

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DANA PIKE, individually and as)
Representative of the Estate of)
Charles F. Pike,)
)
Plaintiff,) 1:04-cv-391-JDT-TAB
)
vs.)
)
DECATUR MEMORIAL HOSPITAL,)
NATIONAL EMERGENCY SERVICES,)
INC., NES INDIANA, INC.,)
)
Defendants.)

ENTRY DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT (DOC. ## 22, 80)¹

This matter is before the court on the summary judgment motion of Defendants National Emergency Services, Inc. and NES Indiana, Inc., as well as a cross motion for partial summary judgment filed by the Plaintiff, Dana Pike.

Factual Background

On August 31, 1994, Defendant Decatur Memorial Hospital (“Decatur”) and Defendant National Emergency Services, Inc., (“NES”)² entered into a contract whereby NES agreed to locate and provide the services of emergency room physicians as well

¹ This Entry is a matter of public record and will be made available on the court’s web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

² In 1996 National Emergency Services, Inc. set up an affiliate, NES Indiana, Inc., and transferred its rights under the contract with Decatur. There is currently no substantive reason to treat the two Defendants differently and therefore the court will refer to them jointly as “NES.”

as provide other services directly related to the hospital's emergency room operations. The contract between the two Defendants is twelve pages long and also has several addenda. In layman's terms, Decatur was essentially subcontracting the responsibility for physician staffing and doctor related medical services provided in its emergency room. As might be expected, the parties to the contract defined the day-to-day responsibilities more clearly than they did their respective liabilities.

Some provisions of the contract (Hospital Emergency Care Agreement), which help describe the relationship are set forth below:

1. *Emergency Department Services*

NES shall provide the services of Indiana Licensed physicians under contract with NES to provide emergency department services to patients of Hospital on a twenty-four (24) hours per day, seven (7) days per week basis during the term of this contract.

NES shall be responsible for all physician emergency room services including the following:

- 1.1 The emergency department physician will treat all patients who present themselves at the emergency department of the Hospital.
- 1.2 Emergency department services shall include treatment for acute care, stabilization of the patient and evaluation for admission to the Hospital or for transfer of the patient for specialized treatment and being available in the emergency department to provide care when not otherwise occupied. NES will only provide physician services. NES and its physicians shall also provide for further medical examination and treatment of patients presenting themselves in the emergency department as may be required to stabilize the patient's medical condition or, if the patient has an emergency medical condition and has not been stabilized, the patient may not be transferred to another appropriate facility unless the provisions of the Treatment for Emergency Medical Conditions and Women in Active Labor Act (a/k/a the "Anti-Dumping Statute"), 42 U.S.C. 139dd, Pub.L.No. 99-272, have been complied with.

- 1.3 The Hospital will provide all necessary and appropriate equipment and also necessary nursing and support staff.

* * *

2. Director of Services

- 2.1 NES shall provide a full-time emergency department medical director who has appropriate medical training, experience and patient orientation skills. NES shall provide the Hospital with advance written information concerning the physician's training and qualifications. The Executive Committee of the Hospital medical staff and the Board of Trustees of the Hospital shall have an opportunity to interview and approve any candidate for the emergency department medical director position.

* * *

- 2.3 NES and the emergency department medical director shall provide the following services:

* * *

- 2.3-5 Develop and recommend all policies and procedures for the emergency department.

- 2.3-6 Verify the qualifications and capabilities of all emergency department personnel.

* * *

- 2.3-9 Recruit physicians to staff the emergency department.

* * *

3. NES's Physicians

NES warrants and represents that each of the physicians assigned by it to Hospital will be duly licensed to practice medicine in the State of Indiana. NES will investigate each physician assigned by it to the Hospital and will give the Hospital's medical staff all information available to it to assist the medical staff in determining whether to grant Hospital privileges to the physicians. . . .

* * *

5. As compensation for services rendered:

5.1 Hospital agrees to pay to NES each month for the first twelve (12) months of this Agreement an amount equal to \$61.50 per physician per hour worked.

* * *

6. Independent Contractor

The relationship between NES and the physicians assigned to the Hospital pursuant to this agreement shall be that of independent contractor. The Hospital shall have the right to reject any physician selected by NES, which right or rejection will not be exercised unreasonably. NES shall not exercise control of any nature, kind, or description, relating to the manner or means in which the physicians perform their duties and provide emergency department coverage.

