IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NICOLAI TAVILLA and DONNA TAVILLA, husband and wife; and on behalf of their minor children, KATHERINE MARIE TAVILLA and ALYSSA JOYCE TAVILLA; and BRITNY NICOLE TAVILLA, an adult child of NICOLAI TAVILLA and DONNA TAVILLA, *Plaintiffs/Appellants*,

v.

HEALTHSOUTH VALLEY OF THE SUN REHABILITATION HOSPITAL, a foreign limited partnership; HEALTHSOUTH PROPERTIES, LLC, a limited liability company; HEALTHSOUTH MERIDIAN POINT REHABILITATION HOSPITAL LIMITED PARTNERSHIP; and HEALTHSOUTH VALLEY OF THE SUN REHABILITATION HOSPITAL LIMITED PARTNERSHIP, *Defendants/Appellees*.

No. 1 CA-CV 12-0768

FILED 1-14-2014

Appeal from the Superior Court in Maricopa County
No. CV2010-026675
The Honorable J. Richard Gama, Judge

REVERSED AND REMANDED

COUNSEL

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Counsel for Plaintiffs/Appellants

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By Michael J. Ryan and Cynthia Y. Patane

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Patricia K. Norris joined.

JONES, Judge:

¶1 Plaintiffs/Appellants Nicolai and Donna Tavilla, individually and on behalf of their minor and adult children, (the Tavillas) appeal the superior court's summary judgment for defendants HealthSouth Valley of the Sun Rehabilitation Hospital, HealthSouth Properties, L.L.C., HealthSouth Meridian Point Rehabilitation Hospital Limited Partnership, and HealthSouth Valley of the Sun Rehabilitation Hospital Limited Partnership (HealthSouth). For the reasons discussed below, we determine a genuine issue of material fact exists precluding summary judgment. Accordingly, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 HealthSouth is an acute rehabilitation hospital providing physical, occupational and speech therapy for patients who have suffered strokes, traumatic injuries or amputations. From 2002 to August 1, 2005, HealthSouth employed Christopher P. Barnes, M.D. (Barnes) first as Program Director, then as Associate Medical Director from August 1, 2005 to December 1, 2008. During his employment, Barnes also acted as treating physician for HealthSouth patients. Barnes, a board certified physician in physical medicine/rehabilitation, leased office space within HealthSouth for his practice of pain management medicine licensed under the name Greater Phoenix Physical Medicine and Rehabilitation, L.L.C.

¶3 Nicolai Tavilla became Barnes' pain management patient in 2003 and saw Barnes monthly at his HealthSouth office until 2008. In 2010, the Tavillas filed a medical malpractice claim against Barnes. The Tavillas also named HealthSouth as a defendant, asserting it was

vicariously liable for Barnes' conduct because he was either HealthSouth's employee or its ostensible agent.

¶4 HealthSouth moved for summary judgment on the grounds HealthSouth was solely Barnes' landlord with respect to Barnes' pain management practice and could not be held vicariously liable for his treatment of Nicolai. HealthSouth further argued it had not created an ostensible agency in Barnes and any such belief by the Tavillas was unreasonable. After allowing the Tavillas additional time to conduct discovery pursuant to Arizona Rule of Civil Procedure 56(f), the superior court entered summary judgment for HealthSouth. The Tavillas timely appealed.

¶5 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2013).

ISSUES

¶6 The Tavillas contend the superior court erred by granting summary judgment for HealthSouth because material questions of fact exist regarding: (1) whether Barnes was HealthSouth's actual agent at the time he treated Nicolai; and (2) whether HealthSouth held Barnes out as its employee, thereby creating an ostensible agency.

DISCUSSION

¶7 We review the entry of summary judgment de novo, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Andrews v. Blake,* 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is only appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *see also Orme Sch. v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (explaining that summary judgment is proper "if the facts produced in support of the claim ... have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim").

¶8 The Tavillas assert HealthSouth may be held vicariously liable for Barnes' negligence because he was the hospital's agent. *Beeck v. Tucson Gen. Hosp.*, 18 Ariz. App. 165, 169-71, 500 P.2d 1153, 1157-59 (1972) (holding doctrine of respondeat superior applied to hospital that employed radiologist); *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 55, 699 P.2d 925, 929 (App. 1985) ("where a doctor employed by the

hospital commits an act of malpractice, the hospital may be derivatively liable under the doctrine of respondeat superior."). Generally, whether an agency exists is a fact question, but it may be "a question of law for the court when the material facts from which it is to be inferred are not in dispute." *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 595, ¶ 21, 161 P.3d 1253, 1259 (App. 2007) (citation omitted).

A. Actual Agency

¶9 Agency arises when "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Ruesga*, 215 Ariz. at 597, ¶ 28, 161 P.3d at 1261 (citing Restatement (Third) of Agency § 1.01 (2006)). An express agency is created when the principal delegates authority to the agent by oral or written words that authorize the agent to do a certain act or series of acts. *Canyon State Canners v. Hooks*, 74 Ariz. 70, 72, 243 P.2d 1023, 1024 (1952). Alternatively, an agency relationship may be implied when the parties' words and conduct, and the circumstances of the particular case, indicate at least an implied intent to create an agency. *Canyon State Canners*, 74 Ariz. at 73, 243 P.2d at 1024.

