

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

REGINA FLOYD,

Plaintiff,

-v-

Case No. 19-013582-NH
Hon. Qiana Lillard

MEHRAN MIRKAZEMI, *et al*,

Defendants.

OPINION AND ORDER

At a session of said Court,
Held in the City of Detroit,
County of Wayne, State of Michigan

on: 1/14/2021

This matter comes before the Court on Defendant Oakwood Healthcare’s summary disposition motion. For the following reasons the motion is granted.

I.

Plaintiff’s complaint alleges that she was admitted to Oakwood Hospital in April 2017, based on complaints of abdominal pain. She was placed under the care of her personal physician, who identified the problem as abdominal tumors and called for a surgical consult. The consultation request was submitted through the hospital’s referral system, which provided Dr Mehran Mirkazem to assess the situation. He recommended immediate surgery, but Plaintiff was unwilling to consent at that time, and was released from the hospital. One week later, however, Plaintiff consented to the procedure, and it was performed on April 25, 2017.

In terms of liability, the complaint alleges that Plaintiff had “worsening hydronephrosis” at the time of the surgery, and that such a condition required follow up care from an urologist or nephrologist. Dr Mirkazemi, however, negligently failed to recognize this condition and, therefore, failed to advise Plaintiff regarding the necessary follow up care. As a result, Plaintiff suffered a nephrectomy, rendering Dr Mirkazemi and his PLLC liable on a medical malpractice theory. The complaint also alleges that the company that owns the hospital (Oakwood Healthcare, Inc) is vicariously liable for Dr Mirkazemi’s conduct.

Oakwood Healthcare now seeks summary disposition.

II.

In this motion, Oakwood Healthcare first notes that vicarious liability in the employment context arises only where the tortfeasor is an employee of the defendant and the negligence occurred in the course of that employment. Oakwood Healthcare then asserts that it did not

employ Dr Mirkazemi, but merely granted him admitting privileges at the hospital. Thus, vicarious liability cannot attach on this basis.

In making this argument, Oakwood Healthcare acknowledges that vicarious liability can also arise on an ostensible agency theory. This occurs where the tortfeasor is not an employee of the defendant, but the defendant's conduct was sufficient to create a reasonable belief on the plaintiff's part that the tortfeasor was, in fact, an employee. See *Grewe v Mt Clemons General Hosp*, 404 Mich 240 (1978). Oakwood Healthcare argues that this theory is not available in this case, as the evidence, even when viewed in the light most favorable to Plaintiff, is insufficient to support such a finding.

In response, Plaintiff does not claim that Dr Mirkazemi was an actual employee of Oakwood Healthcare. Rather, Plaintiff opposes the motion on grounds of ostensible agency, claiming that Oakwood Health Care led her to believe that Dr Mirkazemi was a hospital employee. This impression arose when Plaintiff's personal physician requested a surgical consult, and Oakwood Healthcare provided Dr Mirkazemi based on some sort of "call list." The hospital did not, however, provide the "call list" to referring physicians in advance, so Plaintiff's personal physician did not know who would be assigned to consult on the matter. According to Floyd, "the act of placing Dr Mirkazemi on a 'call list' without such disclosure to the consulting physician/public would generate a belief in the agent's authority."

To prevail on an ostensible agency theory the Plaintiff must demonstrate the following three elements: (1) that she dealt with the agent with a "reasonable belief" in the agent's authority;" (2) that the belief was "generated by some act or neglect on the part of the principal sought to be charged;" and (3) that she was not otherwise guilty of negligence in formulating her belief. *Chapa v St Mary's Hosp*, 192 Mich App 29 (1991). Thus, to defeat a challenge to an ostensible agency claim, the Plaintiff need only establish a question of fact on these elements.

In considering these elements, the Court first recognizes that the terms under which physicians are permitted to practice out of hospital facilities are somewhat arcane and often not understood by the public. Thus, when a consulting physician is provided at a hospital via the hospital's referral system, it is understandable that the patient might assume that the consulted physician is a hospital employee. Such a belief, however, arises not so much from any "act or neglect" on the part of the hospital, but from a lack of understanding of the terms under which the physicians are permitted to practice out of the hospital facilities. Thus, the use of such a referral system, without more, is not sufficient to establish the "act or neglect" element of an ostensible agency claim.

In the current case Plaintiff relies on only a single fact in order to establish the "act or neglect" element of her ostensible agency claim, i.e., Oakwood Healthcare's use of a referral system for professional consultations. Even when the evidence is viewed in the light most favorable to Plaintiff, the Court finds that this is insufficient to establish an "act or neglect" on the part of Oakwood Healthcare sufficient to give rise to a reasonable belief that Dr Mirkazemi was a hospital employee. Thus, Plaintiff is unable to establish an essential element of this theory of liability, and summary disposition is appropriate.

Oakwood Healthcare's motion is granted pursuant to MCR 2.116(C)(10), and it is dismissed from this case.

/s/ Qiana Denise Lillard 1/14/2021

Hon. Qiana Lillard