Neither NES or the Hospital shall exercise any control or direction over methods by NES's physicians assigned to the Hospital [to] practice medicine. The Hospital's sole interest is to assure that the departments and services covered by this agreement are performed in a competent, efficient, and satisfactory manner. . . .

In performing the services herein specified, NES is acting as an independent contractor and not as the agent or employee of the Hospital. Nothing in this agreement shall be construed to create a partnership or joint venture between the Hospital and NES nor to authorize either the Hospital or NES to act as a general or special agent of the other party in any respect, except as specifically set forth in this agreement. The parties agree that the patient-related services to be performed by NES's physicians pursuant to the provisions of this agreement constitute the practice of medicine. The services shall be the sole responsibility of NES and shall be deemed NES's acts and services as an independently licensed contractor.

* * *

11. Insurance

NES shall furnish the Hospital with proof that each individual physician provided by NES and NES are insured against malpractice and other liability in the amount of One Million Dollars (\$1,000,000.00) per incident and Three Million Dollars (\$3,000,000.00) in the aggregate per physician.

13. The Hospital agrees to:

13.1 Provide all necessary medical equipment, drugs, supplies, furniture, and dictation and transcription services at its own expense for the use of physicians so that they might carry out their services in an efficient and skillful manner. . . .

13.2 Maintain and repair all equipment and provide utilities and services such as heat, water, electricity, janitorial services and telephone services, all of which is required in the line of the duties of the physician.

13.3 Provide the services of licensed, registered and vocational nurses and other non-physician technicians and assistants necessary for the efficient operation of the emergency department. Direction and control of such personnel for professional medical matters shall rest with the physician. NES shall have no control, directly or indirectly, over the activities of the nurses and/or technicians.

* * *

14. NES and physicians provided by NES herein assign to Hospital the right to bill and collect fees for all services furnished by physicians.

* * *

19. Construction

This agreement shall, at all times, be construed in such a manner as to conform to all federal, state, and local laws and regulations, and if at any time it does not conform thereto, it shall be considered to be amended so as to be in conformity. This contract shall be construed in accordance with the laws of the State of Indiana. It shall be binding upon the parties hereto, their successors and assigns.

* * *

According to a copy of his vitae dated October of 2000, Dr. David Angel worked as an emergency medicine physician for a number of hospitals and urgent care medical providers over the course of his career, which began in the summer of 1998. Nearly all of the hospitals and medical providers he worked for were located in Indiana, where he

went to medical school and was first licensed to practice. He obtained his license to practice medicine in California in April of 2000, and on his 2000 vitae he listed current positions with both NES, and EmCare, Inc., through its offices in California. With respect to his work with EmCare, Inc., he listed specific assignments at a hospital and a National Park, both of which are located in California. However, in the summer of 2000 the Medical Board of California entered an interim order suspending his license. After an investigation and hearing, the Board concluded that Dr. Angel's "ability to practice his profession safely is impaired because he is mentally ill. His continued practice of medicine without ongoing psychotherapy poses a serious danger to the public health, safety and welfare." Consequently the State of California revoked his license as of November 14, 2001.

On December 26, 2001, Dr. David Angel signed an agreement with NES to serve as an "independent contractor" to provide his services to hospitals that contracted with NES. Dr. Angel had, over the years, already been accepting assignments at Indiana medical facilities through NES. In the updated application he completed on December 26, 2001, he mentioned nothing about his license in California or its having been revoked, and listed only Indiana as a state where he was licensed to practice. He had completed an application for NES previously in October 1999 in connection with earlier assignments. In that application he listed Indiana as the state where he was licensed to practice and California as a state where his licensure was pending. His October 2000 vitae was also in the files of NES. That vitae listed both an Indiana and California license number; however, Dr. Angel worked through NES only at medical facilities in

Indiana. One of the NES employees responsible for checking credentials has testified in deposition that unless Dr. Angel was seeking employment through NES at California facilities, there would have been no NES requirement that he check on the California license number that was listed in the doctor's vitae.

