IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL NESS, Executor of the Estate of DONALD R. NESS, deceased and RUTHETTA NESS,	:	
Plaintiffs,	:	C.A. No. 05C-02-130 SCD
v.	:	
BAYHEALTH MEDICAL CENTER, INC., d/b/a MILFORD MEMORIAL HOSPITAL, GLENN E. GRAYBEAL, M.D., GRAYBEAL & AKANA, P.A., and DAVID A. FOLEY, M.D.	:	
Defendants.	:	

Submitted: January 9, 2007
Decided: February 16, 2007

Decision Upon Bayhealth's Renewed Motion for Judgment as a Matter of Law Pursuant to Superior Court Civil Rule 50.

O P I N I O N

Defendant Bayhealth Medical Center, Inc. ("Bayhealth") has renewed its motion for judgment as a matter of law pursuant to Superior Court Civil Rule 50. The issue presented is whether the evidence presented at trial, viewed in the light most favorable to the plaintiffs and drawing all reasonable inferences therefrom, is sufficient to prove that Dr. Graybeal was an apparent agent of Bayhealth at the time of the alleged negligence.[1] For the following reasons Bayhealth's Motion is GRANTED.

[1] *Ebersole v. Lowengrub,* 208 A.2d 495 (Del. 1965).

Factual Background

Donald R. Ness, decedent, fell from a ladder on May 19, 2003 and, as a result of alleged medical negligence, spent the balance of his life, approximately 2.5 years, a quadriplegic. This claim seeks damages for his pain and suffering during that 2.5 years. His death was not caused by the quadriplegia.

The plaintiffs are Mr. Ness' estate and his widow. The defendants are Bayhealth Medical Center, Inc. doing business as Milford Memorial Hospital ("Bayhealth"); Glenn E. Graybeal, M.D., a general surgeon, and his employer, Graybeal and Akana ("Dr. Graybeal"); and David A. Foley, M.D., an Emergency Room physician, ("Dr. Foley").

Donald Ness was treated at Milford Memorial Hospital on May 19, 20, and 21, 2003. Immediately after his fall on May 19, 2003, he was transported to the Milford Memorial Hospital Emergency Room. He was met there by defendant Dr. Graybeal pursuant to the trauma protocol in place at the hospital. After examination, x-rays, a CT scan and observation he was discharged with instructions to follow up with Dr. Graybeal at his office.

Shortly before midnight that same day Mr. Ness returned to the emergency room where he was treated by Dr. Foley. Dr. Foley consulted with Dr. Graybeal by phone, secured a second CT scan, and obtained authorization from Dr. Graybeal to admit Mr. Ness to the hospital. The next morning, May 20, 2003, Dr. Graybeal saw Mr. Ness in his hospital room and discharged him again.

In the early morning hours of May 21, 2003, Mr. Ness returned to the for the third time and was again seen by Dr. Foley. Dr. Foley examined Mr. Ness, observed significant neurological deterioration, and in consultation with Dr. Graybeal, directed his

transfer to Jefferson Memorial Hospital in Philadelphia for further treatment and spinal surgery.

The plaintiffs claimed that the defendant doctors provided care during the first two hospital visits that did not meet the standard of care for their specialties, emergency medicine, and general surgery and that the medical negligence caused injury. The doctors denied that they violated the standard of care. They also denied the claim of medical causation and damages. The claim against Bayhealth was based on a theory of apparent agency.

The case went to trial. The jury returned a verdict in favor of Dr. Foley. The jury found that Dr. Foley was not medically negligent in the care and treatment of Donald Ness. Having reached that conclusion, the jury was not required to decide whether Dr. Foley was an apparent agent of Bayhealth. The jury was unable to reach a verdict as to the question of Dr. Graybeal's medical negligence. Because the jury could not reach a verdict as to Dr. Graybeal's medical negligence it did not reach the issue of whether he was an apparent agent of Bayhealth. The following discussion is limited to a consideration of Dr. Graybeal as an apparent agent of Bayhealth.

