2012 IL App (1st) 102570-U

FIRST DIVISION
March 26, 2012

No. 1-10-2570

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WILLIAM RABE, Ex'r of the Estate of Carole A. Moran, Deceased, Plaintiff-Appellant, v. LJILJANA N. RASIC, M.D., ADVANCED AMBULATORY ANESTHESIA, S.C. and HOWARD FREEDBERG, M.D., Defendants (Healthsouth Northwest Surgicare, Inc., Doing Business as Northwest Surgicare, LLC, Defendant-Appellee.)	)	Appeal from the Circuit Court of Cook County. No. 06 L 212 Honorable Jeffrey Lawrence, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Circuit court properly granted summary judgment to the defendant-surgical facility where the plaintiff failed to establish a genuine issue of material fact as to whether an agency relationship existed between an anesthesiologist and the defendant-surgical facility for purposes of vicarious liability for the anaesthesiologist's alleged malpractice.

¶ 2 Plaintiff William Rabe, executor of the estate of Carole A. Moran, deceased, appeals from an order of the Circuit Court of Cook County granting summary judgment to defendant Healthsouth Northwest Surgicare, Inc. (Healthsouth). On appeal, plaintiff Rabe contends that genuine issues of material fact exist precluding summary judgment. We affirm the order of the circuit court.

¶ 3 The following uncontested facts are taken from the record on appeal. Healthsouth is a surgery center utilized by physicians for outpatient surgical procedures. Advanced Ambulatory Anesthesia, S.C. (AAA) provided anesthesia services to Healthsouth. If a procedure required the administration of anesthesia, a copy of Healthsouth's surgical schedule would be faxed to AAA's president for the selection and assignment of an anesthesiologist. The assignment was made according to a patient's or physician's request, or, absent that, from AAA's anesthesiologists.

¶ 4 Dr. Gary Silverman served as Healthsouth's medical director. As Healthsouth's medical director, he was responsible for Healthsouth's entire facility and had the authority to cancel a procedure. He also served as president of AAA. Healthsouth and AAA were separate corporations and billed patients separately for their services.

¶ 5 Dr. Ljiljana N. Rasic entered into an "Independent Contractor Agreement" with AAA. Dr. Siliverman executed the agreement on behalf of AAA, in his capacity as president of AAA.

The agreement specifically provided that Dr. Rasic's relationship with AAA was that of an independent contractor. Under the terms of the agreement, AAA paid Dr. Rasic's compensation and provided her with claims-made malpractice insurance. The agreement also covered the scheduling of Dr. Rasic's services, her vacation time and included a covenant not to compete with both AAA and Healthsouth. It also required her to comply with the bylaws and rules of both AAA and Healthsouth, and to obtain privileges at Healthsouth. Dr. Rasic executed Healthsouth's privileges agreement under which she agreed to accept the assignments and responsibilities assigned to her by Healthsouth's governing body.

¶ 6 Prior to April 2004, Dr. Howard Freedberg treated Mrs. Moran for problems with her right shoulder. In March 2004, Dr. Freedberg recommended arthroscopy surgery and explained the risks and benefits of the surgery, as well as the risks of anesthesia. Mrs. Moran chose to proceed with the surgery, and Dr. Freedberg's office scheduled the procedure at Healthsouth. AAA assigned Dr. Rasic as the anesthesiologist for Mrs. Moran's surgical procedure.

¶ 7 On April 5, 2004, Mrs. Moran arrived at Healthsouth for her surgery. There were signs stating "Northwest Surgicare"on the building and in various areas of the facility. In addition there was a sign over the reception desk, which stated, "ALL SURGEONS AND ANESTHESIOLOGISTS ARE DOCTORS IN PRIVATE PRACTICE . (THEY ARE NOT EMPLOYEES OF NORTHWEST SURGICARE, LTD.) Prior to the procedure, Mrs. Moran executed a document entitled "INFORMED CONSENT TO OPERATION AND OTHER MEDICAL SERVICES INCLUDING TRANSFUSION(S)" (the consent form). The consent form provided in pertinent part as follows:

"1. The facility maintains personnel and facilities to assist physicians and surgeons as they perform various surgical operations and other diagnostic or therapeutic procedures. Generally, such physicians, surgeons and practitioners are not agents, servants or employees of the facility, but independent contractors and, therefore, are the patient's agents or servants. The facility provides nursing and support services and facilities; the facility does not provide medical physician care.