The "Physician Agreement" entered into by Dr. Angel and NES contained, among its six pages, the following provisions which help to describe that relationship:

* * *

WHEREAS, Corporation engages in the business of contracting with medical institutions to staff and to service the medical care facilities of such medical institutions; and,

WHEREAS, Corporation provides said staff and service by contracting with individual physicians, as independent contractors, who agree to make their professional services available at such times as may be determined by said independent contractors; and,

WHEREAS, Physician is a licensed physician authorized to practice medicine; and,

WHEREAS, Physician is desirous of contracting his or her services as an independent contractor to Corporation, and Corporation is desirous of contracting with Physician pursuant to the terms and conditions hereinafter set forth;

* * *

2. Physician warrants and represents that he or she is licensed to practice medicine in any and all states in which he or she chooses to work
3. Physician agrees to perform professional medical services at the facilities of medical institutions that Corporation may contract with to provide said services at such times and at such places as may be scheduled by the Physician pursuant to this Agreement, and Corporation agrees to pay physician a sum of money as set forth on Addendum hereto for the provision of said service.
4. Physician shall notify Corporation or the person designated by Corporation on a monthly basis as to the hours or days Physician wishes to make

himself or herself available to provide services pursuant to Paragraph 3 hereof. In no event shall Physician be required by Corporation to perform services for any period of time other than that time contracted for by the parties hereto. The selection of hours or days the Physician will be available to perform services will be at the sole discretion of the Physician.

5. The performance of services pursuant to Paragraph 3 hereof shall be subject to the following terms and conditions:
 - A. Corporation shall have no right to control and shall not control the time, place, or manner in which Physician performs such services.
 - B. Physician shall pay any and all costs and expenses that may result from, in any manner whatsoever, the performance of such services.

* * *

- E. Physician shall at all times perform such services in accordance with that degree of skill and expertise that qualified and licensed physicians in that community would exercise in the same or similar circumstances.
- F. Corporation shall not provide any training, instruction, or any other directions of any kind whatsoever as to the manner in which Physician is to perform such services.

* * *

6. The Corporation shall procure on behalf of Physician professional liability insurance insuring the Physician solely for the services rendered hereunder at particular medical institutions under contract with Corporation. . . .
7. Physician agrees to indemnify and hold Corporation harmless from any and all loss, expense, cost, damage, or liability arising out of the performance of services pursuant to Paragraph 3 hereof by Physician, whether arising out of or related to Physician's performance or failure to perform such services, Physician's failure to abide by the terms and conditions of this Agreement, Physician's failure to abide by other recognized duties inherent in the practice of medicine, or Physician's conduct that is otherwise negligent or intentional or otherwise recognized by law to show fault in failing to abide by a recognized standard of care. In addition to any other remedies in law or equity, Corporation shall have the right to offset and apply all monies due Physicians under this

agreement against all monies due Corporation pursuant to this Paragraph 7.

* * *

10. It is agreed by the parties hereto that Physician is an independent contractor and not an employee, agent, or servant of Corporation. Physician acknowledges that he or she is not entitled to any employee benefits whatsoever either by the Corporation or by the medical institution wherein Physician is providing services. Physician agrees that, as an independent contractor, he or she is fully and completely responsible for payment of all appropriate self-employment tax payments, as well as social security, and any other required tax payments.

* * *

During January and February of 2002, Dr. Angel was accepting NES scheduling assignments at the Decatur emergency room. He had sporadically accepted assignments at Decatur, through NES, since January of 2000. On January 30, 2002, and again on February 13, 2002, Charles Pike was treated in the emergency room at Decatur by Dr. Angel. Pike died on February 13, 2002, while under the care of Dr. Angel. Charles Pike's wife, Plaintiff Dana Pike, alleges that the failure of the Defendants³ to exercise the ordinary skill and care of health care providers deprived him of a significant chance of recovery and ultimately resulted in his death. She also claims that Defendants discharged her husband from the emergency room without first stabilizing his medical condition, in violation of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(c). In her complaint, she specifically alleges that NES and Decatur failed to implement or adhere to reasonable procedures for reviewing

³ Dr. Angel, who is now deceased, was originally a named defendant in this action, but claims against him were dismissed for lack of adequate service on his estate and he was dismissed as a defendant by order of this court on October 24, 2005 (Document #68).

the qualifications of Dr. David Angel before providing him with hospital privileges. NES has filed a motion with the court contending that it is entitled to judgment as a matter of law.

