SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. IRA B. WARSHAWSKY

Justice.

TRIAL/IAS PART 25

BRIAN MOLINA, an infant by his father and natural guardian, GEORGE MOLINA, and GEORGE MOLINA, Individually,

Plaintiffs,

NASSAU COUNTY
INDEX NO. 014335/98
MOTION DATE: 9/12/00
MOTION SEQUENCE 002

-against-

WINTHROP UNIVERSITY HOSPITAL, DAVID KAO, P.A. and BRENDAN MCELROY,

Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Affidavits	X
Replying Affidavits	X
Memoranda of Law: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

This motion by defendant Brendan McElroy, M.D., for an order pursuant to CPLR 3212 dismissing the complaint is granted.

Plaintiff commenced this action sounding in medical malpractice to recover damages for an alleged failure to properly diagnose and treat an injury to his eye which has resulted in loss of vision in the eye. A claim of vicarious liability is asserted against the Hospital and, in this motion, against Dr. McElroy for any malpractice committed by a Physicians Assistant in the Emergency Room.

Brian Molina was approximately 20 months old when he fell and lacerated his eyelid and, allegedly, the cornea of his eye. He was treated on April 12, 1997, in the emergency room of Winthrop University Hospital. The aforesaid emergency room is operated by the defendant hospital; an Attending Physician is present for each shift to supervise, inter alia, physicians assistants in the treatment of patients. Such emergency room staff are employees of the defendant hospital.

According to protocol, the first person to examine and evaluate plaintiff was the triage nurse. He arrived at the hospital at 1:41 P. M., was seen by the nurse at 1:45 P. M. and at 2:30 P. M. he was examined by a Physicians Assistant, one David Kao, who sutured a 1.5 cm laceration of the eyelid. After the procedure the plaintiff was examined by a pediatric resident, and then was discharged from the emergency room. Sedation for the procedure commenced before 3 P. M. and the procedure took place at about 3 P. M. which is the same time that the shift in the ER changed and Dr. McElroy began his shift as the Attending Physician. Subsequently, he signed the plaintiff's hospital chart at the request of the Physicians Assistant, David Kao.

Defendant, McElroy, states that he never examined, diagnosed, or treated plaintiff and that no physician patient relationship was established. He contends that he was not on duty, or even present, when plaintiff's treatment was being decided upon and that he was not a participant in the Attending Physician's conversation and consultation with the Physician's Assistant, Kao, about treatment for the plaintiff. He was not privy to the examination of the child's eye by the resident pediatrician. He concludes that he was not the patient's supervising physician and that liability under a theory of medical malpractice or vicarious liability cannot lie. He argues that his signing of the medical chart was an administrative act which does not expose him to liability.

It is well settled that not all contact with a doctor establishes a physician-patient relationship; the sina qua non of the relationship is diagnosis and treatment, or recommendation for treatment. Lee v City of New York, 162 A. D. 2d 34 (2d Dept 1990). Recently, the concept is capsulized in the words "advice" or "treatment". Durso v City of

New York, 673 N.Y.S. 2d 651 (1st Dept 1998). A physician-patient relationship "is created when the professional services of a physician are rendered to and accepted by another for the purposes of medical or surgical treatment." Zimmerly v Good Samaritan Hospital, A.D.2d (2d Dept 1999). It is also the law that "to maintain an action to recover damages from medical malpractice, a doctor-patient relationship is necessary. Heller v Peekskill Community Hospital, 198 A.D. 2d 265 (2d Dept 1993) citations omitted; Ellis v Peter, 211 A. D. 2d 353 (2d Dept 1995); LoDico v Caputi, 129 A. D. 2d 361 (4th Dept 1987).

In this case there is no evidence that defendant, McElroy, was personally involved in any respect with the treatment of plaintiff, neither by examination, treatment nor advice. All of that was completed before Dr. McElroy began his shift at 3:00 P. M. by the Attending Physician on the shift before him. Nor, is there any obligation, based on a review of the evidence in the record before me, for Dr. McElroy to reevaluate the treatment decision made between 2:30 and 3:00 P. M. by the physician's assistant and the Attending Physician. Since there is no question of fact as to whether a physician-patient relationship was established, the claim of medical malpractice against Dr. McElroy must be dismissed as a matter of law.

Plaintiff argues that defendant, McElroy, must be responsible for the errors and omissions of the Emergency Room staff in doing a proper and thorough examination of the plaintiff's eye which resulted in an incorrect diagnosis. However, the argument misperceives the legal concept of respondeat superior whereby a hospital may be held liable for the malpractice of its employees. Kavanaugh v Nussbaum, 71 N. Y. 2d 535 (1988).

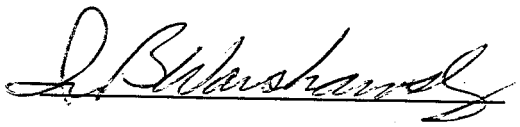
Under this doctrine, an employer will be liable for the acts of an employee acting in furtherance of the employer's business. PJI 2:235. Liability in such circumstances is founded on the relationship of one acting for another at the other's request, for his benefit, acting either on an express or implied contract. The person who is in a position of control over the tort teasor must do so or suffer the consequences. Kavanaugh, supra at 546. Thus, if David Kao had been working for Dr. McElroy, he might be liable for David Kao's

alleged malpractice. However, he was not and indeed it is difficult to imagine how he could have influenced decisions made before he was in a position of authority. Both were employed by Winthrop University Hospital and it is the Hospital that must be responsible for any negligence of another of its employees, not Dr. McElroy.

Accordingly, it is,

ORDERED, that the complaint is dismissed against Brendan McElroy, M.D.

Dated: September 22, 2000



J.S.C.