

Butterfield v. Cotton, No. 744-12-04 Wncv (Toor, J., Oct. 10, 2008)

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STATE OF VERMONT  
WASHINGTON COUNTY

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JAMES BUTTERFIELD,  
Plaintiff

v.

PAUL COTTON, M.D. and  
MATRIX HEALTH SYSTEMS, P.C.,  
Defendants

SUPERIOR COURT  
Docket No. 744-12-04 Wncv

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RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff James Butterfield claims that Defendant Paul Cotton, M.D., negligently prescribed him a psychiatric medication that caused severe injuries while Mr. Butterfield was an inmate in the custody of the Vermont Department of Corrections. Mr. Butterfield further claims that Defendant Matrix Health Systems, P.C., has vicarious liability for any medical malpractice of Dr. Cotton that may be established at trial. There is no allegation of direct negligence against Matrix. Mr. Butterfield and Matrix have filed cross-motions for summary judgment on the vicarious liability issue.

Summary judgment is appropriate if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3). “In determining whether a genuine issue of fact exists, the nonmoving party receives the benefit of all reasonable doubts and inferences.” Samplid Enterprises, Inc. v.

First Vermont Bank, 165 Vt. 22, 25 (1996). The facts material to the issue raised in the motions are not genuinely disputed.

### Undisputed Facts

Matrix contracted with the Vermont Department of Corrections to provide comprehensive mental health services to Vermont inmates. The contract required Matrix to have malpractice insurance of at least \$1,000,000 in place for mental health providers. Contract ¶ 6, at 11. The contract also specifically prohibited Matrix from assigning or subcontracting out any obligation under the contract without the State’s prior written consent. Id. ¶ 13, at 12.

Matrix hired Dr. Cotton to perform many of its obligations under the contract, including treating prisoners such as Mr. Butterfield. There is no written employment contract between Matrix and Dr. Cotton, but both claim that Matrix expressly hired Dr. Cotton as an independent contractor at Dr. Cotton’s urging. Matrix never sought the State’s approval to hire Dr. Cotton as an independent contractor, and the State never approved it, either tacitly or in writing; the record would not support an inference that the State ever knew about it.

The duties that Dr. Cotton performed for Matrix were extensive. He served as “Director of Psychiatry” and oversaw “the delivery and quality of services for the entire mental health system” provided by Matrix. Contract at 2. He also evaluated patients, prescribed medications, participated in weekly treatment team activities, ensured that the State’s mental health policies were followed, and participated in offsite administrative and training activities. Contract at 5.

Mr. Butterfield was not aware of Matrix or Matrix’s relation to Dr. Cotton at the time of the alleged negligence.

### Analysis

Applying the common law right-to-control test, Mr. Butterfield argues that Matrix has vicarious liability for Dr. Cotton's negligence because Dr. Cotton was Matrix's employee, or servant, when the negligence occurred. See Brueckner v. Norwich Univ., 169 Vt. 118, 122 (1999) ("Under the settled doctrine of respondeat superior, an employer or master is held vicariously liable for the tortious acts of an employee or servant committed during, or incidental to, the scope of employment."); Kelley's Dependents v. Hoosac Lumber Co., 95 Vt. 50, 53 (1921) (describing the right-to-control test); Restatement (Second) of Agency § 220 (same). Matrix argues that Dr. Cotton was an independent contractor, not an employee, and that even if he were found to be an employee generally, he was an independent contractor with regard to the alleged negligent acts. Mr. Butterfield responds that Dr. Cotton's status as an independent contractor, if found, would be irrelevant because, as a matter of law, Matrix was not permitted to delegate away its contractual duty to provide non-negligent care and, in any event, Matrix held out Dr. Cotton as its "apparent agent."<sup>1</sup> Matrix argues that the non-delegable duty doctrine has not been adopted in Vermont, and Dr. Cotton cannot be an apparent agent because Mr. Butterfield was never aware of Matrix at the time of the alleged negligence (that is, Mr. Butterfield could not have believed that Matrix was the employer when Mr. Butterfield did not even know that Matrix existed).<sup>2</sup>

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<sup>1</sup> The case law reflects several expressions, used inconsistently, for concepts that are either identical or closely related to "apparent agency," including: apparent authority, ostensible agency, agency by estoppel, agency by representation, and implied agency. For purposes of this case, the court uses the expression "apparent agency" to encompass the concept used in the Restatement (Second) of Agency § 267, the Restatement (Third) of Agency § 2.03, and the Restatement (Second) of Torts § 429.

<sup>2</sup> The Vermont Supreme Court has never addressed the "nondelegable duty doctrine" in a case similar to this. The doctrine, as it may apply to this case, is described generally as follows: "Hospitals may be held liable for the negligence of physicians who are independent contractors where the hospitals contract to provide medical services and then have those services performed by the physicians . . . ." Annotation, Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R. 4<sup>th</sup> 235, § 6 (1987) (discussing cases in which there was a contract to provide specific health services); see also Restatement (Third) of Agency § 7.06 ("A principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not

The court declines to rule on the right-to-control issue and the non-delegable duty question because the undisputed facts demonstrate as a matter of law that Dr. Cotton was Matrix's apparent agent with regard to any medical negligence that may be proven in this case. In short, the record demonstrates that in delivering Mr. Butterfield to Dr. Cotton for medical care, the DOC could only have reasonably believed that Dr. Cotton was a "servant" or employee of Matrix according to the terms of the contract between the DOC and Matrix. Matrix provided Dr. Cotton to the DOC and Mr. Butterfield; they did not seek him out.

