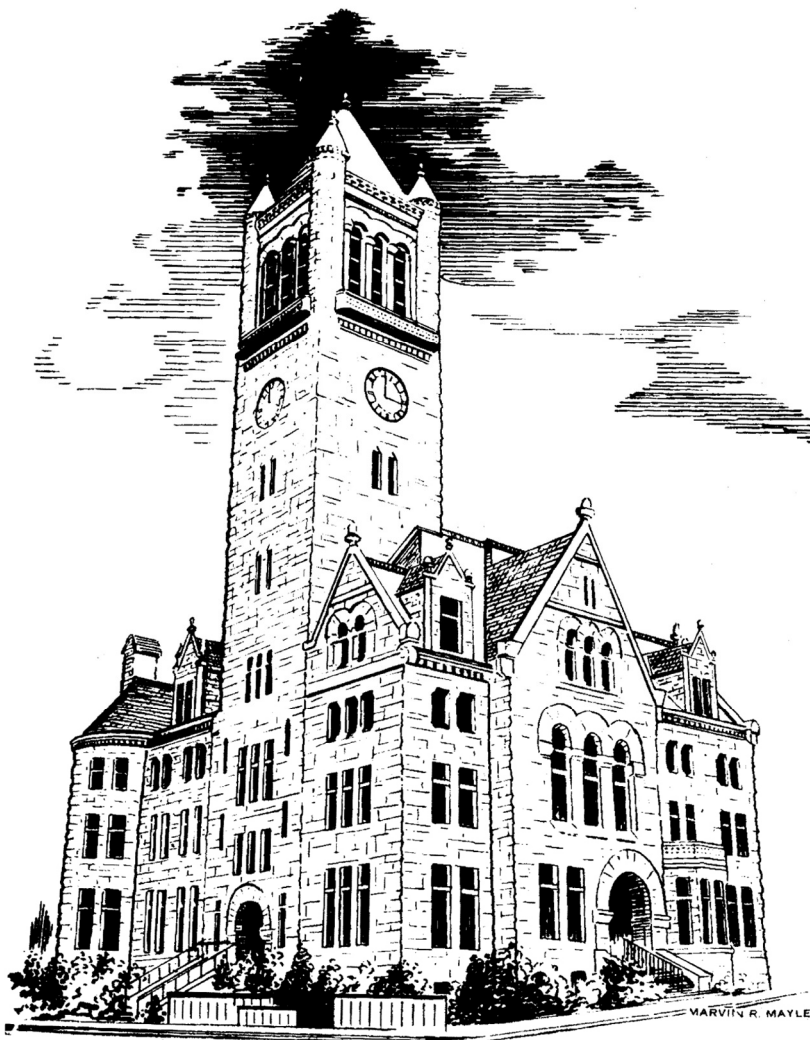


FAYETTE LEGAL JOURNAL

VOL. 85

FEBRUARY 12, 2022

NO. 7



FAYETTE LEGAL JOURNAL

The FAYETTE LEGAL JOURNAL is published weekly by the Fayette County Bar Association, 45 East Main Street, Suite 100, Uniontown, Pennsylvania 15401, 724-437-7994. Legal advertisements should be submitted online at www.fcbar.org no later than 12:00 noon on Friday for publication the following Saturday. No date of publication is promised, however. Legal notices are published exactly as submitted by the advertiser. Copyright 2001 Fayette County Bar Association. All rights reserved.

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Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

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LEGAL NOTICES

*** NO LEGAL NOTICES ***

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JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY CIVIL DMSION

SHARON J. UMBEL and SCOTT UMBEL	:	
Plaintiffs,	:	
	:	
v.	:	
UNIONTOWN HOSPITAL, SHEBA	:	
ORTHOPEDICS and DAVID. R. SHEBA, D.O.,	:	
Defendants.	:	
	:	
v.	:	
BAHERN. WAHBA, M.D.; NABIL	:	
BARBARA, M.D.; and FAYETTE	:	
PHYSICIAN NETWORK, INC.	:	No. 1132 of 2017
Additional Defendants.	:	Honorable Linda R. Cordaro

OPINION

Linda R. Cordaro, J.