* * *

4. I authorize and direct [Dr. Howard Freedberg] to arrange for such additional services for me as he or she may deem necessary or advisable, including but not limited to the administration and maintenance of anesthesia***to which I hereby consent.

* * *

14. I am aware that my physician may have an ownership interest in the facility, and I acknowledge that I have a right to have the procedure performed elsewhere.

* * *

17. My signature below constitutes my acknowledgment that (1) I have read or have had read to me the foregoing, and I agree to it; (2) the procedure(s) has been adequately explained by my physician; (3) I authorize and consent to the performance of the procedure(s) and any additional procedure(s) deemed advisable by my physician in his or her professional judgment; (4) I authorize and consent to the administration of anesthesia for the said procedure(s)."

¶ 8 Mrs. Moran also executed a "REQUEST FOR ADMINISTRATION OF ANESTHESIA."

The request form provided that Mrs. Moran understood the need for anesthesia, that she consented to its use as deemed necessary by her anesthesiologist, surgeon or nurse anesthetist and that she had been advised of the risks involved in the use of anesthesia, including death. She acknowledged that the purpose, necessity and the risks had been explained to her satisfaction by a physician and that she had sufficient opportunity to discuss the proposed treatment and the risks involved. Finally, she executed a financial agreement and assignment of benefits form.

¶ 9 The forms executed by Mrs. Moran were Healthsouth forms. None of the forms identified Dr. Rasic as an employee of AAA or specifically identified her as an independent contractor.

¶ 10 Prior to surgery, Mrs. Moran met with Dr. Rasic. Dr. Rasic was not wearing any identification on her scrubs. The doctor did not inform Mrs. Moran that she worked for AAA and did not discuss her employment status with Mrs. Moran.

¶ 11 Mrs. Moran's shoulder surgery was performed by Dr. Freedberg, with Dr. Rasic as the attending anesthesiologist. Following the surgery, Dr. Freedberg was unable to awaken Mrs. Moran, and attempts to revive her failed. Following the withdrawal of life support, Mrs. Moran died.

¶ 12 Plaintiff Rabe filed a medical malpractice complaint alleging that Mrs. Moran's death resulted from Dr. Rasic's negligence in the management of the anesthesia during Mrs. Moran's surgery. The complaint named as defendants, Healthsouth, Dr. Rasic and Dr. Freedberg. Plaintiff Rabe's amended complaint added AAA as a defendant.[1] Following discovery, Northwest moved for summary judgment arguing that Dr. Rasic was not Healthsouth's agent.

[1]Dr. Freedberg and AAA were dismissed and are not parties to this appeal.

¶ 13 In response, plaintiff Rabe argued that summary judgment was precluded by genuine issues of material fact. He maintained that reasonable persons could draw differing inferences from the undisputed facts.

¶ 14 The circuit court granted Healthsouth's motion for summary judgment and made a finding pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). This appeal followed.

¶ 15 ANALYSIS

¶ 16 I. Standard of Review

¶ 17 We review the grant of summary judgment *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 18 II. Summary Judgment Principles

¶ 19 Our review is guided by the well-settled principle that "[s]ummary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). Summary judgment is a drastic measure and should be granted only when the movant's right to judgment is free and clear from doubt. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 994 (2005). We consider the evidence in the light most favorable to the nonmoving party. *Bourgonje*, 362 Ill. App. 3d at 994. Where the material facts are disputed or, if undisputed, reasonable persons might draw different inferences from the undisputed facts, a triable issue of fact exists precluding summary judgment. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993).

¶ 20 III. Discussion

¶ 21 As a general rule, no vicarious liability exists for the actions of an independent contractor. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). Vicarious liability may be imposed for the actions of independent contractors where an agency relationship is established. *Petrovich*, 188 Ill. 2d at 31. An agent's authority may be either actual or apparent. *C.A.M. Affiliates, Inc. v. First American Title Insurance Co.*, 306 Ill. App. 3d 1015, 1021 (1999). The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal. *Pyskaty v. Oyama*, 266 Ill. App. 3d 801, 824 (1994). While the existence and scope of an agency relationship generally present questions of fact, a court may decide the issue if the relationship is so clear as to be undisputed. *C.A.M. Affiliates, Inc.*, 306 Ill. App. 3d at 1021.

