

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000450-MR

DOLORES M. BRUCE, INDIVIDUALLY,
AND AS ADMINISTRATRIX OF THE
ESTATE OF NICOLE M. BRUCE, DECEASED

APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 00-CI-00008

MARSHALL COUNTY
PUBLIC HOSPITAL
DISTRICT CORPORATION

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Dolores M. Bruce, Administratrix of the Estate of Nicole M. Bruce, deceased, and Dolores M. Bruce, Individually, (hereinafter "Bruce") have appealed from the Marshall Circuit Court's January 31, 2002, Summary Judgment in favor of Marshall County Public Hospital District Corporation

(hereinafter "MCH"). This appeal arose from a medical malpractice action brought as a result of the death of ten-year old Nicole Bruce (hereinafter "Nicole"). Having determined that there is a genuine issue of material fact to be decided by the jury and that summary judgment was inappropriate, we reverse and remand.

We will briefly outline the facts as they relate to the underlying matter. Nicole began experiencing episodes of vomiting and headaches in August 1998. Her mother, Bruce, sought treatment for Nicole's problems from Dr. John Tveite, a family practice specialist at the Marshall County Family Medical Center. She also received treatment from nurse practitioner, Misha Glendening, at the same location. Nicole underwent various diagnostic procedures, including an upper GI¹ and a CT scan of the head. Nicole underwent the CT scan at Marshall County Hospital on November 17, 1998. Prior to the scan, Bruce signed a Marshall County Hospital form entitled "Consent to Admission, Examination and Treatment". In all Bruce, signed six of these forms when Nicole underwent outpatient diagnostic studies and when she was admitted to the hospital for treatment as an in-patient. Dr. William Wilson (hereinafter "Dr. Wilson"), a radiologist, interpreted the CT scan and determined that it was normal. He recommended consideration of an MRI with

¹ A radiographic and fluoroscopic examination of the stomach and duodenum.

contrast if the persistent vomiting continued. Nicole was last admitted to the hospital on January 10, 1999, where she died on January 12, 1999. An autopsy revealed that she died as a result of a tumor in the fourth ventricle of her brain.

Bruce filed a civil suit in Marshall Circuit Court on January 11, 2000, alleging negligence in Nicole's care and treatment resulting in her death. The complaint named Dr. Tveite, Marshall County Medical Associates, PSC; Marshall County Family Medical Center, Inc.; Misha Glendening; Marshall County Hospital and Healthcare Foundation, Inc.; Dr. Wilson; and Radiology Associates of Murray, PLLC, as defendants. Over a year later, Bruce moved the circuit court to amend her complaint to name Marshall County Public Hospital Corporation, which owned and operated Marshall County Hospital, as an additional defendant. The circuit court allowed her to file the amended complaint in which she alleged both direct and ostensible agency negligence claims against MCH.

MCH moved for a summary judgment, arguing that Bruce had not identified any expert witness to establish that any MCH employees departed from the applicable standard of care and that Bruce could not rely upon an ostensible agency theory because of the language contained within the consent to treat form Bruce

signed.² Bruce responded to the motion, arguing that the language on the form did not provide her with sufficient notice. The circuit court allowed the parties to orally argue the motion and, on January 31, 2002, granted a summary judgment and dismissed the claims against MCH. This appeal followed.

On appeal, Bruce argues that the circuit erred in holding that MCH was not liable for the actions of radiologist Dr. Wilson. Citing Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255 (1985), Bruce argues that she was entitled to assume that Dr. Wilson was an agent of MCH and that the consent to treat form, which she admits she did not read, nevertheless did not give her adequate notice that a physician not associated with the hospital would review Nicole's CT scan. On the other hand, MCH argues that Bruce is bound by the language on the form she signed and cannot argue lack of knowledge. MCH asserts that it is the action of the hospital that is relevant; MCH affirmatively informed the public that all of the physicians were not employees of the hospital, but were independent contractors. Whether Bruce read the form or not is irrelevant to the analysis.

² Bruce orally responded to the direct negligence argument raised in the motion for summary judgment, but otherwise did not dispute that portion of the motion. The summary judgment order did not specify whether it was based upon either or both arguments raised. In any event, Bruce only raised the ostensible agency argument in her brief before this Court, so that the summary judgment on the direct negligence argument was proper.

The standard of review for this Court to review a summary judgment is well settled in the Commonwealth.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. [citations in footnotes omitted.]

Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432, 436 (2001).

An ostensible agent is defined by the Restatement (Second) of Agency Section 267 (1958) as:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the

care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

In Williams v. St. Claire Medical Center, Ky.App., 657 S.W.2d 590 (1983), the Kentucky Court of Appeals recognized that a hospital could be vicariously liable based upon an ostensible agency claim. In that case, Williams suffered permanent brain damage during an anesthesia procedure performed by a nurse anesthetist without the required supervision. The nurse anesthetists were not employees of the hospital, but rather were employees of a personal service corporation. The Court held that "[w]e believe it to be axiomatic that the general public, unless otherwise directed, in seeking medical services from public hospitals, acts in total reliance upon the hospital staff as though they are agents and servants of the hospital in a traditional sense." Id. at 596.

Two years later, the Supreme Court of Kentucky addressed the ostensible agency doctrine as it relates to treatment in an emergency room by a physician not employed by the hospital in Paintsville Hospital, supra. In that case, the physician failed to properly read a head x-ray and therefore failed to diagnose a skull fracture with subdural hematoma. After noting that "it is unreasonable to put a duty on the patient to inquire of each person who treats him whether he is

an employee or independent contractor of the hospital," the Court held that "the operation of a hospital emergency room open to the public, where the public comes expecting medical care to be provided through normal operating procedures within the hospital, falls within the limits for application of the principles of ostensible agency and apparent authority." Id. at 258.

In reviewing the facts of this case, we believe that there is a genuine issue of material fact regarding whether the consent to treat form gave Bruce sufficient notice that a physician who was not employed by MCH would be reading and interpreting the CT scan. Bruce testified in her deposition that she brought Nicole to MCH so that MCH could perform the diagnostic CT scan. She did not know that a physician would be interpreting the scan, and did not know that Dr. Wilson read the scan until after Nicole's death.

We believe that the language of the form was sufficiently ambiguous so as to allow the issue to go to the jury. The first sentence of the form reads as follows:

Knowing that the PATIENT may have a condition requiring hospitalization and medical treatment, I do hereby voluntarily consent to routine diagnostic and therapeutic procedures and hospital care for the PATIENT by the HOSPITAL, the patient's physician, and their assistants and assignees.

The next paragraph contains language designed to shield the hospital from liability for the negligence of staff physicians.

The first sentence provides:

I understand that all of the physicians on the staff of this hospital, including the attending physician(s), are not employees or agents of the hospital but rather, are independent contractors who have been granted the privilege of using its facilities for the care and treatment of their patients.

In this case, Nicole was undergoing a diagnostic CT scan that was performed by the hospital. A jury could reasonably conclude that the language of the second paragraph does not apply in those situations as it did not specifically include radiologists who interpret studies such as CT scans. Therefore, MCH may still be found liable under an ostensible agency claim.

For the foregoing reasons, the January 30, 2002, summary judgment is reversed to the extent that it dismisses the ostensible agency claim against MCH and the matter is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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