January 7, 2022

Currently before the Court is Defendant Uniontown Hospital's Motion for Summary Judgment. For the following reasons, the Motion is GRANTED.

BACKGROUND

This is a medical professional liability claim brought by Plaintiffs Sharon and Scott Umbel against Defendants Uniontown Hospital, Sheba Orthopedics, and Dr. David Sheba.

Ms. Umbel, at the time 53 years of age, sustained a medial collateral (MCL) injury to her right knee at her workplace on April 19, 2015. She was seen and treated by Defendant Dr. David Sheba (Defendant Sheba) during the period of May 8, 2015 to August 17, 2015.

On May 26, 2015, Defendant Sheba performed a right knee arthroscopy at Uniontown Hospital. Ms. Umbel subsequently experienced nosocomial (hospital- acquired), iatrogenic (after medical or surgical management) infection, including osteomyelitis and septic arthritis of the knee.

On June 3, 2015, Defendant Sheba performed a repeat arthroscopy with debridement to clean out the infection, and Ms. Umbel was discharged to home on oral Bactrim and Cefadroxil (Duricef). She presented to the Uniontown Hospital emergency room and was admitted on June 19, 2015 with hyperkalemia (elevated potassium level), dizziness, and low blood pressure. She was discharged June 20, 2015, and Defendant Sheba ordered medications Clindamycin, Lisinopril, Prednisone, and Bactrim at discharge. One week later, June 26, 2015, she was again admitted to the hospital with elevated

potassium levels and was treated for kidney failure, reportedly due to adverse drug interaction between a sulfonamide (antibiotic Bactrim) and an ACE inhibitor (Lisinopril).

After discharge from the hospital, Ms. Umbel continued to experience pain and infection. On September 3, 2015, she consulted with Dr. Ari Pressman, M.D., board-certified orthopedic surgeon and Chief of Surgery at Uniontown Hospital, and Dr. Pressman treated her from then on.

On September 1, 2017, Plaintiffs Sharon and Scott Umbel filed a Complaint against Uniontown Hospital, Sheba Orthopedics, and Dr. David Sheba, claiming that Defendant Sheba's "post-operative mismanagement increased the risk of, and was a substantial factor in causing, septic arthritis of the knee ... resulting [in] significant damage to the cartilage and ligaments of her knee and leg resulting in the Patient's current disability." Compl. ¶ 22.

The Complaint included 4 counts:

- Count I - Informed Consent (against Dr. David Sheba);
- Count II - Medical Professional Negligence (against Dr. David Sheba);
- Count III - Vicarious Liability/Respondeat Superior (against "All Defendants"); and
- Count IV - Loss of Consortium (against "All Defendants").

Defendant Uniontown Hospital filed Preliminary Objections on September 18, 2017, objecting to Count III for its ambiguity and failure to identify the agents by which the Plaintiffs sought to hold the Defendant vicariously liable.

The Plaintiffs then filed an Amended Complaint on October 24, 2017 in which Count III as to indirect liability was presented as against Defendants Uniontown Hospital and Sheba Orthopedics as "corporate" Defendants.

As amended, Count III describes the following as to Defendant Sheba: "David R. Sheba, D.O., who treated Ms. Umbel as described in the Statement of Facts common to all counts, Count I and Count II. Am. Compl. ¶ 203. {1}"

Defendant Uniontown Hospital filed a Motion for Summary Judgment with supporting brief on July 30, 2021, arguing that Plaintiffs must either provide expert opinion related to the elements of a medical malpractice claim specifically as to Uniontown Hospital or must support that Defendant Sheba was an ostensible agent of Defendant Uniontown Hospital, and since they do neither, the Motion should be granted. Defendant Sheba filed a Response to the Motion on September 3, 2021 in favor of granting the Motion {2} Oral argument was held on October 15, 2021.

{1} The Plaintiffs' Amended Complaint asserts, generally, that, at all relevant times, Defendant Sheba was acting as "the agent, employee, and/or servant ostensible or otherwise" of Defendant Uniontown Hospital. Am. Compl. ¶ 6.