Elements of Proof

The following factors are relevant in determining whether plaintiffs have presented evidence sufficient to defeat this motion:

1. Whether the circumstances at the hospital were such that they created a reasonable belief in the mind of Mr. Ness that Dr. Graybeal was its agent for diagnosing and treating Mr. Ness;

2. Whether plaintiffs have demonstrated that Mr. Ness relied on those circumstances in accepting treatment;

3. Whether it was reasonable under the circumstances for Mr. Ness to believe that Dr. Graybeal was an employee of the hospital.[2]

Discussion

Plaintiffs contend that when Mr. Ness was taken to the Emergency Room for treatment the first time, he believed Dr. Graybeal was an employee of the hospital. It is undisputed that Dr. Graybeal was not an employee of Bayhealth, but was an independent contractor. Dr. Graybeal did not maintain an office at the hospital nor did he receive a salary from the hospital, but he was put on notice of the trauma case coming in and was present in the Emergency Room when Mr. Ness arrived. There was no evidence that either Dr. Graybeal or Bayhealth made any affirmative representation to Mr. Ness or to his wife that would suggest an agency relationship. Mrs. Ness testified that she believed Dr. Graybeal to be a hospital employee but did not have a specific basis for that belief.

When Mr. Ness was discharged after his first trip to the he and his wife were given a set of discharge instructions. The discharge instructions read in relevant part,

> Call as soon as possible to make an appointment in 1 week to see GLENN GRAYBEAL, MD. You can reach GLENN GRAYBEAL at (302) 422-3377, 1 SUSSEX AVE. MILFORD, DE, 19963. If you have any problems before this appointment, call the office.

When Mr. Ness was discharged after his admission he was again told to contact Dr. Graybeal's office for follow-up care. Mrs. Ness signed two consent forms on behalf of her husband, one for each of the first two Emergency Room visits. Although she

[2] *See Fulton v. Quinn*, 1993 WL 19674 (Del. Super.).

testified she did not review them before signing, these forms indicated that some of the medical personnel providing treatment may not be employees of the hospital.

Although Mr. Ness lived more than two years after the conduct which is the basis for this lawsuit, the record does not provide any evidence from him addressing this issue. He was twice deposed, but he was not asked any questions regarding Dr. Graybeal as an agent of Bayhealth.

If Dr. Graybeal was negligent, that negligence was part of a course of conduct that began when Mr. Ness first came to the Emergency Room, and continued through his admission and second discharge. Once Mr. Ness was admitted by Dr. Graybeal, and seen in the hospital room, and for a second time instructed to contact his office, there was no reasonable basis for Mr. Ness to believe that Dr. Graybeal was an employee of the hospital. Dr. Graybeal's status as independent from the Emergency Room personnel would have been evident and we have no evidence from Mr. Ness to the contrary. At the time of the second discharge, the injury which rendered Mr. Ness a quadriplegic had yet not occurred. Plaintiffs' experts testified that it was a breach of the standard of care for Dr. Graybeal to discharge Mr. Ness on May 20, 2003, when the cause of his pain had not been fully investigated.

Had the decedent's condition arisen after the first Emergency Room visit alone, there would be a factual issue regarding agency as a patient arriving at a hospital may not understand that the surgeon waiting to attend him is not an employee of the hospital. Such is the factual circumstance involved in the cases relied upon by the plaintiffs.

Vanaman v. Milford Memorial Hospital, Inc.,[3] arose in the context of a patient who was treated at Milford Memorial Hospital after she fell and twisted her ankle. Her family physician was not available, so she was taken to the hospital. A cast was put on her leg by the physician available to her. The claim alleged that the cast put on the plaintiff's leg was too tight, causing a number of injuries. The plaintiff contended that the treating physician was an agent of the hospital. The physician said that he was an independent contractor. The court held that "if it should be found that the hospital represented that [the physician] was its servant or other agent in diagnosing and treating plaintiff in its **emergency facility**, and if it thereby caused her to justifiably rely on the care or skill of [the physician], then it is liable to her for harm caused by any lack of care or skill by [the physician]."[4] (Emphasis supplied).