¶10 The Tavillas have not offered any evidence that HealthSouth directed or controlled Barnes' pain management practice. *Gregg*, 145 Ariz. at 55, 699 P.2d at 929. For example, there is no evidence the hospital assigned or scheduled Barnes' pain management patients, set his rates, completed his billing, provided equipment, or shared income for those patients. *See Beeck*, 18 Ariz. at 169-70, 170, 500 P.2d at 1157-58. Indeed, HealthSouth's 2002 lease agreement with Barnes stated the space was to be used only as an office for outpatient visits in connection with Barnes' private practice of medicine. The 2002 lease further required Barnes to maintain a distinction between his private practice and his duties as a medical administrator in his course of dealing with his private patients, clients, vendors, and other parties[1]. Accordingly, a reasonable jury could not find that Barnes' services for HealthSouth encompassed his treatment of Nicolai, who was a pain management patient.

[1] Although HealthSouth continued to lease office space to Barnes for his pain management practice in 2005 when he became HealthSouth's Associate Medical Director, this language was omitted from subsequent leases.

¶11 As the record contains no evidence of an express or implied agency between HealthSouth and Barnes concerning his treatment of pain management patients, we determine as a matter of law that HealthSouth cannot be held vicariously liable for Barnes' alleged negligent treatment of Nicolai on the basis of actual agency. *Ruesga*, 215 Ariz. at 595, ¶ 21, 161 P.3d at 1259.

B. Ostensible Agency

¶12 We turn, then, to the Tavillas' argument that HealthSouth may be held vicariously liable for Barnes' conduct under a theory of ostensible agency.

¶13 "An apparent or ostensible agent is one where the principal has intentionally or inadvertently induced third persons to believe that such a person was his agent although no actual or express authority was conferred on him as an agent." *Reed v. Gershweir*, 160 Ariz. 203, 205, 772 P.2d 26, 28 (App. 1989). To establish an ostensible agency, a plaintiff must show "the alleged principal not only represented another as his agent, but that the person who relied on the manifestation was reasonably justified in doing so under the facts of the case." *Reed*, 160 Ariz. at 205, 772 P.2d at 28.

¶14 The Tavillas contend HealthSouth impliedly represented Barnes was its agent by allowing him to use office space in its facility without providing notice the hospital was not responsible for the medical care. In support of this argument, the Tavillas rely on *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999) and *Butler v. Domin*, 15 P.3d 1189 (Mont. 2000), cases that concern patients admitted to a hospital and treated by on-call physicians without notice the physicians were independent contractors.

¶15 In *Sword*, noting an "ongoing movement by courts to use apparent or ostensible agency as a means by which to hold hospitals vicariously liable for the negligence of some independent contractor physicians," the Supreme Court of Indiana adopted the Restatement (Second) of Torts § 429 (1965), and concluded "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 an independent contractor and not subject to the control and supervision of the hospital." *Id.* at 150, 152. The court determined a genuine issue of material fact precluded summary judgment on the issue of ostensible agency, based primarily on three factors: (1) the plaintiff sought treatment

from the defendant hospital, not the specific physician who was alleged to be negligent, (2) the hospital assigned the physician without putting the patient on notice that the physician was an independent contractor, and (3) the hospital held itself out as a full service hospital. *Id.*, 714 N.E.2d at 152-53. Agreeing with the reasoning of *Sword*, the Supreme Court of Montana held in *Butler* that a patient who selected a hospital, but not the physician who performed the procedure, and had no notice the hospital did not employ the physician, had raised a genuine issue of material fact regarding ostensible agency that precluded summary judgment. *Id.*, 15P.3d at 1197, ¶ 39, 1198, ¶ 43.

¶16 Unlike those cases, Nicolai was referred to and sought treatment specifically from Barnes, and there is no evidence that he received any treatment at HealthSouth's facility apart from Barnes' care. *See Sword*, 714 N.E.2d at 151 ("An example of a situation where a patient might be in a position to know that the physician was an independent contractor may exist if the patient . . . selects a particular physician in advance of going to the hospital."). Further, the nature of Barnes' treatment was pain management, a service HealthSouth did not offer. *See Id.*, 714 N.E.2d at 151 (stating when considering the element of reliance, courts "sometimes ask whether, because of the hospital's manifestations, the plaintiff believed the hospital was providing the pertinent medical care as opposed to simply acting as a situs for the physician to provide health care as an independent contractor.").