¶ 22 A. *Actual Authority*

¶ *23* Actual agency may be either express or implied; "[a]n agent has express authority when the principal explicitly grants the agent the authority to perform a particular act." *C.A.M. Affiliates, Inc.*, 306 Ill. App. 3d at 1021. An implied agency relationship "is an actual agency relationship that is established through circumstantial evidence." *Buckholz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 172 (2003). Plaintiff Rabe argues that there was sufficient circumstantial evidence to establish an actual implied agency relationship between Dr. Rasic and Healthsouth.

¶ 24 "The cardinal consideration for determining the existence of implied authority is whether the alleged agent retains the right to control the manner of doing the work." *Petrovich*, 188 Ill. 2d at 42. Plaintiff Rabe argues that Healthsouth controlled Dr. Rasic's work as an

anesthesiologist based on Dr. Rasic's execution of Healthsouth's privilege agreement, which required her to comply with Healthsouth's bylaws, accept duties assigned to her by Healthsouth's governing board and provide medical care to the patients she was assigned. He also relies on the terms of the agreement she entered into with AAA, which required her to comply with both AAA's and Healthsouth's bylaws and rules, acquire privileges at Healthsouth, and not to compete with AAA or Healthsouth after her contract with AAA was terminated.

¶ 25 "An independent contractor is defined by the level of control exercised over the manner of work performance." *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 13 (2004). The evidence relied on by plaintiff Rabe does not establish that Healthsouth retained the right to control Dr. Rasic's treatment choices for her patients as an anesthesiologist. "It is well established that the decision to treat a patient in a particular manner is generally a medical question entirely within the discretion of the treating physician and not the hospital." *Buckholtz*, 337 Ill. App. 3d at 172.

¶ 26 The fact that Dr. Rasic was required to comply with Healthsouth's bylaws and privileges agreement does not imply that she was Healthsouth's agent. In *Hundt v. Proctor Community Hospital*, 5 Ill. App. 3d 987 (1972), the reviewing court held that the relationship between a hospital and members of its staff who were not regular employees of the hospital "has traditionally been an independent relationship even though both parties must cooperate for the purposes of hospitalization to succeed. The necessity for co-operation neither authorizes [n]or requires a change or an abandonment of the independent roles of each." *Hundt*, 5 Ill. App. 3d at 990.

¶ 27 Moreover, our courts have held that requiring an independent contractor to follow certain

policies and procedures did not establish the right to total control of the contractor's work. See *Oliveira-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127, 135 (2007) (evidence that the franchisor promulgated policies and procedures intended for franchisees to follow did not establish that the franchisor retained the right to control the specific means and manner in which the franchisee conducted its day-to-day business). In *Salisbury v. Chapman Realty*, 124 Ill. App. 3d 1057, 1061 (1984), the reviewing court found that the franchisee's agreement to conduct business in accordance with the franchisor's confidential manual, to maintain its office according to the franchisor's standards and the franchisor's right to inspect the franchisee's records, was not such complete control as to overcome the intent of the franchise agreement to avoid creating a principal-agent relationship. *Salisbury*, 124 Ill. App. 3d at 1061. In *Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716 (1980), the reviewing court found the control necessary to establish an agency relationship lacking despite evidence that the franchisor had the power to promulgate an operational manual, which covered the following subjects: training and supervision of franchisees and restaurant managers, quality control, record keeping, periodic inspections, appearance of the premises and hours of operation, employees' appearance and demeanor, food and beverage preparation, advertising, and relations with suppliers. *Slates*, 90 Ill. App. 3d at 727.

¶ 28 The terms of the agreement Dr. Rasic entered into with AAA established that Healthsouth did not exercise such complete control over Dr. Rasic as to negate Dr. Rasic's independent contractor status. The agreement specifically provided that Dr. Rasic's relationship with AAA was that of an independent contractor. Under the agreement, AAA controlled the

scheduling of Dr. Rasic's services, paid her compensation, set the amount of her vacation time, and provided her with "claims-made" malpractice insurance for her "acts and omissions*** within the scope of her independent contractor relationship with" AAA. While the agreement provided that Dr. Rasic owed certain duties to both AAA and Healthsouth, Healthsouth was not a party to the agreement.

