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

AMANDA LYNN DEWALD, ET AL. v. HCA HEALTH SERVICES OF TENNESSEE, ET AL.

Appeal from the Circuit Court for Rutherford County
No. 51307 Robert E. Corlew, III, Chancellor

No. M2006-02369-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 a radiologist with staff privileges at the hospital, based upon the theory of apparent agency. The trial court overruled the hospital's motion for summary judgment on the issue of apparent agency, but granted the hospital permission to appeal pursuant to Tenn. R. App. P. 9. Because the steps taken by the hospital to disavow that the radiologist was an agent of the hospital were sufficient to preclude the plaintiffs' 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.

Bryan Essary, Nashville, Tennessee, for the appellant, HCA Health Services of Tennessee, Inc., d/b/a Stonecrest Medical Center.

Phillip Lester North, Nashville, Tennessee, for the appellant, Adrian Lamballe, M.D.

Rodney M. Scott and W. Kennerly Burger, Murfreesboro, Tennessee, for the appellee, Amanda Lynn DeWald and Thomas B. DeWald.

OPINION

FACTS

On January 25, 2004, Amanda Lynn Dewald presented to the StoneCrest Medical Center ("StoneCrest") emergency room complaining of lower abdominal pain and nausea. Upon admission, her husband, Thomas B. Dewald, signed on her behalf 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 and physician assistants, the anesthesiologists, the radiologists, . . .

Mr. Dewald had also signed an identical form on behalf of his wife during a prior visit to StoneCrest one and a half months earlier. Following her admission, Mrs. Dewald underwent a pelvic ultrasound, the results of which suggested decreased arterial flow to the left ovary. These results were received by the emergency room physician, and Mrs. Dewald was released with instructions to follow up with her family care physician.

Following the pelvic ultrasound, Adrian Lamballe, M.D., a radiologist with staff privileges at Stonecrest, dictated and electronically signed a report incorrectly indicating that Mrs. Dewald had undergone a series of chest x-rays which revealed she had advanced lung cancer. This erroneous report was transmitted to Mrs. Dewald's family care physician who advised Mrs. Dewald the next morning to report immediately to another hospital to commence treatment for lung cancer. Mrs. Dewald was admitted that same day and spent two days hospitalized believing she had terminal lung cancer before finally learning that the report sent to her family care physician actually contained Dr. Lamballe's impressions from another patient's x-ray.

On January 26, 2005, Mrs. Dewald and her husband, Thomas Dewald, filed this action against both Dr. Lamballe and StoneCrest. StoneCrest subsequently filed a motion for summary judgment asserting that (1) its employees complied with the acceptable standard of professional practice, (2) Dr. Lamballe was not an employee of StoneCrest, and (3) Dr. Lamballe was not an apparent or ostensible agent of StoneCrest. The trial court granted summary judgment as to any claims asserted against StoneCrest for any negligent conduct by direct employees or representatives of StoneCrest, upon an acknowledgment by Mr. and Mrs. Dewald that their substantive claims against StoneCrest are based solely upon apparent agency and not upon any direct respondeat superior relationship between StoneCrest and Dr. Lamballe. However, the trial court determined that the affirmative steps taken by StoneCrest to disavow that Dr. Lamballe was an agent of the hospital were not sufficient to preclude Mr. and Mrs. Dewald's claims from proceeding under the theory of apparent authority. The trial court thus denied the motion for summary judgment as to the claims based on apparent authority, but granted StoneCrest permission to appeal pursuant to Tenn. R. App. P. 9.

StoneCrest filed its Tenn. R. App. P. 9 application in this court on November 6, 2006. Mr. and Mrs. Dewald did not file an answer within the time provided by Tenn. R. App. P. 9. On November 27, 2006, this court determined that the case appeared to be appropriate for disposition without further briefing and oral argument, and ordered Mr. and Mrs. Dewald to file an answer to application. Mr. and Mrs. Dewald filed their answer on December 12, 2006. We subsequently directed the trial court clerk to certify and transmit the record on appeal. The record was filed on February 2, 2007, and a supplemental record was filed on March 12, 2007. On April 5, 2007, we granted the application for permission to appeal, waived further briefing and oral argument and ordered the case submitted for a decision on the record, the application and the answer.

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 StoneCrest's motion for summary judgment on the issue of apparent agency, an essential element of the plaintiffs' remaining claim. In support of its motion for summary judgment, StoneCrest 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. and Mrs. Dewald must, in order to survive the motion for summary judgment, demonstrate that they will be able to prove at trial that Dr. Lamballe 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.

"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.

Mrs. Dewald concedes in her deposition that StoneCrest attempted in the consent form "to expressly describe . . . that physicians similar to those listed there are not employees or agents of the hospital." Mr. and Mrs. Dewald argue that Mrs. Dewald did not sign the consent form or have any knowledge of the disclaimer. StoneCrest's liability is not, however, based on whether Mrs. Dewald read the disclaimer, but rather on whether StoneCrest held Dr. Lamballe out as its agent.

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. and Mrs. Dewald can point to no conduct by StoneCrest which "clothed the agent with the appearance of authority." Rather, Mrs. Dewald just "assume[d] they [the physicians] were part of the hospital." Mrs. Dewald's subjective beliefs are not enough to survive summary judgment.

IN CONCLUSION

The portion of the trial court's September 6, 2006 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 StoneCrest's motion for summary judgment. Amanda Lynn and Thomas DeWald are taxed with the costs for which execution may issue.

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FRANK G. CLEMENT, JR., JUDGE