{2} This Response also opposed a separate Motion for Summary Judgment filed by Additional Defendants Wahba, Barbara, and FPN.

STANDARD OF REVIEW

Any party may move for summary judgment after the relevant pleadings are closed when: 1) there is no genuine issue of any material fact as to a necessary element of the cause of action or defense, or 2) an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense that in a jury trial would require the issues be submitted to a jury. Pa.R.Civ.P. 1035.2.

When determining whether to grant a motion for summary judgment in Pennsylvania, the following standards apply:

[S]ummary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

Burnish v. KWI Building Co., 916 A.2d 642, 645 (Pa. Super. Ct. 2007) (citations omitted).

"[A] record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense." *Cont'l Casualty Co. v. Pro Machine*, 916 A.2d 1111, 1115 (Pa. Super. Ct. 2007) (citations omitted). "If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied." *Mull v. Ickes*, 994 A.2d 1137, 1139-40 (Pa. Super. Ct. 2010) (citations omitted).

DISCUSSION

Count III of Plaintiffs' Amended Complaint sounds in indirect liability on the theory of vicarious liability/respondeat superior/ ostensible agency. The claims against Defendant Uniontown Hospital are solely on these grounds as indicated by the Plaintiffs' Certificate of Merit. Vicarious liability, or "imputed negligence," means that due to a relation between an employee/employer or principal/agent, once such a relationship has been demonstrated, a plaintiff has recourse against the principal for the negligence of the responsible agent. *Green v. Pennsylvania Hospital*, 123 A.3d 310, 316 (Pa. 2015). Generally, "an employer is not liable for torts committed by an independent contractor in his employ." *Capan v. Divine Providence Hosp.*, 430 A.2d 647,648 (Pa. Super. Ct. 1980). Nevertheless, under the "ostensible agent" theory, an employer still may be subject to vicarious liability if the recipient of services rendered by the agent accepts them in "the reasonable belief that the services are being rendered by the employer or by his servants." *Id.*

The Plaintiffs' claim of indirect medical professional liability is made pursuant to MCARE, 40 P.S. § 1303.516, which states:

- (a) Vicarious liability-A hospital may be held vicariously liable for the acts of an-

other health care provider through principles of ostensible agency only if the evidence shows that:

- (1) a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents; or
- (2) the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents.

(b) Staff privileges. - Evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency unless the claimant meets the requirements of subsection (a)(t) or (2).

(West, Westlaw through 2021 Regular Session Act 91).

Patients receiving care in a hospital might well look to "the institution rather than the individual physician for care." *Parker v. Freilich*, 803 A.2d 738,747 (Pa.Super. Ct. 2002), quoting *Capan*, 430 A.2d at 649. However, as in *MCARE §1303.516(b)*, staff privileges alone are not enough to demonstrate a hospital would be vicariously liable via ostensible agency. An "'ostensible agency' relationship between hospital and physician exists where the hospital 'holds out' the physician as its employee" and that such "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'." *Parker*, 803 A.2d at 747 (citation omitted).

In *Parker*, the Superior Court reversed a nonsuit granted in favor of the defendant physician, Dr. Freilich. It found that a jury could have reasonably determined that an ostensible agency relationship existed between Dr. Freilich and an independent contractor nurse, Robert Shaw, when the facts included that: the plaintiff had been in Dr. Freilich's care prior to the procedure in question but had never met Nurse Shaw; Dr. Freilich did not affirmatively tell the plaintiff that Nurse Shaw was his employee; Dr. Freilich did not inform the plaintiff that Nurse Shaw was an independent contractor; and neither the letterhead nor the consent form signed by Dr. Frielich and the plaintiff indicated whether Nurse Shaw was an employee or an independent contractor or that Dr. Freilich could not be held liable for Nurse Shaw's negligence. For these reasons, the Superior Court found that "a patient in [the plaintiffs] position could have been led to a reasonable belief that Nurse Shaw was indeed Dr. Freilich's employee." *Id.* at 749.