¶17 Nevertheless, the Tavillas assert HealthSouth created the impression that Barnes was its agent and they reasonably believed he was rendering treatment to Nicolai in his capacity as a HealthSouth employee because:

1. Barnes' office was in an undifferentiated area of the hospital without signage identifying him as a tenant or independent contractor;

2. Barnes used the hospital's in-patient rooms and medical equipment in his examinations of the Tavillas;

3. When the Tavillas arrived for appointments with Barnes they were greeted by the HealthSouth receptionist at the front entrance of the hospital and she directed them to Barnes' office;

4. Barnes left prescriptions for the Tavillas at the HealthSouth reception desk;

5. HealthSouth staff interacted with the Tavillas and did not inform them Barnes was not an employee;

6. The Tavillas were told on multiple occasions by HealthSouth staff that Barnes was late for their appointment because he was seeing HealthSouth patients;

7. The Tavillas appointments with Barnes were occasionally interrupted by HealthSouth staff's telephone calls soliciting treatment advice from Barnes or requesting Barnes leave to tend to a HealthSouth patient; and

8. In conjunction with their appointments with Barnes, the Tavillas used the hospital parking lot, restrooms, walkways, and cafeteria.[2]

¶18 HealthSouth contends it was simply Barnes' landlord for purposes of his treatment of Nicolai and cannot be held responsible for his conduct. *See Rendall v. Pioneer Hotel, Inc.*, 71 Ariz. 10, 16, 222 P.2d 986, 990 (1950) ("A tenant is not the servant of the landlord so that a tort committed by the tenant . . . could be imputed to the landlord . . . .").[3] It

[2] The Tavillas also claim Barnes told them he worked for HealthSouth and frequently interrupted or delayed his appointments with the Tavillas to attend to HealthSouth in-patients. Those are not HealthSouth's acts and could not be considered its representations for purposes of an ostensible agency analysis. *Reed v. Gershweir*, 160 Ariz. 203, 205, 772 P.2d 26, 28 (App. 1989) ("Apparent authority can never be derived from the acts of the agent alone."); *see also* Restatement (Third) Of Agency § 3.03 cmt. b (2006) ("Apparent authority is present only when a third party's belief is traceable to manifestations of the principal.").

[3] HealthSouth also asserts that holding a hospital vicariously liable for the acts of its tenant is inconsistent with the purpose of Arizona's Medical Malpractice Act, A.R.S. §§ 12-561 to -573 (2013), which the legislature enacted to curtail rising medical malpractice insurance costs. *See Eastin v. Broomfield*, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977). However, we have previously acknowledged that a hospital may be held liable for a

also disputes that allowing Barnes' patients to use its public areas and receptionist created an ostensible agency, arguing such acts were no more than a facilitation of Barnes' practice. *See* Restatement (Third) Of Agency § 3.03 cmt. b (2006) ("Apparent authority is present only when a third party's belief is traceable to manifestations of the principal. The fact that one party performs a service that facilitates the other's business does not constitute such a manifestation."). Further, HealthSouth argues the Tavillas could not have reasonably construed the hospital's signage, public areas, and the receptionist's assistance as a manifestation from HealthSouth that Barnes was its agent.

¶19 Viewing all evidence and inferences in the light most favorable to the Tavillas, *Andrews*, 205 Ariz. at 240, ¶ 12, 69 P.3d at 11, we determine a reasonable jury could find both HealthSouth's actions or inactions induced the Tavillas to believe Barnes was its agent with regard to Nicolai's treatment and the Tavillas were reasonably justified in relying on those manifestations. For example, a jury could conclude HealthSouth went beyond merely facilitating Barnes' pain management practice and, instead, created the impression of an agency relationship. HealthSouth did not post signage or otherwise indicate to Barnes' pain management patients Barnes was not acting on behalf of HealthSouth, a distinction a jury might find particularly noteworthy given Barnes' was board certified in physical medicine/rehabilitation and his pain management practice was located at HealthSouth, a rehabilitation facility. In addition, HealthSouth failed to restrict Barnes' use of hospital facilities, allowing Barnes' private patients to use the HealthSouth's parking area, main entrance, and cafeteria. Furthermore, HealthSouth permitted its staff to interact with the Tavillas by transmitting information and medication from Barnes to the Tavillas, as well as directing the Tavillas to Barnes' office. Finally, beginning in 2005, HealthSouth did not contractually require Barnes to inform his patients he was not HealthSouth's agent. Whether the Tavillas reasonably interpreted these circumstances as a manifestation by HealthSouth that Barnes was its agent is a question for a jury to decide. *Ruesga*, 215 Ariz. at 595, ¶ 21, 161 P.3d at 1259.

CONCLUSION

¶20 The facts and circumstances of this particular case indicate a genuine *issue o*f material fact as to whether Barnes was HealthSouth's

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physician's conduct under the theory of ostensible agency. *See Gregg*, 145 Ariz. at 55, 699 P.2d at 929.

ostensible agent. *O.S. Stapley Co. v.* Logan, 6 Ariz. App. 269, 272, 431 P.2d 910, 913 (1967) ("The relation of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied from words and conduct of the parties and the circumstances of the particular case."). HealthSouth, therefore, was not entitled to summary judgment. For the foregoing reasons, we reverse and remand for further proceedings consistent with this decision.