

NO. COA97-1043

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 1998

GEORGE T. WRENN,
Plaintiff,

v.

MARIA PARHAM HOSPITAL, INC.
Defendant.

From Durham County
No. 95 CVS 2437

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CLERK OF SUPERIOR COURT
DURHAM, N.C.

Appeal by plaintiff from judgment entered 23 May 1997 by Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 21 April 1998.

On 8 January 1992, plaintiffs, George T. Wrenn and Carolyn M. Wrenn, filed their first complaint against Coastal Emergency Services, Inc., Maria Parham Hospital, Inc. and Jesse Randall Byrd, M.D. The complaint alleged that defendant hospital was negligent under three theories: 1) respondeat superior; 2) nursing negligence; and 3) corporate negligence. On 4 April 1994, the plaintiffs filed an amended complaint which replaced the first complaint. Against defendant hospital, the amended complaint alleged only the respondeat superior claim. The amended complaint did not allege nursing negligence or corporate negligence against the hospital. On 7 June 1994, plaintiffs voluntarily dismissed their claims contained in their 4 April 1994 amended complaint against defendant hospital pursuant to Rule 41(a).

On 6 June 1995, plaintiff, George T. Wrenn, not Carolyn M. Wrenn, re-filed his complaint against Coastal Emergency Services, Inc., Maria Parham Hospital, Inc. and Jesse Randall Byrd, M.D.

This complaint alleged the respondeat superior claim and also attempted to resurrect a corporate negligence claim against defendant hospital. Plaintiff eventually settled with defendants Byrd and Coastal, leaving only defendant Maria Parham Hospital in the instant action.

The facts are as follows: Carolyn M. Wrenn took her husband George T. Wrenn, the plaintiff, to defendant's emergency room in Henderson, North Carolina at approximately 3:10 a.m. on 4 September 1989. Plaintiff's symptoms included the sudden onset of a fever of more than 103 degrees, chills, nausea, vomiting, frontal headaches and aches in the muscles of his lower extremities. He appeared acutely ill and was vomiting bile-stained material. Plaintiff gave a history of having been bitten by a tick approximately two weeks earlier.

Plaintiff was seen in the emergency room by Jesse Randall Byrd, M.D. Dr. Byrd's residency training was in internal medicine, but he had failed the speciality board examination for certification in internal medicine in 1987, 1988, 1989 and 1990. He also failed the board examination for emergency medicine in 1990. At the time Dr. Byrd treated plaintiff in the emergency room, defendant hospital had a sign posted which was plainly visible to the incoming patients which stated, "the emergency physician on duty [is] not an employee or agent of Maria Parham."

On 4 September 1989 when plaintiff came in for treatment, the hospital did not have an emergency room medical director. Dr. Byrd was the only physician on duty; however, Dr. Byrd's patient care

credentials for the emergency room were restricted to category one. This restriction required him to request consultation "in all cases in which doubt exists as to the diagnosis, where expected improvement is not soon apparent and when specialized therapeutic or diagnostic techniques are indicated."

Prior to plaintiff's discharge and during the x-ray procedure, the x-ray technician noted in red ink on plaintiff's records that "patient passed out on last upright film." Dr. Byrd's opinion was that plaintiff had food poisoning even though plaintiff's wife had eaten the same foods as her husband and was not sick. Dr. Byrd released plaintiff.

At approximately 10:02 p.m. on 4 September 1989, plaintiff's wife returned him to the hospital in septic shock with a rash. He was flown to Duke University Medical Center. He was admitted into Duke's emergency department at approximately 2:40 a.m. on 5 September 1989 and his condition was diagnosed as septic shock.

Plaintiff was discharged 25 September 1989 but was subsequently readmitted to surgically treat ischemia. The distal half of each foot was removed, as well as one finger. Plaintiff underwent multiple procedures for skin grafting and to treat skin breakdowns.

Maria Parham Hospital, Inc. is a nonprofit corporation that owns and operates Maria Parham Hospital in Vance County. Coastal is a corporation engaged in the business of providing emergency room physicians under contract to various hospitals including Maria Parham in Vance County.

