2011 IL App (1st) 101317-U

No. 1-10-1317

SIXTH DIVISION
December 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARTIN W. DAVIS and SANDRA DAVIS, Both Individually and as Special Administrators of the Estate of Martin W.G. Davis, Deceased,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 06 L 9375
HOLY CROSS HOSPITAL,	)	Honorable Eileen Brewer,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice R. Gordon and Justice Cahill concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court properly granted summary judgment in favor of the defendant hospital because (1) there was no genuine issue of material fact showing that the hospital could be liable for any negligence of the physicians under the theory of apparent authority; (2) plaintiffs' expert witness was a surgeon and not qualified to testify regarding the standard of care

for the nursing profession; and (3) plaintiffs failed to show any negligence by the hospital under the theory of *res ipsa loquitur*.

¶ 2 Plaintiffs Martin and Sandra Davis, both individually and as special administrators of the estate of their deceased son, Martin W.G. Davis, an 18-year-old male, appeal the circuit court's order granting summary judgment in favor of defendant Holy Cross Hospital. Plaintiffs argue that: (1) the ambiguities and vagueness of two hospital consent forms raised genuine issues of material fact concerning whether an apparent agency relationship existed between the physicians and the defendant hospital; (2) plaintiffs' surgeon expert witness was competent to testify about the alleged negligence of the hospital nursing staff and personnel for failing to communicate appropriate and necessary information to the physicians; and (3) plaintiffs' *res ipsa loquitur* claim did not need to be supported by expert medical testimony.

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 On April 3, 2001, plaintiffs' son died during surgery at defendant Holy Cross Hospital. The deceased was injured the previous day when he was walking along a sidewalk, attempted to go over a concrete barrier and fell. That evening, he complained to plaintiffs about chest pain. About 11:30 p.m, they drove to MacNeal Memorial Hospital, but left after waiting about 20 minutes because it was too busy. Mrs. Davis then telephoned Christ Hospital and was told that the emergency room wait was approximately three to four hours. The Christ Hospital personnel recommended that the family go home and call an ambulance. The Davis family returned home and called 911. About 12:30 a.m., an ambulance took plaintiffs' son to defendant Holy Cross

Hospital, which was the only option for emergency medical service transport from the Davis residence. The plaintiffs did not specifically request that their son be taken to Holy Cross Hospital.

¶ 6 At the defendant's emergency room, the hospital staff gave decedent's father, Mr. Davis, a one-page consent form. The top of the form, under the heading "CONSENT AND DISCLOSURE STATEMENT FOR EMERGENCY MEDICAL TREATMENT, stated:

> "I am aware that emergency room services are provided by an independently contracted group of physicians who are not employed by Holy Cross Hospital that have an agreement with the hospital to provide services in the emergency room.
>
> I hereby authorize the independent physicians at Holy Cross Hospital and the staff under their direction to conduct such examinations, perform such procedures and operations and administer such treatment and medications as may be deemed necessary and advisable.
>
> I understand that physicians other than those in the emergency room may be involved in my care and/or treatment; for example, through performing an operation or procedure ***. Most of these physicians are independent contractors and not employees of Holy Cross Hospital. ***. If I have any questions regarding [*sic*] physician's relationship to the hospital I should contact the administrator of Practice Management Services.
>
> * * *

> I acknowledge that I have read this document in its entirety and that I fully understand it."

Mr. Davis signed this form.

¶ 7 Thereafter, Dr. Adams, an emergency room physician, told plaintiffs that their son may have suffered a splenic injury. Later, Dr. Jacob, the surgeon, told plaintiffs that he would perform exploratory surgery on their son. Mr. Davis then signed a two-page form entitled "CONSENT FOR SURGICAL AND SPECIAL PROCEDURE," which listed 13 items. In the first item, Mr. Davis specifically authorized Dr. Jacob or assistants and associates elected by him at Holy Cross Hospital to perform an exploratory laparotomy on the decedent. The second item stated:

> "The surgeon may or may not be an employee of Holy Cross Hospital. If I want to know who employs my surgeon(s) I must ask my surgeon for that information."

Under the thirteenth item of the form, Mr. Davis acknowledged that he had read the document in its entirety and fully understood it. Plaintiffs' son was taken to surgery about 4:30 a.m. He bled to death during the operation.

