

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

RONALD GREEN AS THE EXECUTOR OF	:	IN THE SUPERIOR COURT OF
THE ESTATE OF JOSEPH FUSCO,	:	PENNSYLVANIA
	:	
Appellant	:	
	:	
v.	:	
	:	
PENNSYLVANIA HOSPITAL AND	:	
CONTRIBUTORS TO PENNSYLVANIA	:	
HOSPITAL AND STELLA BARBER, RN	:	
AND SYLVIA AQUINO, RN AND	:	
LORI YAKISH, RN AND KELLY A. CARR,	:	
RRT AND JAMES KEARNEY, MD AND	:	
STEVEN A. GLASSER, MD AND	:	
JOHN D. SPRANDIO, JR., MD AND	:	
BORA LIM, MD AND EUGENE M.	:	
LUGANO, MD AND ANTHONY GIORGIO	:	
AND LORI J. RHOADES,	:	
	:	
Appellees	:	No. 2858 EDA 2012

Appeal from the Order Entered August 21, 2012,  
In the Court of Common Pleas of Philadelphia County,  
Civil Division, at No. 090604093; June Term 2009

BEFORE: GANTMAN, SHOGAN and PLATT\*, JJ.

CONCURRING AND DISSENTING MEMORANDUM BY SHOGAN, J.:

**FILED JANUARY 30, 2014**

I concur in the result reached by the majority with respect to Appellant’s second issue concerning the trial court’s decision to preclude Appellant’s nursing expert from testifying that Nurse Yakish caused Decedent’s damages. However, I respectfully dissent from the majority’s conclusion regarding Appellant’s first issue.

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\*Retired Senior Judge assigned to the Superior Court.

In Appellant's first issue, he claims that the trial court erred in refusing to remove the non-suit based on its conclusion that no reasonably prudent person in Decedent's position would be justified in believing that the care he was receiving was being rendered by the hospital or its agents. Appellant's Brief at 10. The entry of a nonsuit is proper only if the fact-finder, after viewing all the evidence in favor of the plaintiff and resolving any conflicting evidence in favor of the plaintiff, could not reasonably conclude that the elements of the cause of action have been established. ***Freed v. Geisinger Medical Center***, 910 A.2d 68, 72 (Pa. Super. 2006). "The lack of evidence must be so clear that it admits no room for fair and reasonable disagreement." ***Id.*** (citation and quotation marks omitted).

Section 1303.516 of the MCARE Act provides as follows:

**Ostensible agency**

**(a) Vicarious liability.**--A hospital may be held vicariously liable for the acts of another health care provider through principles of ostensible agency only if the evidence shows that:

(1) a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents; or

(2) the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents.

**(b) Staff privileges.**--Evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency unless the claimant meets the requirements of subsection (a)(1) or (2).

40 P.S. § 1303.516. Here, the facts viewed in the light most favorable to Appellant reveal that Dr. Malaisrie became involved in Decedent's care as part of an emergency response team when he was "squirting blood" from his tracheostomy incision. N.T., Trial, 6/5/12, at 56-57. Anesthesiology and ENT (ear, nose, and throat) were called to the room, and Dr. Malaisrie responded to Decedent's emergency situation at the direction of the hospital and not at the request of Decedent. *Id.* at 60. For these reasons, and pursuant to the applicable standard of care, I conclude that the question as to whether a prudent person in Decedent's position would be justified in the belief that the care in question was being rendered by the hospital or its agents, should have survived the motion for non-suit and been decided by the jury.

Accordingly, I respectfully dissent.