The contract between Coastal and the hospital required that the emergency care be provided in accordance with "all currently accepted and approved methods and practices of the professional speciality of emergency medicine." In addition, the contract between defendant hospital and Coastal stated that Coastal would provide "independent contractor" physicians to staff defendant hospital's emergency department and that defendant hospital would provide the facilities and support personnel for the emergency department. Coastal would be compensated at a set rate per hour of physician coverage.

The physicians supplied by Coastal were not eligible for any of defendant's employee benefits programs and defendant was not responsible for paying the physicians or scheduling their hours. Further Coastal agreed to indemnify the defendant hospital for any damages or injury claims caused by or resulting from the negligent acts or omissions by any Coastal-supplied physicians arising out of the clinical practice of emergency medicine at Maria Parham.

Pursuant to the contract between Coastal and the hospital, Coastal-supplied physicians were required to see all patients who came into the emergency room. Defendant hospital billed, collected and determined all fees for services performed by Coastal's physicians. The hospital was also required to maintain all records associated with the physician's services.

The contract between Dr. Byrd and Coastal mirrored the salient features of the Maria Parham/Coastal contract and provided that Coastal would schedule Dr. Byrd's services with designated

hospitals and pay him a hourly fee. The Byrd/Coastal contract expressly stated that Dr. Byrd would be an independent contractor. Dr. Byrd was required to obtain his own professional liability insurance and was responsible for paying self-employment taxes.

Plaintiff filed a negligence action against Coastal, Dr. Byrd, and the hospital. Plaintiff settled with defendants Coastal and Dr. Byrd. Defendant hospital made a motion for summary judgment on 1 May 1997 which the trial court granted. Plaintiff appeals.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, PA, by Adam Stein, for plaintiff-appellant.

Bentley & Associates, P.A., by Charles A. Bentley, Jr., for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Beth R. Fleishman and Robin T. Morris, for defendant-appellee.

EAGLES, Chief Judge.

We first consider whether the trial court erred in granting defendant's summary judgment motion on plaintiff's vicarious liability claim. Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). While the moving party has the burden of proving there is no genuine issue of material fact

[t]he movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which could

bar the claim. (Citations omitted.) By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.

Varner v. Bryan, 113 N.C. App. 697, 701, 440 S.E.2d 295, 298 (1994) (quoting *Collington v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Where a party for whom work is being done retains the right to interfere, control, or direct the manner in which the details of the work are executed, the relationship of employer-employee is created. *Willoughby v. Wilkins*, 65 N.C. App. 626, 633-34, 310 S.E.2d 90, 95 (1983); *Rucker v. Hospital*, 20 N.C. App. 650, 660, 202 S.E.2d 610, 617 (1974), *aff'd*, 285 N.C. 519, 528, 206 S.E.2d 196, 202 (1974). If a doctor is subject to interference or control by the hospital with respect to the manner or method of performing his duties as an emergency room physician, an employee-employer relationship is created. *Id.* Even if the contract between the hospital and the emergency room doctor said the doctor was an independent contractor, if other provisions in the contract suggested that the doctor was an employee rather than an independent contractor, the doctor becomes an employee. *Ford v. Willys-Overland*, 197 N.C. 147, 149, 147 S.E. 822, 823 (1929).

There are eleven potential factors that provide some evidence of agency. No one factor is decisive. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 385, 364 S.E.2d 433, 438 (1988). The factors are: 1) requirement that the doctor see all patients coming to the emergency room; 2) that the doctor have no private

practice; 3) that the doctor serve the best interests of the hospital; 4) that the doctor be governed by leave provisions and benefits provided by hospital; 5) that the doctor be paid by unit of time; 6) that there were required hours of work; 7) that the hospital collects fees; 8) that excess payments are divided among physicians; 9) that referrals of patients to specialists are determined by the hospital; 10) that the doctor does not set own schedule; and 11) that the medical records are filed with the hospital. *Rucker*, 20 N.C. App. at 660, 202 S.E.2d at 617; *Willoughby*, 65 N.C. App. at 634-35, 310 S.E.2d at 96. Whether an employer-employee relationship exists is a question of fact for the jury when there is evidence which tends to prove it. *Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E.2d 714, 716 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 30 (1986). However, it is a question of law for the court if only one inference may be drawn from the facts. *Id.* The key factor is whether the alleged employer has the right to supervise and control the details of the work performed by the alleged employee. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987).