Vanaman is distinguishable because the patient saw the physician only in the Emergency Room where she was treated and discharged. The plaintiff, who was available as a witness, was able to describe the circumstances of the treatment, the representations made, and the basis for her reliance.

A similar situation arose in *Fulton v. Quinn*.[5] The plaintiff was taken by his employer to Milford Memorial Hospital Emergency Room after a fall from a catwalk. He was admitted by the on duty Emergency Room physician. Dr. Quinn was the on call orthopedic surgeon who was summonsed to treat the plaintiff. Dr. Quinn determined that there was a compound fracture which needed surgery. Surgery was performed the evening of the same day. After the surgery, the plaintiff was admitted. He remained under the care of Dr. Quinn until he was discharged.

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[3] 272 A.2d 718 (Del. 1970).
[4] *Id*. at 722.
[5] 1993 WL 19674

Fulton is distinguishable because the conduct which gave rise to the alleged malpractice occurred in the Emergency Room, prior to the admission of the patient under the care of the surgeon. That sequence left open the possibility that the surgeon had been represented in some fashion to be an agent of the hospital which representation had been relied upon by the patient. The same possibility existed in this case until after the first visit to the Emergency Room when Mr. Ness was informed where to contact Dr. Graybeal. At that point, the only evidence in the case establishes that Dr. Graybeal was not a hospital employee.

Paintsville Hospital Company v Rose,[6] is also distinguishable. In *Paintsville* the patient was found unconscious on a street, and transported to the hospital Emergency Room for care. Defendant doctor was a private physician who was on call. The doctor admitted the patient with the consent of his parents and made arrangements for his post-admission treatment by a different physician in an appropriate specialty. The claim against the doctor was failure to read x-rays and diagnose a subdural hematoma. The trial court granted summary judgment in favor of the estate of the patient. The appellate court reversed, adopting the theory of "ostensible agency . . . as a viable legal theory under our law" and concluding that material issues of fact remained.[7]

Paintsville is distinguishable because the defendant doctor treated the patient **only** in the Emergency Room and the conduct giving rise to the claim occurred in that setting. The only context in which the defendant doctor was known to the family was the Emergency Room, creating a different factual pattern than presented here where the Emergency Room doctor followed up in a private capacity.

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[6] 683 S.W.2d 255 (Ky. 1985).
[7] *Id*. at 256.

Conclusion

The plaintiffs have not presented a legally sufficient evidentiary basis for a jury to find that the conduct of Dr. Graybeal, which continued through the time he treated Mr. Ness after Mr. Ness' admission and second discharge, occurred when it was reasonable for Mr. Ness to believe that Dr. Graybeal was an agent of Bayhealth.

WHEREFORE, defendant Bayhealth's motion for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50 is GRANTED.

IT IS SO ORDERED.

/s/ Susan C. Del Pesco
Judge
Susan C. Del Pesco

The Honorable Susan C. Del Pesco

Original to Prothonotary
xc:
Francis J. Murphy, Esquire, Philip T. Edwards, Esquire, Murphy Spadaro & Landon, Wilmington, Delaware, attorneys for the plaintiffs;

Mason E. Turner, Esquire, Prickett Jones & Elliott, Wilmington, Delaware, attorney for defendant Bayhealth Medical Center, Inc.;

Dennis D. Ferri, Esquire, Morris James LLP, Wilmington, Delaware, attorney for defendant Glenn E. Graybeal, M.D., Graybeal & Akana, P.A.; and

John Balaguer, Esquire, White and Williams LLP, Wilmington, Delaware, attorney for defendant David A. Foley, M.D.