¶ 8 In 2006, plaintiffs filed a wrongful death lawsuit against Holy Cross Hospital. Plaintiffs sought recovery from defendant for the alleged medical negligence of both its direct employees and its agent physicians. In addition, plaintiffs sought recovery against defendant under a theory of *res ipsa loquitur*.

¶ 9 Plaintiffs identified Dr. R. Lawrence Reed, a general surgeon, as their only expert witness. According to his report pursuant to section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2006)), Dr. Reed opined that defendant deviated from the standard of care by failing to transfer decedent to a trauma center and by choosing to operate on him. In interrogatory responses, plaintiffs indicated that defendant deviated from the standard of care by failing to follow defendant's policy T-11 and failing to transfer decedent to a trauma center for a higher level of care and management of his injuries. Plaintiffs also indicated that the standard of care for a splenic injury patient would have been non-operative observation.

¶ 10 In his deposition, Dr. Reed acknowledged that it was ultimately the surgeon's decision as to whether he has reasons to perform surgery and the physician's decision as to whether he should transfer a patient. Dr. Reed was not aware of any hospital policy or procedure that allowed nurses to force a transfer of a patient. Dr. Reed had no information that allowed him to opine to a reasonable degree of medical certainty that if a nurse had advised Drs. Adams or Jacob of policy T-11, either doctor would have transferred the patient. Dr. Reed was not a nurse and did not have a registered nurse license.

¶ 11 In her deposition, Karen Hair, a registered nurse at Holy Cross Hospital, stated that she was the night nursing administrator at the time of the incident. She was not responsible for making the decision as to where to transfer a trauma patient. The physician who handles the case makes that decision. It was the physician's decision to transfer a patient to a different facility or from one unit at Holy Cross Hospital to another.

¶ 12 Nurse Suzanne Wayland testified that she was working either as a charge or a staff nurse at the time of the incident. She said that the decision to transfer an individual to a trauma center was not a nursing decision.

¶ 13 Decedent's father, Mr. Davis, testified in his deposition that he would have asked questions about the consent form before he signed it if he did not understand something on the form or had any questions about it.

¶ 14 Defendant moved for summary judgment, contending it could not be held vicariously liable for any alleged negligence of the physicians because they were neither actual nor apparent agents of the hospital. Defendant also argued it could not be vicariously liable for the actions of any nurses whose negligence had not been established by competent expert testimony. The circuit court granted summary judgment in favor of defendant. Plaintiffs filed a motion to reconsider, which the circuit court denied. Plaintiffs timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions and any affidavits on file 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. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). Although the nonmoving party is not required to prove his case at the summary judgment stage, he must nonetheless present a factual basis that would arguably entitle him to judgment. *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 847 (2010). If he fails to establish an element of his cause of action, summary judgment is proper. *Id.* This court may

affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied upon that ground. *Home Insurance Co.*, 213 Ill. 2d at 315. We review the entry of summary judgment *de novo*. *Id.*

¶ 17 A. Vicarious Liability

¶ 18 Plaintiffs contend summary judgment in favor of defendant on the issue of apparent agency was improper because the two consent forms signed by Mr. Davis were vague and ambiguous and, thus, failed to inform plaintiffs that the treating physicians at the hospital were not defendant's agents.

¶ 19 In a medical malpractice context, a hospital may be held vicariously liable pursuant to the doctrine of apparent agency for the negligence of a physician who is not an employee of the hospital but who, rather, is an independent contractor. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179 (2006). "Apparent authority in an agent is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 523 (1993). "If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable." *Id.* at 522.

¶ 20 "For a hospital to be liable under the doctrine of apparent authority, a plaintiff must show that: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in

reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence." *Id*. at 525.

¶ 21 The first two prongs of the above *Gilbert* analysis, commonly known as the holding out elements, are not satisfied if the evidence demonstrates that the plaintiff was placed on notice of the independent contractor status of the physicians. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1087 (2009). The focus under the third, or justifiable reliance, prong of *Gilbert* is whether the plaintiff relied on the holding out of the hospital that the physicians were its agents or employees when accepting treatment. *Scardina v. Alexian Brothers Medical Center*, 308 Ill. App. 3d 359, 365 (1999).