The question here is whether there is a genuine issue of material fact that Dr. Byrd was subject to regulation, interference or control by defendant hospital with respect to the manner or method of performing his duties as an emergency room physician. Plaintiff argues that there was some evidence that Dr. Byrd was acting as an agent of defendant hospital at the time he treated and

discharged plaintiff and summary judgment was inappropriate. After careful review, we agree.

Under the contract between Coastal and Maria Parham Hospital, emergency room doctors were required to see all patients who came into the emergency room and could not decline to see a patient there. The Byrd/Coastal contract stated that Dr. Byrd's contact with the defendant hospital constitutes "a position of trust." Additionally, defendant hospital prepared bills and collected all fees for services performed by Dr. Byrd. Defendant hospital also determined the amount of fees to be charged for Dr. Byrd's services and billed patients for Dr. Byrd's services in defendant hospital's name. Defendant hospital was responsible for and kept all the records associated with Dr. Byrd's emergency room services. The contract provides: "Hospital shall provide and maintain an adequate system of medical records for the Emergency Department, at Hospital's expense." Dr. Byrd generated no records of his own. The contract called for defendant hospital to provide Dr. Byrd with the use of "emergency facilities," an "on-call room," "medical records," "support services" and "hospital personnel."

In addition, defendant hospital had a significant degree of control over Dr. Byrd's medical judgment. In defendant hospital's "Delineation of Clinical Privileges," Dr. Byrd was allowed credentials as a category one emergency room physician at defendant hospital. The "Delineation of Clinical Privileges" document described Category I:

Category #1 - Emergency care and care of preliminary nature. Future management must be

provided by an appropriately qualified physician. Consultation is requested in all cases in which doubt exists as to the diagnosis, where expected improvement is not soon apparent and when specialized therapeutic or diagnostic techniques are indicated.

Dr. Byrd was required in a number of instances to consult with other physicians. Dr. Byrd's category one status indicates that Dr. Byrd's activities as emergency room physician were limited and restricted and that defendant hospital retained some control over Dr. Byrd.

Given that there is evidence of several factors that support the contention that Dr. Byrd was an employee rather than an independent contractor, we hold that summary judgment was inappropriately granted. We therefore reverse the judgment of the trial court and remand for a new trial.

Next we consider whether summary judgment was also inappropriate because defendant hospital had a non-delegable duty to provide competent medical care and that the care provided by defendant hospital was negligent. Plaintiff contends that even if there is no employee-employer relationship, the defendant hospital may still be vicariously liable based on the non-delegable duty doctrine.

A principal can still be held liable for the torts of an independent contractor if the independent contractor was performing a "non-delegable duty" of the principal. *Medley v. N.C. Department of Corrections*, 330 N.C. 837, 841, 412 S.E.2d 654, 657 (1992). This exception to the general rule is a reflection of a "policy judgment that certain obligations are of such importance that employers

should not be able to escape liability merely by hiring others to perform them." *Id.* (quoting Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 23.31 at 392-93 (1991)). A duty is non-delegable if "the responsibility is so important to the community that the employer should not be permitted to transfer it to another." *Id.* (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71 at 512 (5th ed. 1984)).

Plaintiff argues that, taken together, the Restatement (Second) of Torts, Section 424 and 42 Code of Federal Regulations (CFR) Sections 482.12(e) and 482.55 prohibit the defendant from escaping liability on the theory of non-delegable duty. However, the CFR sections cited by plaintiff impose on hospitals only general duties to maintain minimum standards of care as a condition to federal funding.

In addition, in *Medley v. N.C. Department of Correction*, the Supreme Court cited but did not explicitly adopt the Restatement (Second) of Torts, Section 424. See *Hedrick v. Rains*, 344 N.C. 729, 477 S.E.2d 171, 172 (1996) (holding that the Restatement should not be viewed as determinative of North Carolina law unless specifically adopted in the jurisdiction). *Medley* focused on the unique situation of prison inmates' health care to conclude that the Department of Corrections could be held liable for the negligence of an independent contractor physician treating prisoners incarcerated at a state prison facility on the theory of non-delegable duty. 330 N.C. at 845, 412 S.E.2d at 659. The Court stated that the duty was founded on the North Carolina and United

States constitutional provisions against cruel and unusual punishment. *Id.* at 843-44, 412 S.E.2d at 658-59. The Court said that this duty "is of such great importance that the state cannot avoid liability by contracting with someone else to perform it." *Id.* at 845, 412 S.E.2d at 659. The opinion noted that prisoners, unlike members of the general public, are not free to select their own physicians or health care facilities. *Id.* at 842, 412 S.E.2d at 657. None of these factors are present here. The narrow exception in *Medley* has never been applied to a private hospital in North Carolina. Accordingly, we hold that summary judgment for defendant as to the non-delegable duty doctrine was appropriate. This assignment of error is overruled.

