IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned June 5, 2007

MARVIN M. BOREN, AS HUSBAND OF DOROTHY FAYE BOREN v. MARK T. WEEKS, M.D., ET AL.

Appeal from the Circuit Court for Warren County
No. 2151 Larry B. Stanley, Jr., Judge

No. M2007-00628-COA-R9-CV - Filed on June 12, 2007

This Tenn. R. App. P. 9 interlocutory appeal concerns a hospital's liability for the alleged negligence of an emergency room physician. The trial court granted the hospital summary judgment as to all claims except those alleging an ostensible or apparent agency relationship between the physician and the hospital. Because the steps taken by the hospital to disavow that the physician was an agent of the hospital were sufficient to preclude the plaintiff's claims based on apparent agency, we reverse the trial court's order denying summary judgment.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Vacated in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Thomas M. Pinckney, Nashville, Tennessee for appellant, Mark T. Weeks, M.D., d/b/a Emergency Medicine Associates; and Sterling Health Care Group, Inc.

Bryan Essary and Carrie C. Wiltshire, Nashville, Tennessee, for the appellant, River Park Hospital, Inc., d/b/a River Park Hospital.

Christopher K. Thompson, Murfreesboro, Tennessee, for the appellee, Marvin M. Boren, as husband of Dorothy Faye Boren.

OPINION

FACTS

On May 26, 2004, Dorothy Faye Boren suffered a fall at her home. The following morning at 9:13 a.m., she presented to the River Park Hospital Emergency Department complaining of a left thigh hematoma and multiple rib contusions. During the admission process, either Mrs. Boren or

her husband, Marvin M. Boren,[1] signed a "Consent for Medical Procedures and Treatment" that contained the following language:

> I understand those physicians providing medical services are not agents or employees of the hospital. This includes but is not limited to the emergency department physicians . . . .

Mrs. Boren was seen by a physician and discharged. She returned to the Emergency Department at 7:50 p.m. complaining of continued pain. Upon admission, her husband, Marvin M. Boren, signed a second "Consent for Medical Procedures and Treatment." Mrs. Boren was evaluated by Mark T. Weeks, M.D., and then admitted to River Park. She was discharged on May 29, 2004.

On June 3, 2004, Mrs. Boren returned to the River Park Emergency Department for a third time, complaining of chest pain on her left side. Mrs. Boren's daughter, Rhonda R. King, signed the "Consent for Medical Procedures and Treatment" during this visit. Mrs. Boren was again evaluated by Dr. Weeks, who concluded that she suffered from "chest wall pain" and "chest pain" and discharged her home. On June 7, 2004, Mrs. Boren's primary care physician admitted her to River Park on an in-patient basis. Mr. Boren again signed the "Consent for Medical Procedures and Treatment." Mrs. Boren underwent a CT scan of her chest which revealed multiple pulmonary emboli on her left and right arteries. Mrs. Boren died later that evening.

On May 16, 2005, Mr. Boren filed this action against River Park Hospital, Dr. Weeks, and several related entities.[2] The complaint alleges that Dr. Weeks failed to act with ordinary and reasonable care in accordance with the recognized standard of acceptable professional practice in the community in which he practices. The complaint further asserts River Park is vicariously liable for Dr. Weeks's negligence because Dr. Weeks was acting within the scope of his authorized agency with River Park and with the apparent authority to act on behalf of River Park.

On September 8, 2006, River Park filed a motion for summary judgment on the grounds that River Park was not negligent and that it was not vicariously liable for the negligence of Dr. Weeks. River Park asserted that Dr. Weeks was not an actual agent of River Park and that there was no apparent agency relationship between Dr. Weeks and River Park. In support of its motion, River Park presented proof that it took affirmative steps to disclaim any agency relationship by asking patients or their representatives to sign a form acknowledging that physicians are not employees or agents of the hospital. Mr. Boren and Ms. King signed this form upon Mrs. Boren's admission. In addition, River Park presented evidence that Mrs. Boren herself had signed a consent form

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[1] While there is some question as to whether Mrs. Boren or her husband signed the consent form during Mrs. Boren's first admission to River Park on May 27, 2004, this dispute is not material to our decision, and we presume for the purposes of this appeal that Mrs. Boren did not sign the consent form on May 27, 2004.

[2] The complaint originally named as the hospital defendant HCA, Inc. d/b/a Tristar Health System d/b/a River Park Hospital. The parties subsequently agreed to amend the style of the case and the pleadings to reflect that River Park Hospital, Inc. is the proper hospital defendant.

containing a similar disclosure at a different hospital several months earlier. In response to the motion for summary judgment, Mr. Boren conceded that he could not show actual agency, but contended summary judgment concerning the issue of apparent agency was not appropriate because a material question of fact exists as to whether adequate and proper disclosure was made to Mrs. Boren and her family regarding Dr. Weeks's relationship with River Park.

