact as to Florida Hospital's vicarious liability through an apparent agency relationship with Dr. Malik, and summary judgment in favor of Florida Hospital was improper as to count two of Appellant's complaint. The final summary judgment as to count two is reversed. We affirm on all other issues.

AFFIRMED in part, REVERSED in part. REMANDED for further proceedings.

COHEN and EDWARDS, JJ., concur.