In *Goldberg ex rel. Goldberg v. Isdaner*, the Court affirmed denial of judgment notwithstanding the verdict because the facts were sufficient for the jury to conclude that the plaintiff indeed did look to the hospital, not the physician, for treatment. There, the defendant physician's office was on the hospital campus; the plaintiff signed several consent forms indicating affiliation with the hospital; the defendant physician gave the plaintiff a brochure referencing the hospital's expertise in handling high-risk patients and a team of physicians that included the defendant physician; the brochure was approved by the hospital; the hospital made no distinction between independent versus employed physicians; and the defendant reinforced plaintiffs belief that the doctor and hospital were "a team" when his office referred the plaintiff to the hospital where hospital employees provided her care while the defendant physician did not. 780 A.2d 654, 660-61 (Pa. Super. Ct. 2001). See also *Tindall v. Friedman*, 970 A.2d 1159, 1168-69

(Pa. Super. Ct. 2009) (reversing judgment notwithstanding the verdict because the facts on record were sufficient for a jury to conclude that an ostensible agency relationship did exist).

Therefore, the issue here is whether there are sufficient facts on record that could demonstrate either that Defendant Sheba is an actual employee of Defendant Uniontown Hospital, or from which a jury could reasonably conclude that an ostensible agency relationship existed. The Plaintiffs do not provide or point to any evidence that there was an actual employment relationship. Therefore, to sustain their claims, pursuant to 40 P.S. § 1303.516(a), there must be sufficient facts showing that a reasonably prudent person would justifiably believe that Uniontown Hospital was rendering care to Ms. Umbel or that the Hospital "held out" Defendant Sheba as its agent.

The Plaintiffs must at least present a prima facie cause of action from the record as it exists. However, there do not appear to be any facts that could reasonably establish an ostensible agency link between Defendant Sheba and Defendant Uniontown Hospital.

For example, Plaintiffs mention Uniontown Hospital in the following contexts:

1. Dr. Sheba ordered an MRI that was performed at Uniontown Hospital on May 12, 2015. Am. Compl. ¶ 37.
2. Dr. Sheba performed unnecessary surgery at Uniontown Hospital on May 26, 2015. Am. Compl. ¶¶ 49, 173.
3. The Uniontown Hospital record for surgery does not show a signed informed consent form. Am. Compl. ¶ 154.
4. Dr. Sheba was consulted while Ms. Umbel was admitted to the Hospital from June 19-20. Am. Compl. ¶ 89-90.
5. The Hospital discharge summary notes from Ms. Umbel's June 19, 2015 admission mention Dr. Sheba's recommendations. Am. Compl. ¶ 93.
6. Dr. Sheba ordered antibiotics upon Ms. Umbel's discharge from Uniontown Hospital. Am. Compl. ¶ 94.

These facts mention Uniontown Hospital but could not be understood as demonstrating any employment relationship or potential ostensible agency relationship. Furthermore, Plaintiffs also state that:

1. Ms. Umbel initially consulted with Dr. Sheba on May 8, 2015. Am. Compl. ¶ 26.
2. Ms. Umbel presented to Dr. Sheba's office for a "pre-op" visit on May 18, 2015. Am. Compl. ¶ 41.
3. Dr. Sheba did not inform Ms. Umbel of the risks or rationale of the surgery during her May 18 visit. Am. Compl. ¶¶ 42-46.
4. Dr. Sheba managed Ms. Umbel's post-operative care. Am. Compl. ¶¶ 69-76.
5. Ms. Umbel presented to Dr. Sheba again, two weeks after surgery. Am. Compl. ¶ 77.
6. Ms. Umbel visited Dr. Sheba's office on July 1, 2015, four weeks after surgery and after her two hospital emergency room visits/admissions. Am. Compl. ¶ 110.