¶ 29 Plaintiff Rabe's reliance on *Petrovich* is misplaced. In *Petrovich*, the supreme court found that there was sufficient evidence of an HMO's control over its network of physicians under the implied authority doctrine to entitle the plaintiff to a trial. Evidence of control by the HMO included: reducing the physician's compensation when the physician made a referral, its quality assurance program, under which physicians were required to allow the HMO access to their patients' medical records to determine if "inappropriate care" was being rendered, and its referral system in which physicians were required to approve all requests for patient care and referrals. *Petrovich*, 188 Ill. 2d at 50-51. In the present case, nothing in the agreement between Dr. Rasic and AAA or in Healthsouth's privilege agreement grants Healthsouth the control over Dr. Rasic similar to that in *Petrovich*.

¶ 30 Finally, plaintiff Rabe points out that AAA was nothing more than a corporate shell and that its existence was concealed from nurses and staff at Healthsouth, as well as Mrs. Moran. Neither factor supports the implication that Dr. Rasic was Healthsouth's agent. Dr. Rasic's agreement with AAA was signed by Dr. Silverman as president of AAA, not as medical director of Healthsouth. Moreover, the consent form executed by Mrs. Moran provided that the physicians were independent contractors, that Healthsouth did not provide any medical physician

care, and the sign in the reception room stated that anaesthesiologists were not employees of Healthsouth.

¶ 31 We conclude that there was insufficient evidence that Dr. Rasic was an actual agent of Healthsouth to raise a genuine issue of material fact.

¶ 32 B. *Apparent Authority*

¶ 33 Under the doctrine of apparent authority, a hospital may be held liable for the negligent acts of a physician providing care at a hospital regardless of whether the physician is an independent contractor, unless the patient knows or should have known, that the physician was an independent contractor. *Gilbert*, 156 Ill. 2d at 524. For the hospital to be liable, the plaintiff must show:

> " '(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.' " *Gilbert*, 156 Ill. 2d at 525 (quoting *Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 855-56, 423 N.W.2d 848 (1988).

The analytical framework set forth in *Gilbert* has specific application to an action in which a plaintiff seeks to hold a hospital vicariously liable for the malpractice of an independent contractor physician under the doctrine of implied authority. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 193 (2006).

¶ 34 In considering whether the plaintiff has established the first element of the *Gilbert* test, referred to as the "holding out" element, our court has held that, while not always dispositive, the existence of an independent contractor disclaimer in a consent form was an important factor to consider. *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 633 (1998). Because the consent form clearly set forth the independent contractor status of the treating physician, the court in *James* held that the plaintiff had failed to carry her burden as to the holding out element. *James*, 299 Ill. App. 3d at 633.

¶ 35 Plaintiff Rabe argues that reliance on *James* is misplaced arguing that the consent must inform the patient that specific doctors were not employees or agents of the hospital. He points out that the consent in this case provided that, in general, the physicians, surgeons and practitioners were independent contractors but failed to identify them. Nothing in *Gilbert* or *James* imposes such a requirement, and plaintiff Rabe does not cite any authority in support of this argument. Moreover, the consent also informed Mrs. Moran that Healthsouth did not provide medical physician care.

¶ 36 Plaintiff Rabe maintains that the subsequent cases have disagreed with the analysis in *James.* See *Scardina v. Alexian Brothers Medical Center*, 308 Ill. App. 3d 359, 367 (1999) (finding that *James* improperly held the plaintiff to a standard of detrimental reliance); see also *York*, 222 Ill. 2d at 194-95 (holding that reasonable reliance was the proper standard in applying the *Gilbert* test). However, the disagreement with the court's analysis in *James* concerned the reliance element of the *Gilbert* test. See *Churkey v. Rustia*, 329 Ill. App. 3d 239, 243-44 (2002) (*Scardina* only addressed the reliance element of the *Gilbert* test and was not relevant to an

analysis of the holding out element).

¶ 37 Moreover, in *York*, following its determination the plaintiff had sufficiently established reliance to impose vicarious liability on the hospital for the malpractice of the independent-contractor physician, the supreme court stated as follows:

> "Our decision today, however, does not alter our pronouncement in *Gilbert* that if a patient knows, or should have known, that the allegedly negligent physician is an independent contractor, that patient may not seek to hold the hospital vicariously liable under the apparent agency doctrine for any malpractice on the part of that physician. In other words, if a patient is placed on notice of the independent status of the medical professionals with whom he or she might be expected to come into contact, it would be unreasonable for a patient to assume that these individuals are employed by the hospital. It follows, then, that under such circumstances a patient would generally be foreclosed from arguing that there was an appearance of agency between the independent contractor and the hospital." *York*, 222 Ill. 2d at 202.