¶ 22 Here, plaintiffs acknowledged that Mr. Davis signed the emergency medical treatment consent and disclosure form set forth in detail above. That document clearly advised plaintiffs that the emergency room services were provided by independent contractors. It further advised plaintiffs that most of the physicians, like those performing an operation, were also independent contractors and not employees of defendant. By signing the form, Mr. Davis acknowledged that he had read and fully understood it. Mr. Davis also signed a surgical consent form that specifically authorized Dr. Jacob to perform the surgery. That form stated that the surgeons may or may not be employees of defendant and if the signer wanted to know who employed the surgeon, then the signer should ask the surgeon for that information. Again, Mr. Davis acknowledged, by signing the surgical consent form, that he had read it in its entirety and understood it.

¶ 23 Contrary to plaintiffs' assertions on appeal, the language and format of the two forms Mr. Davis signed were neither confusing nor inconsistent. Plaintiffs' reliance on *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584 (2007), and *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826 (2009), to support their arguments that the consent forms were confusing and ambiguous is misplaced. The language and format of the consent forms Mr. Davis signed here were very different from those at issue in *Schroeder* and *Spiegelman*, where the forms contained multiple sections and the independent contractor disclosures were unclear or buried in small print in the middle of various paragraphs concerning other matters. *Schroeder*, 371 Ill. App. 3d at 587-88; *Spiegelman*, 392 Ill. App. 3d at 829, 836-37.

¶ 24 Because the consent forms placed plaintiffs on notice of the independent contractor status of the doctors involved in decedent's care, it would be unreasonable for plaintiffs to assume that the doctors were defendant's employees and, thus, plaintiffs cannot sustain an apparent agency claim against defendant. *Wallace*, 389 Ill. App. 3d at 1088-89 (affirming summary judgment in favor of the hospital where a minor struck by a car was taken to a hospital and her mother, upon arrival in the emergency room, signed a consent form that disclosed the independent contractor status of the treating physicians); *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 633 (1998) (accord). Plaintiffs complain that, given their son's condition, they were under duress and confused when Mr. Davis signed the consent forms and defendant made no effort to ensure that plaintiffs understood the consent forms. This court, however, had rejected similar challenges by plaintiffs to consent forms. See *Wallace*, 389 Ill. App. 3d at 1084, 1092. Moreover, Mr. Davis

clearly testified at his deposition that he would have asked questions before signing the forms if he had not understood something contained in the forms.

¶ 25 Because plaintiffs did not show the necessary holding out element of the *Gilbert* analysis, they failed to establish that the physicians involved in decedent's medical care were apparent agents of defendant. Consequently, the circuit court properly entered summary judgment in favor of defendant on this issue.

¶ 26 B. Direct Liability

¶ 27 Plaintiffs contend summary judgment in favor of defendant on the issue of direct liability for the alleged negligence of its nursing staff was improper because plaintiffs' expert was competent to testify about the nurses' obligations involving a failure to communicate necessary and appropriate information. According to plaintiffs, Dr. Reed's testimony did not apply to specialized nursing practices and procedures but, rather, to the hospital's practices and procedures that were violated by the hospital's nurses, and Dr. Reed was competent to opine regarding the appropriate and necessary communications between the doctors and nurses.

¶ 28 Expert testimony is required in a medical malpractice action to establish the standard of care for a particular practitioner and the deviation from the standard of care. *Walski v. Tiesenga*, 72 Ill. 2d 249, 255-57 (1978). To sustain an action for medical negligence, the plaintiff must establish not only the appropriate standard of care and deviation by a qualified expert but also that the injury claimed was proximately caused by the deviations enumerated. *Johnson*, 402 Ill. App. 3d at 847. Proximate cause must be established by expert testimony to a reasonable degree of medical certainty and must not be contingent, speculative or merely possible. *Id.* Moreover,

an expert in a medical malpractice case must be licensed in the same school of medicine about which standard of care he proposes to testify. *Dolan v. Galluzzo*, 77 Ill. 2d 279, 285 (1979); see also *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 119 (2004) (a physician was not competent to testify regarding the standard of care for the nursing profession or deviations therefrom).

