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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001624-MR

LISA RAINS, ADMINISTRATRIX OF THE ESTATE OF BOBBY RAY RAINS, DECEASED; LISA RAINS, INDIVIDUALLY, AND AS SURVIVING SPOUSE AND HEIR OF BOBBY RAY RAINS, DECEASED — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-CI-00369

ST. JOSEPH HEALTHCARE, INC.; ST. JOSEPH HOSPITAL; STEPHANIE DUNKLE-BLATTER, M.D.; NEW LEXINGTON CLINIC, P.S.C.; LEXINGTON CLINIC, P.S.C.; LEXINGTON CLINIC-INTERNAL MEDICINE SERVICE OF LEXINGTON CLINIC; MICHAEL ESTRIDGE, M.D.; JOHN DOE, M.D., AS UNKNOWN TREATING PHYSICIAN OR PHYSICIANS ASSOCIATED WITH ST. JOSEPH HOSPITAL AND ST. JOSEPH HEALTHCARE, INC.; AND RICHARD ROE, M.D., AS UNKNOWN TREATING PHYSICIAN OR PHYSICIANS ASSOCIATED WITH NEW LEXINGTON CLINIC, P.S.C., AND LEXINGTON CLINIC, P.S.C., AND LEXINGTON CLINIC-INTERNAL MEDICINE SERVICE OF LEXINGTON CLINIC

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Lisa Rains, individually, as the surviving spouse and heir, and as the administratrix of the estate of Bobby Ray Rains, appeals from the trial court's order granting summary judgment in favor of St. Joseph Healthcare, Inc. (hereinafter "SJH"). For the following reasons, we affirm.

Bobby was transferred to SJH from Baptist Regional Memorial Hospital on January 6, 2007. While hospitalized at SJH, Bobby was seen by multiple specialists, including defendants Dr. Stephanie Dunkle-Blatter and Dr. Michael Estridge. Dr. Dunkle-Blatter performed a paracentesis[1] procedure on Bobby, during which Lisa alleges Bobby's vein was "nicked." Lisa claims that Drs. Dunkle-Blatter and Estridge should have ordered diagnostic tests or medications following that puncture and failed to do so. Bobby was transferred to the University of Kentucky Medical Center on January 20, 2007, where he died five days later.

Lisa filed suit against SJH, among others, asserting that SJH was vicariously liable for the aforementioned doctors' alleged negligence under a theory of ostensible agency. SJH filed a motion for summary judgment on the

[1] Paracentesis is a procedure in which a needle or catheter is inserted into the abdominal cavity to remove fluid. *See Taber's Cyclopedic Medical Dictionary*, 1318 (16th ed. 1989). The record shows that three paracentesis procedures were performed on Bobby while he was hospitalized at Baptist Regional.

basis that the "Authorizations and Consents" form signed by Bobby notified him that the doctors were not employees or agents of SJH and thus precluded its liability as a matter of law. The consent form contained the following provision:

> 8. I understand that physicians, surgeons, radiologists, pathologists, anesthesiologists, other doctors, and physicians assistants who may render care or services in my case are not employees or agents of Saint Joseph HealthCare, Inc. I acknowledge[,] authorize, and consent to each of the matters discussed above. I agree to abide by the rules of Saint Joseph HealthCare, Inc., cooperate with physicians and hospital personnel in my care and treatment, and observe the rights of other patients.

After reviewing the parties' arguments and the record, the trial court granted summary judgment in favor of SJH, finding that Bobby's signature on the consent form acknowledged that the physicians were not agents or employees of SJH so as to bar SJH's liability as a matter of law under an ostensible agency theory.[2] The court further found that the substance of Dr. Brian Heller's[3] affidavit, submitted by Lisa, concerned SJH's standard of care involving its employees or agents, rather than the issue of its liability, and was irrelevant to Lisa's claim

[2] The court noted that the defendant physicians were employed or affiliated with Lexington Clinic, an independent group of multi-specialty providers with privileges to treat patients at SJH. The record shows that Lexington Clinic is a defendant in the underlying action.

[3] The court's order refers to an expert, but does not identify the expert by name. Our review of the record reveals Dr. Heller to be the named expert.

against SJH.[4] The court granted summary judgment in favor of SJH. Lisa now appeals.

