

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZORAIDA NAZARIO : CIVIL ACTION
 :
 v. :
 :
 EDWARD CARROLL, D.O., et al. : NO. 99-1200

ORDER - MEMORANDUM

Ludwig, J.

AND NOW, this 3rd day of November, 2000, the motion of defendant Delaware Valley Medical Center for summary judgment is denied. Fed. R. Civ. P. 56.¹ Jurisdiction is diversity. 28 U.S.C. § 1332.

This is a personal injury action based on medical malpractice. On March 15, 1997, plaintiff Zoraida Nazario injured her right wrist in a roller skating accident. She was admitted to the emergency room at DVMC, where she was seen by Edward Carroll, D.O. and Jules Yavil, D.O. X-rays taken by Dr. Yavil of plaintiff's arm revealed a comminuted fracture of the distal radius. Dr. Carroll performed closed reduction and casting of the wrist, and the hospital referred plaintiff to Dr. Bernard Amster and his group, Orthopedic Associates, for follow-up care.²

According to the complaint, Dr. Amster and his group were negligent for allowing the fracture to heal improperly. Cmpl't. ¶¶ 63-64. Plaintiff's theory is that DVMC is liable for the professional negligence of Dr. Amster and his group under the doctrine of ostensible agency.

¹ Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All inferences are drawn from the evidence in the light most favorable to the non-movant. Shelton v. University of Medicine & Denistry of New Jersey, 223 F.3d 220, 224 (3d Cir. 2000).

² Plaintiff dismissed Doctors Carroll and Yavil, and Dr. William Johnson, a member of Orthopedic Associates, as defendants.

Under Pennsylvania law, which governs this issue, a hospital may be held responsible for the torts of its independent contractors. Capan v. Divine Providence Hospital, 287 Pa. Super. 364, 367, 430 A.2d 647, 648 (1981); see Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 352 (3d Cir. 1995). An ostensible agency requires that (1) the patient looked to the hospital for care, rather than the individual physician, and (2) the hospital “held out” the physician to be its employee. Capan, 287 Pa. Super. at 368-70, 430 A.2d at 649-50; Boyd v. Albert Einstein Med. Ctr., 377 Pa. Super. 609, 615, 547 A.2d 1229, 1232 (1988). While not disputing that plaintiff looked to it for her initial care, def.’s supp. mem. at 2, DVMC contends that it did not hold out Dr. Amster and his group as its employees and the evidence that it did so is insufficient to create a jury question.

A holding out occurs “when the hospital acts or omits to act in some way which leads the patient to a reasonable belief he is being treated by the hospital or one of its employees.” Capan, 287 Pa. Super at 370, 430 A.2d at 649. “The rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an invitation from the defendant to enter into such relations with such servant.” Davis v. Hoffman, 972 F.Supp. 308, 312 (E.D. Pa. 1997) (quoting Restatement (Second) of Agency § 267 cmt. a (1958)). An example is “the emergency room visit in which the patient goes to the hospital for care without any existing relationship with the physician about to treat her.” Davis, 972 F.Supp. at 312.

Here, under the circumstances, the “Emergency Department Discharge Instructions” form given to plaintiff by DVMC on the day of the accident necessitates the denial of summary judgment. Pltf.’s mem. exh. B; def.’s mem. exh. B. The form,

headed by DVMC's name and address, specifically directs her to "[f]ollow-up in the office of Dr. Amster a specialist in orthopedics by calling [his telephone number] at 9 am tomorrow or Monday for an appointment as soon as possible." Id. It does not suggest that Dr. Amster was an independent provider or that it was for her to decide on the choice of an orthopedist. While the other contents of the form are in some respects ambiguous as to aftercare – e.g., "[s]ee your family doctor for follow-up care" – a fact-finder could reasonably infer that Dr. Amster was DVMC's employee, operating under its control, and that consulting with him was a requisite part of the hospital's course of treatment. Id.

DVMC asserts that the relationship between it and plaintiff ended after her initial emergency room visit and that Dr. Amster's alleged negligence occurred entirely outside the confines of the hospital. Def.'s mem. at 10; def.'s supp. mem. at 2. In actuality, that may well have been the situation, but the hospital by its own directive fostered an appearance to the contrary. Moreover, it has produced no evidence to show that plaintiff knew or had reason to know that Dr. Amster was an independent actor, or that if she had elected to consult another physician she would not have disobeyed the hospital's instructions. Accordingly, the issue must be submitted to a jury.

Edmund V. Ludwig, J.