¶ 29 Here, Dr. Reed, plaintiffs' only expert witness, opined that defendant's employees–*i.e.*, the nurses–deviated from the standard of care by failing to follow policy T-11, which, in his opinion, required transfer of the decedent to a level 1 trauma center. Dr. Reed acknowledged, however, that he was not a nurse and did not have a registered nurse licence, the physicians make the decision as to whether to transfer a patient, and a nurse could not force the transfer of a patient. Furthermore, defendant's employees–nurses Hair and Wayland–testified that the transfer of a patient to a trauma center was not a nursing decision but, rather, a physician's decision. In addition, the T-11 policy itself describes that the decision as to whether to transfer a patient is one for the attending physician.

¶ 30 Plaintiffs attempt to fit these facts into the exception to *Sullivan* found in *Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896 (1997). In *Wingo*, the court recognized an exception to the same-school-of-medicine foundational requirement for expert testimony where the allegations of negligence did not concern an area of medicine about which there would be a different standard. *Id*. at 906 (where the allegations of negligence did not concern a nursing procedure but, rather, related to what a nurse was required to communicate to the physician, the same-school-of-medicine requirement for expert testimony did not apply). We find, however, that the *Wingo* exception is not applicable in the instant case.

¶ 31 Although Dr. Reed opined that the failure to transfer this patient was a deviation from the standard of care, he did not opine that any nurse's failure to communicate with any physician constituted another deviation from the standard of care. To the contrary, he specifically testified that he had no information to a reasonable degree of medical certainty that if a nurse had told the physician the contents of policy T-11 that the physician then would have transferred this patient. Consequently, even assuming, *arguendo*, that a nurse should have told a physician about policy T-11, plaintiffs offered no expert testimony to establish that a failure to communicate proximately caused the plaintiffs' injuries. See *Johnson*, 402 Ill. App. 3d at 847 (summary judgment in favor of the defendant was appropriate where plaintiffs failed to sustain their burden of proving that the alleged deviations proximately caused an injury).

¶ 32 Plaintiffs failed to provide any competent expert testimony to establish that any nurses deviated from the applicable standard of care. Absent such required expert medical testimony, defendant may not be liable for the actions of its nurses. The circuit court, therefore, properly entered summary judgment in favor of defendant on this issue.

¶ 33 C. *Res Ipsa Loquitur*

¶ 34 Plaintiffs contend they could maintain their negligence claim against defendant under a theory of *res ipsa loquitur* in the absence of expert medical testimony. According to plaintiffs, *res ipsa loquitur* applies because decedent was solely within the control of defendant's agents and employees when he died during the operation.

¶ 35 Under the doctrine of *res ipsa loquitur*, the plaintiff in a medical malpractice case must prove that he sustained an injury in an occurrence that ordinarily does not happen in the absence

of negligence by an agency or instrumentality within the defendant's exclusive control. *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill. App. 3d 863, 869 (2010). Whether the *res ipsa loquitur* doctrine should apply in any particular case presents a question of law. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). In a *res ipsa loquitur* claim in a medical malpractice setting, the plaintiff may rely upon the common knowledge of laymen if the issues are within such, otherwise the plaintiff must establish the elements through the use of expert medical testimony. *Id*. at 537.

¶ 36 The doctrine of *res ipsa loquitur* does not apply in this case. Plaintiffs alleged that decedent was injured as a result of the physician's decision not to transfer him to a level 1 trauma center and to operate rather than observe and manage his condition medically. The deposition testimony established that the medical judgment involved in deciding to transfer or operate on a patient are not matters of common knowledge among lay people. Consequently, competent medical testimony was required to establish liability under plaintiffs' alleged *res ipsa loquitur* claim. Due to the absence of such testimony, the circuit court properly entered summary judgment in favor of defendant.

¶ 37 III. CONCLUSION

¶ 38 Because plaintiffs failed to establish that the physicians were apparent agents of the hospital, failed to provide competent testimony concerning any deviation from the nursing standard of care, and failed to support the *res ipsa loquitur* claim with expert medical testimony, plaintiffs failed to raise a genuine issue of material fact necessary to survive summary judgment. We find, therefore, that the circuit court properly entered summary judgment in favor of defendant Holy Cross Hospital. Accordingly, we affirm the judgment of the circuit court.

¶ 39 Affirmed.