Summary Judgment Standard

The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 587 (1986). Summary judgment should be granted only where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Only genuine disputes over material facts can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it might impact the outcome of the suit under the governing law. *Id.*

When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the non-moving party. See Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 255; *Conley v. Village of Bedford Park*, 215 F.3d 703, 708 (7th Cir. 2000). Because “summary judgment is not a paper trial, the district court’s role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe.” *Waldrige v. American Hoenchst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). The court’s only task is “to decide,

based on the evidence of record, whether there is any material dispute of fact that requires a trial.” *Id.*

Discussion

The substantive details of Mr. Pike’s medical condition and the nature of the negligent treatment allegedly provided are not issues right now. NES does not, at this point, challenge the claim of Mrs. Pike that Dr. Angel or the hospital provided medical care at a level below that which was customarily provided in the relevant medical community. This case has been stayed⁴ while the malpractice claim makes its way through Indiana’s medical review panel process which is mandated by the state’s Medical Malpractice Act, Ind. Code § 34-18-8-4. The stay was lifted to allow NES to file the summary judgment motion at bar because NES represented that its motion was in no way dependent on any opinion from the medical review panel. NES claims to be entitled to summary judgment in its favor, because as a matter of law: 1) it can not be liable for medical malpractice because it is not a health care provider; 2) it is not responsible for the acts of Dr. Angel who is an independent contractor; and, 3) it had no authority to grant Dr. Angel hospital privileges.⁵ In response, Plaintiff argues that NES contractually assumed the responsibility, and hence duty, to provide physician

⁴ The court notes that in its May 21, 2004 order staying the case, it required a status report from Plaintiff’s counsel every six months. There is no record of any such reports being filed.

⁵ NES states in its brief that it assumes that it is not the target of the federal statutory violation alleged in Plaintiff’s Complaint. Plaintiff does not challenge that assumption and, because NES is not a hospital, the entity against whom an injured person has a right to seek damages under the statute, the court agrees that Plaintiff’s statutory claim does not apply to NES.

emergency room services at Decatur and to verify the qualifications and capabilities of any doctors it assigned to that task, including the investigation of their backgrounds. In doing so, according to Plaintiff, NES opened itself up to an exception to the general rule that a principal is not liable for the negligence of an independent contractor.

NES's co-defendant, Decatur, filed a brief in response to NES's summary judgment motion. In that brief, Decatur opposes any grant of summary judgment in favor of NES and challenges its characterization of Dr. Angel as an independent contractor. However, despite the contract between the two, Decatur has filed no cross claim against NES. In addition, comparative fault is not applicable to a medical malpractice action under Indiana law, Ind. Code § 34-51-2-1(b)(1), the importance of which will be discussed later. So, in analyzing the pending motion, there would appear to be no reason to look past the concession of Plaintiff that Dr. Angel was an independent contractor procured by NES pursuant to its contractual obligation to Decatur.

In sorting through the various legal theories and doctrines that are applicable to the existing circumstances, it is most important to understand the relationships between the parties. The court finds it most beneficial to examine first the relationship between Decatur and the decedent, Charles Pike. Pike went to Decatur to obtain emergency medical treatment because those services were offered by the hospital. While he was a patient in the emergency room, the emergency physician services were provided by Dr. Angel, an independent contractor. In many, if not most, circumstances, an actor's independent contractor status shields others from liability as a principal or under

respondent superior. However, the Indiana Supreme court has stated that “a hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital. *Sword v. NKC Hosps., Inc.*, 714 N.E. 2d 142, 152 (Ind. 1999). While a hospital may be able to avoid liability for a doctor’s negligent actions by providing the patient written notice of the doctor’s independent contractor status, in some emergency situations even such written notice may not suffice if there is an inadequate opportunity for the patient to make an informed choice. *Id.* Since the record is silent with respect to any written notice provided by Decatur to Mr. Pike, the court assumes there was no such notice provided and that under Indiana law the hospital could be found liable for the negligence of Dr. Angel.