On October 16, 2006, the trial court determined that a genuine issue of material fact exists as to the issue of vicarious liability and denied the motion for summary judgment. River Park promptly filed a motion to correct or clarify. On March 13, 2007, the trial court modified its October 16, 2006, order to reflect that River Park's motion for summary judgment was granted in part and denied in part. All claims of direct negligence against the staff of River Park and any claim that Dr. Weeks was an actual agent of River Park were dismissed. The sole remaining claim against River Park was based on the theory of ostensible agency of Dr. Weeks. The trial court granted River Park permission to appeal pursuant to Tenn. R. App. P. 9 on the same date. This court granted River Park permission to appeal on April 5, 2007. We also waived further briefing and oral argument and directed the trial court clerk to file the record.

STANDARD OF REVIEW

Decisions based on summary judgment do not enjoy a presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). Rather, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgment is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mutual Automobile Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats

the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn.1975).

ANALYSIS

The sole issue on appeal is whether the trial court erred in denying River Park's motion for summary judgment on the issue of apparent agency, an essential element of the plaintiff's remaining claim. In support of its motion for summary judgment, River Park presented proof that it took specific steps to disavow any agency relationship with any physicians, including radiologists, providing medical services. Faced with such proof, Mr. Boren must, in order to survive the motion for summary judgment, demonstrate that he will be able to prove at trial that Dr. Weeks was an apparent agent of the hospital.

Apparent agency is essentially agency by estoppel. *White v. Methodist Hosp.*, 844 S.W.2d 642, 646 (Tenn. Ct. App. 1992). Its existence depends upon such conduct by the principal as would preclude the principal from denying another's agency. *Kelly v. Cliff Pettit Motors*, 234 S.W.2d 822 (Tenn. 1950). The liability of the principal is determined in any particular case by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent. *Southern Ry. Co. v. Pickle*, 197 S.W. 675, 677 (Tenn. 1917).

"It is well settled that apparent authority must be established through the acts of the principal rather than those of the agent." *Bells Banking Co. v. Jackson Centre, Inc.*, 938 S.W.2d 421, 425 (Tenn. Ct. App. 1996). A principal is responsible for the acts of an agent only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority. *Mechanics Laundry Serv. v. Auto Glass Co. of Memphis*, 98 S.W.3d 151, 157 (Tenn. Ct. App. 2002). To prove apparent authority one must establish: (1) the principal actually or negligently acquiesced in another party's exercise of authority; (2) the third person had knowledge of the facts and a good faith belief that the apparent agent possessed such authority; and (3) the third person relied on this apparent authority to his or her detriment. *Mechanics Laundry Service v. Auto Glass Co. of Memphis, Inc.*, 98 S.W.3d at 157.

This court has held that evidence of a patient's reasonable reliance upon a health care provider's apparent authority to act for a hospital may be inferred "in the hospital setting." *White v. Methodist Hosp.*, 844 S.W.2d 642, 647-48 (Tenn. Ct. App. 1992); *Davis v. University Physicians Foundation, Inc.*, No. 02A01-9812-CV-00346, 1999 WL 643388, at *2 (Tenn. Ct. App. Aug. 24, 1999). However, plaintiffs must do more than simply invoke *White* in order for their claim to survive the hospital's motion for summary judgment. *Knight v. Hospital Corp. of America*, No. 01A01-9509-CV-00408, 1997 WL 516, at *3 (Tenn. Ct. App. Jan. 8, 1997). In *White*, the plaintiff

actually presented proof in opposition to the hospital's motion for summary judgment concerning the physician's relationship with the hospital, the manner in which the physician was selected to treat the patient, as well as other proof relevant to their apparent agency theory. In this case, Mr. Boren can point to no conduct by River Park which "clothed the agent with the appearance of authority" so as to overcome Park River's affirmative efforts to disavow an agency relationship.

River Park's liability is not based on whether Mrs. Boren read the disclaimer, but rather on whether River Park held Dr. Weeks out as its agent. Mr. Boren asserts that a material question of fact exists as to whether adequate and proper disclosure was made to Mrs. Boren and her family regarding Dr. Weeks's relationship with River Park. Based on the undisputed facts, we conclude that River Park's efforts to disavow that the Emergency Room Physicians were agents of the hospital were sufficient to preclude the plaintiff's claims based on apparent agency.

IN CONCLUSION

The portion of the trial court's March 13, 2007 order denying summary judgment on the issue of apparent agency is vacated and the case is remanded to the trial court for entry of an order granting River Park's motion for summary judgment. Marvin M. Boren is taxed with the costs for which execution may issue.

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FRANK G. CLEMENT, JR., JUDGE