Next we consider whether plaintiff's nursing negligence claim and corporate negligence claim were barred by the statute of limitations. There were three separate complaints filed in this negligence action. The first complaint alleging respondeat superior, nursing negligence and corporate negligence was filed 8 January 1992. The amended complaint was filed on 4 April 1994 and the third complaint was filed 6 June 1995. Defendant argues that only the claims asserted in the amended complaint were timely filed and thus only those claims can be asserted against defendant hospital. After careful review, we agree.

It is a well established rule that the original complaint, as a pleading, is superceded by an amended complaint. *Hughes v. Enterprises*, 245 N.C. 131, 134, 95 S.E.2d 577, 581 (1956). The amended complaint is then controlling and the prior complaint has

no legal effect. *Id.* The amended complaint was filed in April 1994; therefore, as of 1994, the amended complaint was the operative and controlling legal pleading.

The statute of limitations for medical negligence actions is three years. G.S. 1-15(c). The conduct giving rise to the present case occurred on 4 September 1989. The statute of limitations expired 4 September 1992. The first complaint filed on 8 January 1992 was filed within three years after 4 September 1989. The amended complaint filed 4 April 1994 added no new claims or parties and was timely filed as well. However, in the amended complaint, plaintiff did omit certain previously asserted claims against defendant. Plaintiff deleted the nursing negligence and the corporate negligence claims from the amended complaint. In the amended complaint, plaintiff never alleged that the hospital itself was negligent but did claim that the doctor and Coastal were negligent. The amended complaint did list the hospital's duties but never pleaded that defendant hospital breached its duties or caused plaintiff's injuries. To avoid dismissal, a complaint alleging negligence has to specifically set forth enough information to satisfy the substantive elements of negligence and establish a prima facie case. *Davis v. Messer*, 119 N.C. App. 44, 51, 457 S.E.2d 902, 907 (1995).

On 7 June 1994, plaintiff voluntarily dismissed the amended complaint without prejudice against defendant hospital but not against defendants Coastal or Dr. Byrd. Under Rule 41(a), the plaintiff has one year to re-file the same claims that were

included in the amended complaint against defendant hospital.

Plaintiff re-filed its case against defendant hospital 6 June 1995. The third complaint attempted to reassert not only the respondeat superior claim but also the corporate negligence claim. The third complaint was totally silent as to the nursing negligence claim. Rule 41(a) specifically states that the new action must be "based on the same claim" as the prior action or claim for relief. If the re-filed complaint states a new claim and the statute of limitations has run, the claim must be dismissed. A claim against defendant hospital for its own direct negligence as in a nursing or corporate negligence claim, is fundamentally different from a claim for vicarious liability based on the negligence of others. *Poole v. Copland, Inc.*, 125 N.C. App. 235, 246, 481 S.E.2d 88, 95 (1997). Because the amended complaint did not allege corporate negligence, the corporate negligence claim alleged in the third complaint is a new claim and must be dismissed pursuant to Rule 41(a). In addition, because neither the amended complaint nor the third complaint alleged a nursing negligence claim, the nursing negligence claim must be dismissed. Accordingly, summary judgment as to the corporate negligence claim and the nursing negligence claim was appropriate. This assignment of error is overruled.

Finally, we consider whether the trial court erred in holding that plaintiff was not entitled to punitive damages. Plaintiff argues that there was substantial evidence that defendant hospital's conduct was aggravated, reckless and wanton. We disagree. Plaintiff did not allege, nor did he produce any

forecast of evidence that could justify an award of punitive damages. Accordingly, this assignment of error is overruled.

Affirmed in part and reversed in part.

Judges JOHN and TIMMONS-GOODSON concur.

Report per Rule 30(e).