Next, under the Plaintiff’s alternative theory of liability, there is the issue of whether or not Decatur could be held liable for negligently credentialing Dr. Angel. A cause of action for negligent credentialing has been recognized in Indiana. *Winona Mem’l Hosp., Ltd. P’ship v. Kuester*, 737 N.E.2d 824 (Ind. Ct. App. 2000). In *Kuester* the Indiana Court of Appeals found that such an action could be brought against a hospital and that the Indiana Medical Malpractice Act applied to such an action. *Id.* at 828-29.

In order to answer the question of whether these same theories of liability might be pursued against NES, there needs to be an understanding of the relationship between NES and Decatur. That relationship is contractually based. As indicated

previously, in essence Decatur subcontracted to NES its responsibility to provide emergency physician services in connection with its operation of a hospital emergency room (or department). That there is a responsibility for a hospital to provide emergency physician services if it operates an emergency department is inherent in the decision of the Indiana Supreme Court in *Sword*, which opined that unless a patient provides actual informed consent to treatment by an independent contractor, there is a recognized patient expectation that the doctor is acting as an agent of the hospital. *Sword*, 714 N.E.2d at 152. In this instance, Decatur has turned to NES, via contract, to make sure that there are qualified physicians to staff the emergency room.

In Section 1 of the Hospital Emergency Care Agreement, NES agreed to “be responsible for all physician emergency room services.” According to Section 6 of the agreement, those services “shall be the sole responsibility of NES and shall be deemed NES’s acts and services as an independently licensed contractor.” And, NES promises in Section 3 to investigate each emergency room physician and provide the hospital with all information available to NES in order to assist the hospital in determining whether or not the doctor should receive the privilege of practicing at the hospital. The contractual assumption by NES of these responsibilities leads to the question of whether there was also an assumption of a duty to others. The answer to that question turns on the analysis of another relationship.

The court agrees with the assertion made by NES in its reply brief, that Plaintiff’s contention that she can recover against NES because it assumed a contractual duty, is contingent upon her husband being a third-party beneficiary to the contract. After all,

there was no contractual privity between NES and Mr. Pike. However, the court disagrees with NES when it comes to whether or not an emergency room patient would be a third-party beneficiary to the Hospital Emergency Care Agreement. Applying Indiana law, an emergency room patient is a third-party beneficiary of the Hospital Emergency Care Agreement.

Under Indiana law, in order to maintain a contract action based upon one's status as a third-party beneficiary, it must appear under the circumstances, and from the terms of that contract, that there was an intent that one of the parties perform some part of the agreement for the direct benefit of the person or class of persons claiming to be a third-party beneficiary. *St. Paul Fire & Marine Ins. Co. v. Pearson Constr. Co.*, 547 N.E.2d 853, 856 (Ind. Ct. App. 1989). More specifically, a contract has a third-party beneficiary if (1) the parties to the agreement intend to benefit a third-party; (2) the contract imposes a duty on one of the parties in favor of the third-party; and (3) the performance of the terms of the contract render a direct benefit to the third-party. *Id.* It is the intention of the contracting parties to the agreement and not their motives which controls. *Id.* Evidence of intent can be gleaned from the language of the agreement considered against the background of the circumstances shown to surround the contracting parties at the time of its execution. *Id.*; see also *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 122 (Ind. Ct. App. 2001).

The responsibility for providing "all physician emergency room services" has no purpose unless it is to provide those services to emergency room patients. Decatur may be motivated by its commitment to the community to provide such services and it

may receive several indirect benefits from NES agreeing to recruit, schedule and be responsible for the provision of such services, but the clear intent of the agreement is that emergency physician services be provided for the direct benefit of emergency room patients. The promise to investigate those doctors and provide the information gathered to the hospital for purposes of assisting in the determination of whether the doctors are qualified to receive hospital privileges, provides a direct benefit to Decatur in so far as it assists Decatur in meeting its requirement to assess a doctor's suitability to utilize the hospital facility in connection with practicing medicine. However, the court is not convinced that there is not an equally direct benefit intended in favor of the patient; that is, an intent to assure that the emergency room patient is receiving treatment from a physician qualified and fit to provide emergency medical assistance. In the end, the court is convinced that as an emergency room patient, the decedent was an intended third-party beneficiary of the contract between NES and Decatur. As such his wife and estate are entitled to pursue a negligence claim against NES. *St. Paul Fire & Marine Ins. Co. v. Pearson Construction Co.*, 547 N.E.2d at 857.