¶ 38 Nonetheless, our courts have recognized that even where a patient has signed a consent form containing a disclaimer as to the existence of any employment or agency relationship between a hospital and a physician, additional facts may exist that would create a triable issue of fact as to whether a hospital held a physician out as its agent. *Churkey*, 329 Ill. App. 3d at 245. Plaintiff Rabe maintains that the provisions in the consent form that "in general, the physicians were independent contractors" and that some of the physicians may have an ownership in Healthsouth, and the fact that the request for anaesthesia did not reference independent

contractors, raise a question of fact as to whether Mrs. Moran was placed on notice as to Dr. Rasic's status as an independent contractor. He relies on *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826 (2009), and *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584 (2006).

¶ 39 In *Schroeder*, this court distinguished *James*, by explaining that the issue was whether the decedent was confused or misled by the contents of the consent form. Unlike the consent form in *James*, which clearly set out the physician's independent contractor status, the disclosure form in *Schroeder* advised the decedent that his care would be managed by his personal care physician or other physicians who were not employed by the defendant-hospital, as well as support staff, who were employed by the hospital, and consultants who had staff privileges but who were not employed by the hospital. We determined that there was sufficient material evidence that the decedent may have been misled by the forms and could have reasonably believed that his personal care physician and the consulting physicians were employed by the defendant to warrant a trial. *Schroeder*, 371 Ill. App. 3d 593-94.

¶ 40 In *Spiegelman*, this court found the consent form similar to the disclosure form in *Schroeder*, noting that "[b]oth in *Schroeder* and in the instant case, the consent utilized a multipart format and contained various provisions unrelated to the independent contractor disclaimer." *Spiegelman*, 392 Ill. App. 3d at 837 (citing *Schroeder*, 371 Ill. App. 3d at 587). In addition, the paragraph immediately preceding the disclosure of the independent contractor status of the physicians, advised the plaintiff that hospital employees would attend to her medical needs in the emergency room. Coupled with the fact that the plaintiff executed the consent at a time

when she was experiencing worsening dizziness and vision problems, this court concluded that a reasonable jury could find that the consent was confusing and ambiguous and therefore did not adequately inform the plaintiff of her physician's independent contractor status. *Spiegelman*, 392 Ill. App. 3d at 837.

¶ 41 The disclosure form in the present case was neither ambiguous nor confusing. The disclosure of the independent contractor status of the physicians and surgeons was disclosed in the first paragraph of the informed consent form. We do not believe that the term "generally" would cause Mrs. Moran to be confused as to whether Dr. Rasic was an employee of Healthsouth. The consent form advised Mrs. Moran that Healthsouth provided nursing care and support services but did not provide medical physician care. Unlike *Spiegelman* where references to "employees" and "independent contractor status" were placed close together in the consent form, in this case the disclosure that her physician might have an ownership interest in Healthsouth appeared in paragraph 14 of the consent form and would not reasonably cause confusion since the independent contractor disclaimer appeared in paragraph 1 of the form. Unlike the plaintiff in *Spiegelman*, there is no evidence that Mrs. Moran was experiencing physical problems that would have impacted her ability to read or understand the consent form.

¶ 42 Nothing in the request for anaesthesia form contradicted the disclaimer in the consent form or would have misled Mrs. Moran into believing that Dr. Rasic was employed by Healthsouth. Further, it is uncontested that Dr. Rasic did not wear any identification associating her with Healthsouth and said nothing to Mrs. Moran indicating she was employed by Healthsouth. The signs in the Healthsouth facility merely announced the name of the facility.

The one sign that referred to employment status, stated that anesthesiologists were not employed by Healthsouth.

¶ 43 The record in this case does not reveal any additional facts that would create a triable issue of fact as to whether Healthsouth held out Dr. Rasic as its agent. Based on the consent form, as a matter of law, Mrs. Moran knew or should have known that Dr. Rasic was an independent contractor. We conclude that the consent form in this case is dispositive on the issue of holding out. Therefore, summary judgment for Healthsouth was proper. See *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1094 (2009) (a plaintiff must satisfy all three elements of the *Gilbert* test to avoid summary judgment); *Churkey*, 329 Ill. App. 3d at 243-44 (court's analysis ends if the plaintiff cannot make a sufficient showing as to the holding-out element).[2]

¶ 44 The judgment of the circuit court is affirmed.

¶ 45 Affirmed.

[2]It is unclear why the court in *James* also discussed the justifiable reliance element of the *Gilbert* test after determining that the holding-out element had not been established.