On appeal, Lisa asserts that the trial court erred by granting summary judgment in favor of SJH because a genuine issue of fact exists as to SJH's liability under an ostensible agency theory, based upon the inadequate and improper consent form presented for Bobby's signature. We disagree.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, 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." CR[5] 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

[4] We agree with the trial court that Dr. Heller's affidavit is immaterial to the issue of SJH's liability under an ostensible agency theory; Lisa did not allege independent negligence on the part of SJH. While Dr. Heller's affidavit does call into question the font size and the complexity of the language used in SJH's consent form, no binding legal authority is cited in support of his opinions and we find the provision of the form at issue to be both legible and comprehendible.

[5] Kentucky Rules of Civil Procedure.

On appeal from a granting of summary judgment, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lewis B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). We review the trial court's legal conclusions *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

An apparent or ostensible agent is not an actual agent, but is "'one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him.'" *Middleton v. Frances,* 257 Ky. 42, 44, 77 S.W.2d 425, 426 (1934) (citation omitted). The general premise in Kentucky is that hospitals are not vicariously liable for doctors who are not its employees under an ostensible agency theory so long as the hospital makes the patient aware that the treating physician is not a hospital employee when the treatment was performed. *See Paintsville Hosp. Co. v. Rose,* 683 S.W.2d 255, 256 (Ky. 1985). *See also Floyd v. Humana of Virginia, Inc.,* 787 S.W.2d 267, 270 (Ky.App. 1989) (medical malpractice plaintiff could not hold hospital liable for alleged negligence of physician on ostensible agency theory where admission forms read and signed by plaintiff indicated her knowledge that doctors were independent contractors and not agents of hospital, and no representation or action was made so as to induce plaintiff to believe that doctors were employees or agents of hospital); *Roberts v. Galen of Virginia, Inc.,* 111 F.3d 405, 412-13 (6th Cir.

1997) (under Kentucky law, hospital is not liable under ostensible agency doctrine for alleged negligence of independent contractor physicians where hospital's patient registration and authorization form alerted the public that its physicians are not its employees or agents), *rev'd on other grounds,* 525 U.S. 249, 119 S.Ct. 685, 142 L.Ed.2d 648 (1999); *Vandevelde v. Poppens,* 552 F.Supp.2d 662, 667 (W.D.Ky. 2008) (hospital not vicariously liable under Kentucky law for alleged negligence of physicians based on an ostensible agency theory where hospital's consent upon admission forms alerted the public that its physicians were not its employees or agents); *Johnston v. Sisters of Charity of Nazareth Health Sys., Inc.*, 2003 WL 22681562 at *3 (Ky.App. Nov. 14, 2003) (hospital not liable under ostensible agency theory where patient signed admission forms on six different occasions which explicitly stated that pathologists and physicians at hospital were independent contractors and not employees or agents of hospital).

In this case, the record reflects that on **seven** separate occasions, beginning in March 2005 and ending with a final admission in January 2007, Bobby signed an SJH form entitled "Authorizations and Consents." This one-page form, which was identical in all material respects at each admission, is not complex and is not drafted in legalistic language. Paragraph eight of the form, immediately preceding his signature, informed him that "physicians, surgeons, radiologists, pathologists, anesthesiologists, other doctors, and physicians assistants who may render care or services in [his] case are not employees or agents of Saint Joseph HealthCare, Inc." No evidence was presented to show that SJH represented to the

public that the doctors working within the confines of the hospital were its employees or agents. Thus, as a matter of law, SJH cannot be held vicariously liable for the alleged negligence of the doctors under an ostensible agency theory.

The order of The Fayette Circuit Court is affirmed.

ACREE, CHIEF JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I dissent because I believe that an agency relationship was created by the acts of the principal, St Joseph Healthcare, LLC (SJH), and that the consent form was inadequate to disavow the consent.

The question before our court is whether the trial court erred in granting summary judgment given the assertion of ostensible and apparent agency based upon the allegedly inadequate and improper consent form presented to the decedent for signature; such inquiry necessarily begins with an understanding of our jurisprudence on apparent authority. Under common law principles of agency, a principal is vicariously liable for damages caused by torts of commission or omission of an agent, excluding an independent contractor, acting on behalf of and pursuant to the authority of the principal. *See Williams v. Kentucky Dept. of Educ*., 113 S.W.3d 145, 151-52 (Ky. 2003), citing *Wolford v. Scott Nickels Bus Co*., 257 S.W.2d 594, 595 (Ky. 1953).