NES argues that since it is not a health care provider it can not be liable for medical malpractice. While NES may not be a "qualified provider" as that term is defined in the Indiana Medical Malpractice Act (see Ind. Code § 34-18-2-24.5 and Ind. Code § 34-18-3-2 setting forth requirements that medical providers and their insurers file certain proofs with the commissioner to become "qualified"), its agreement to be responsible for all physician emergency room services at Decatur makes it more than a bit difficult for it to say it is not a "health care provider" under the statute when the statute

provides that an agent of a facility authorized by the state to provide health care is a “health care provider.” See Ind. Code § 34-18-2-14(1). And, the Medical Malpractice Act makes it clear that if a health care provider fails to “qualify”, it loses the protections of the Act and subjects itself to liability under the law without regard to the Act. Ind. Code § 34-18-3-1. In the end, so long as Plaintiff has established a foundation for the existence of a legal duty on the part of NES, it can not insulate itself from liability by claiming it is outside the purview of the Medical Malpractice Act.

Next, NES argues that, in context, the agreement between it and Decatur can not be read to place any responsibility on it for the malpractice of any of the emergency room physicians it provides. That simply is not the case. A reasonable reading of the agreement makes it clear that NES is agreeing to be responsible for the provision of all emergency room physician services. There may be language that attempts to insulate NES from liability for the conduct of the doctors, but there is also language that says the agreement is to be interpreted as in compliance with the laws of the state where the hospital is located and, as the court has previously explained, that law includes the liability of a hospital for the negligence of emergency room physicians unless knowing consent to treatment by an independent contractor is obtained from the patient. That liability can not be avoided via subcontracting the emergency room physician responsibilities. Either the hospital retains that liability or the subcontracting entity assumes it (or perhaps both) and in this case the contract between NES and Decatur seems to put that responsibility squarely on NES.

Finally, NES contends it is insulated from liability with respect to negligent credentialing because Decatur has the ultimate responsibility for issuing hospital privileges and regardless of what information NES may have provided. According to NES, Decatur had the obligation to obtain various primary source verification reports that would have tapped national data banks and provided all relevant information on any doctor. NES contends that, because Dr. Angel passed Decatur's credentialing procedure only Decatur can be found liable on a claim that the process was inadequate. Part of the problem with this argument is that it is based on the testimony of an NES employee (or former NES employee) as to what the hospital needed to do to complete an appropriate credential check and the basis for her knowledge with regard to what is required of hospitals is not explained. Another problem with this argument is that Dr. Angel received hospital privileges at Decatur before he even obtained a California license. There is no evidence that Decatur knew he had a license in California or that it was revoked, while it is clear that NES had Dr. Angel's vitae which listed his California license number, and NES also had a policy of conducting two year reviews or re-application processes for its physicians which was intended to include some form of status verification.

While NES is not entitled to summary judgment, Plaintiff is not entitled to summary judgment either. Although she asserts that there is ample evidence "to support the proposition that NES failed to exercise ordinary care in the discharge of these duties", referring to its agreement to be responsible for emergency room physician services and to investigate all doctors assigned to Decatur's emergency

department, Plaintiff has failed to demonstrate that there are not questions of fact remaining as to what may have been reasonable. Further, the issue of causation has yet to be established. At this point, there is no evidentiary nexus between Mr. Pike's death and the alleged malpractice of Dr. Angel or the Defendants. All that has been established, through this entry, is that through its contract with Decatur, NES assumed a duty in favor of Mr. Pike and other emergency room patients. Though NES has not argued the issue of the standard of care provided to Plaintiff while he was in the emergency room, it has not conceded that issue either.

The court indicated earlier that it would address the importance of the fact that comparative fault does not apply to a malpractice action under the Indiana Malpractice Act. Since NES is admittedly not a "qualified provider" the Act is not applicable to a negligence action against it. So, if this matter proceeds to trial, as the court sees it now, comparative fault principles would apply to the claim against NES, but not to the claim against Decatur.

Conclusion

For the reasons discussed in this entry, Defendant NES's Motion for Summary Judgment (Document #22) and Plaintiff's Cross Motion for Partial Summary Judgment (Document #80) are **DENIED**.

ALL OF WHICH IS ENTERED this 1st day of May 2007.



John Daniel Tinder, Judge
United States District Court

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