Therefore, Ms. Umbel first presented to Defendant Sheba directly, with no indication

that Defendant Uniontown Hospital was involved. It was Defendant Sheba who first examined her, ordered an MRI, recommended the surgery to her, and managed her post-surgical care. Ms. Umbel's encounters with Defendant Sheba both before and after her surgery were direct, with no facts to show that such encounters were in any way associated with Defendant Uniontown Hospital. The sole fact that Defendant Sheba performed the surgery at Uniontown Hospital is not enough to sustain a prima facie case since staff privileges alone are not sufficient to establish an ostensible agency relationship under the MCARE statute. There is no record of paperwork, letterhead, or brochures suggesting an ostensible agency relationship, and there is nothing to indicate that actions or omissions of either Defendant Uniontown Hospital or Defendant Sheba implied any affiliation or association. There are no facts to demonstrate a reasonably prudent person would believe that Defendant Uniontown Hospital was providing care via Defendant Sheba, nor any indication that Defendant Uniontown Hospital held out (or failed to disclaim) Defendant Sheba as an employee/agent.

The above analysis represents the Court's best effort to thoroughly consider the record in a light most favorable to the Plaintiffs and to determine if there is a legally cognizable cause of action, however concealed. *Yacoub v. Lehigh Valley Med. Assocs.*, P.C., 805 A.2d 579, 589 (Pa. Super. Ct. 2002) (citations omitted).

The Court also notes that under Pa.R.Civ.P. 1035.3(a), an adverse party "may not rest upon the mere allegations or denials of the pleadings." Furthermore, "[s]ummary judgment may be entered against a party who does not respond." Pa.R.Civ.P. 1035.3(d). The Plaintiffs did have an opportunity to respond to Defendant Uniontown Hospital's motion and to point to "evidence in the record establishing the fact essential to the cause of action or defense which the motion cites as not having been produced." Pa.R.Civ.P. 1035.3(a)(2). The Plaintiffs were ordered to file a brief responding to the issues Defendant Uniontown Hospital raised, but they did not do so, and they did not attend October 15, 2021 oral argument on the motion.

Because indirect liability is the only ground on which Plaintiffs claim against Defendant Uniontown Hospital, yet the record shows no indication of an actual employment relationship nor sufficient facts from which a jury could conclude that an ostensible agency relationship existed, there is no prima facie cause of action.

Defendant Uniontown Hospital's Motion for Summary Judgment as to its indirect liability via Defendant Dr. David Sheba is therefore GRANTED.

ORDER.

AND NOW, this 4th day of January, 2022 in consideration of the Motion for Summary Judgment filed by Defendant Uniontown Hospital and after Oral Argument on the Motion, it is hereby ORDERED and DIRECTED that the Motion is GRANTED as to Defendant Uniontown Hospital's indirect liability via Defendant Dr. David Sheba.

BY THE COURT:
Linda R. Cordaro, Judge

ATTEST:
Prothonotary

LUNCH & LEARN SERIES

The Fayette County Bar Association's first 2022 presentation in its Lunch & Learn Series will be:

- Date: **Wednesday, March 2nd** from 12:00 p.m. to 1:30 p.m.
- Location: Courtroom No. 3 of the Fayette County Courthouse
- Discussion topics: **Children & Youth Services Mental Health Placements** - The difference between Residential Treatment Facilities, Community Residential Rehabilitation, and Inpatient hospitalization; and what is required of each level of care, along with an overview of Fayette services and access
- Presenter: **Michelle DeForrest**, M.S.Ed., NCC, LPC Fayette County Care Manager Supervisor
- Moderator: **Honorable Judge Linda R. Cordaro**, Fayette County Court of Common Pleas

Attorneys serving or interested in serving as Guardian Ad Litem or Parents' Counsel for CYS are encouraged to attend.

CLE Credit

1.5 hours of Substantive CLE credit for the program. The fees are as follows:

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- \$10 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2017

- No charge for attendance with CLE Credit

Non-members of the FCBA

- \$10 fee for attendance without CLE Credit
- \$40 fee for attendance with CLE Credit

** All fees to be paid at the door **
A light lunch will be provided.

RSVP

If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to cindy@fcbar.org on or before Monday, February 28th.

BAR BANQUET SAVE-THE-DATE



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Friday, April 29th
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