Few Vermont cases discuss apparent agency at all, and none do so in factually similar circumstances. The Vermont Supreme Court has described the concept as follows: "An apparent agency is initiated by the manifestation of the principal to a third party, who reasonably believes that the other individual is the agent. Statements of the agent are insufficient to create an apparent agency relationship." Kimco Leasing Co. v. Lake Hortonia Properties, 161 Vt. 425, 429 (1993). This general description of apparent agency is not inconsistent with the slightly more precise formulations of apparent agency available at the Restatement (Second) of Agency § 267 and the Restatement (Second) of Torts § 429, neither of which the Court has ever expressly adopted or rejected.

The Restatement (Second) of Agency describes the principal's liability for the acts of an apparent agent as follows:

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.

Restatement (Second) of Agency § 267. The Restatement (Second) of Torts describes it in slightly different terms:

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the delegate is an agent."). The doctrine appears to fit the facts of this case, and substantially overlaps with the apparent agency analysis, but as noted, the court does not reach the nondelegable duty question.

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Restatement (Second) of Torts § 429.

By arguing that Dr. Cotton cannot be an apparent agent in the circumstance of this case, Matrix suggests that apparent agency necessarily depends on the injured person's own reliance on the alleged principal's representations as manifesting the agency. Because Mr. Butterfield was unaware of Matrix, he could not have relied on—and in fact did not rely on—Matrix's representations in this regard.

It is not clear to the court that § 267 should be read so narrowly in this context, even if some courts in other states have read it that narrowly. The comments to § 429 expressly support a more flexible understanding of apparent agency:

*In order that the rule stated in this Section may apply it is not necessary that the person who is injured have himself accepted the services in the belief that they are being rendered by the employer of the contractor. It is equally applicable where the services are rendered to the injured person because a third person believes that they are being rendered by the employer of the contractor, as when the injured person shares in services which a third person accepts in such belief, or when they are furnished him under an arrangement which a third person makes under such belief.*

Restatement (Second) of Torts § 429 cmt. a. (emphasis added). The Restatement (Third) of Agency § 2.03, adopted in 2006,<sup>3</sup> is consistent with § 429 on this point. Section 2.03 describes the principal's liability in this context as follows:

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.

Restatement (Third) of Agency § 2.03. The comments to section 2.03 specifically say this:

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<sup>3</sup> See [http://www.ali.org/ali\\_old/Agency.htm](http://www.ali.org/ali_old/Agency.htm) (last visited Oct. 10, 2008).

In some situations in which an agent has acted with apparent authority, the principal did not make the manifestation of authority to the party who suffered injury. In these cases, the plaintiff is a fourth party who is injured as a result of action taken by a third party, when the third party took action traceable to the principal's manifestation regarding an actor's authority as an agent.

Restatement (Third) of Agency § 2.03 cmt. e. The Reporter's Notes confirm that the new definition of apparent agency in the third Restatement is intended "to eliminate any inference [drawn from the definition in the second Restatement] that, to create apparent authority, a principal's manifestation must be directed to a specific third person in a communication made directly to that person." Restatement (Third) of Agency § 2.03, Reporter's Notes a.

In this case, it does not matter that Mr. Butterfield had never heard of Matrix when the alleged negligence occurred. What matters is that, in delivering Mr. Butterfield to Dr. Cotton for care, the DOC reasonably believed that Dr. Cotton was Matrix's employee or "servant." Matrix had expressly promised in its contract with the DOC that it would not act through independent contractors without the DOC's permission, never sought or received that permission with regard to Dr. Cotton, and assigned to Dr. Cotton extensive responsibilities that no reasonable person would presume were being undertaken by an independent contractor. "A principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts offer an advantage." Restatement (Third) of Agency § 2.03 cmt. c. In treating Mr. Butterfield, Dr. Cotton was acting as Matrix's apparent agent.

In several relatively recent cases, other courts have similarly concluded that a medical provider was acting as an apparent agent and the principal thus could be held vicariously liable for the provider's negligence. *See, e.g., Burless v. West Virginia Univ. Hospitals*, 601 S.E.2d 85, 92–96 (W.Va. 2004) (adopting apparent agency specifically for physician–hospital context);

Simmons v. Tuomey Regional Medical Center, 533 S.E.2d 312, 322–323 (S.C. 2000) (noting that courts have found apparent authority when “a third person accepts such services on the injured person’s behalf,” that “[n]umerous courts have . . . allow[ed] a plaintiff to attempt to hold a hospital vicariously liable for a purportedly independent physician’s negligent acts,” and collecting cases); Parker v. Freilich, 2002 PA Super 188, ¶¶ 17–22, 803 A.2d 738 (applying apparent agency to independent contractor nurse in private physician’s office); Jennison v. Providence St. Vincent Medical Center, 25 P.3d 358, 366–68 (Or. Ct. App. 2001) (applying apparent agency even though injured person, subjectively, was oblivious to which provider performed the negligent act); *see also* Annotation, Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R. 4<sup>th</sup> 235, § 7 (1987) (discussing cases in which “the physician has ostensible agency, agency by estoppel, or apparent authority”).

Matrix has vicarious liability for any negligence of Dr. Cotton that Mr. Butterfield proves to the jury.

#### Order

Mr. Butterfield’s motion for summary judgment establishing Matrix’s vicarious liability for any negligence of Dr. Cotton is granted; Matrix’s motion for summary judgment is denied.

Dated at Montpelier, Vermont this 10<sup>th</sup> day of October 2008.

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Helen M. Toor  
Superior Court Judge