Apparent authority is created when the *principal* holds out to others that the agent possesses certain authority that may or may not have been actually granted to the agent. *See Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky.App. 1990) ("It is a matter of appearances on which third parties come to rely."). Moreover, "It is a rule, universally acknowledged, that the declarations of an agent are inadmissible to prove the fact of agency or that he was acting within the scope of his authority in a particular transaction." *Galloway Motor Co. v. Huffman's Adm'r,* 281 Ky. 841, 137 S.W.2d 379, 382 (Ky. 1939). Agency is a legal conclusion to be reached only after analyzing relevant facts. The burden of proving agency is on the party alleging its existence. *See Wright v. Sullivan Payne Co*., 839 S.W.2d 250, 253 (Ky. 1992), citing *Cincinnati Insurance Company v. Clary*, 435 S.W.2d 88 (Ky. 1968).

This Court first applied the ostensible agency principle to the hospital/nurse anesthetist relationship in *Williams v. St. Claire Medical Center*, 657 S.W.2d 590, 596 (Ky.App. 1983). Therein, this Court held that "By taking no action to give appellant notice otherwise, the hospital "held-out" Johnson as an employee, thus creating an apparent agency." *Id.* Thereafter, in *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 257 (Ky. 1985), the Kentucky Supreme Court applied the ostensible agency principal to the hospital/emergency room doctor relationship. In so doing, the court adopted the section of the Restatement (Second) of Agency § 267 (1958), dealing with reliance upon the apparent authority of an agent, which states:

> One who represents that another is his servant or other 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 by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Recently, in *Papa John's Intern., Inc. v. McCoy*, 244 S.W.3d 44, 58 (Ky. 2008), the dissent discussed the Restatement (Third) of Agency § 2.03 (2006) formulation of the rule of apparent agency, which states:

> Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties *when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations*. (Emphasis added.)

McCoy at 58. The *McCoy* dissent further noted that in light of the Restatement (Third) of Agency § 2.03 (2006), formulation of the rule of apparent agency:[6]

> Advertising and branding are the common means by which manifestations of apparent agency are made. The manifestations should be interpreted according to what a third party reasonably understands, not by what the principal or agent knows or should have known.

McCoy at 58 (internal footnotes and citations omitted).

I would find such a learned discussion persuasive in the case *sub judice*. While the focus necessarily will be on the *principal's* actions, here SJH, in

[6] I believe that the trial court should look at all relevant evidence in reaching its determination as to whether agency existed, including the advertising used by the hospital in promoting its business.

determining whether apparent authority existed, I would find that the "Authorizations and Consents" form prepared by SJH was an action by the principal. While SJH argues that this form was sufficient to disabuse Mr. Rains of the notion that the doctors practicing within its confines were agents or employees of SJH, I disagree.

I believe that the Restatement (Third) of Agency § 2.03 (2006) accurately details when apparent agency will be found, i.e., when a third party *reasonably believes* the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations. Without such constraints, a principal would be free to notify a third party in an absurd manner and then claim that said notification was sufficient to deny apparent authority. Thus, I disagree with the trial court's conclusion that the form signed by Rains bars a patient from proceeding on a claim of ostensible agency against a hospital and would hereby adopt the Restatement (Third) of Agency § 2.03 (2006) formulation of the rule of apparent agency as applies to these facts.

Sub judice, Rains's expert, Dr. Brian Heller raised issues with the "Authorizations and Consents" form signed on January 8, 2007,[7] notably, the small font and the complexity of the language used in the form given the literacy level of the general population. The combined effect of the print size and the language, opined Heller, presented the possibility that this would not have been fully understood or appreciated by a patient in pain. In addition, Dr. Heller noted that

[7] I note that this was the day after Mr. Rains's admission to SJH.

this important paragraph was located at the end of the document, which was itself confusing, and seemed to contradict itself by describing the doctors as non-employees but requiring patients to cooperate with all "physicians and hospital personnel."[8]

I believe that the trial court erred when it found Rains's expert to be irrelevant to the issue concerning ostensible agency and in making the conclusion that Rains was prevented from arguing a claim of ostensible agency against SJH based on the signed form. As such, I would find that the court erred in granting summary judgment. I would reverse the entry of summary judgment and remand to give both parties the opportunity to complete any additional discovery and to fully present to the trial court their arguments concerning agency.

BRIEF FOR APPELLANT:

James A. Ridings
London, Kentucky

BRIEF FOR APPELLEE, ST. JOSEPH HEALTHCARE, INC., D/B/A ST. JOSEPH HOSPITAL:

Jeffery T. Barnett
Bradley J. Sayles
Lexington, Kentucky

[8] Briefly, I address this apparent contradiction. Certainly it would seem that if the doctors were separate and apart from the hospital and not its agents, then cooperation demanded between patient and the doctors by the hospital is contradictory and may of itself give rise to ostensible agency.