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McCrosky v. Carson Tahoe Reg'l Med. Ctr., 133 Nev. Adv. Op. 115 (Dec. 28, 2017)[1]

CIVIL APPEAL: VICARIOUS LIABILITY

Summary

The Court determined that vicarious liability is not abrogated by NRS 41A.045or by settling with one tortfeasor, unless the settlement so provides. Further, whether an ostensible agency exception exists is a question of fact that must be determined by the jury. Finally, after finding that federal law preempts NRS 42.021, the Court reverted to the per se rule in Nevada that collateral source payments may not be admitted into evidence.

Background

After finding out she was pregnant, Tawni McCrosky visited Maternal Obstetrical Management (MOM's) clinic, a prenatal care clinic operated by Carson Tahoe Reginal Medical Center (CTRMC). MOM's clinic is staffed by nurses and physicians who volunteer their time. Each time McCorsky visited MOM's, she signed a "Conditions of Admission" (COA), which stated "[all] independent contractors [] are NOT employees or agents of the hospital. I am advised that I will receive separate bills for these services. __ (Initial)". McCrosky also signed and initialed a COA identical to the one above when she preregistered with CRTMC to deliver her baby at the hospital.

Dr. Hayes was the obstetrician on call that delivered McCrosky's baby. The delivery resulted in McCrosky's child suffering permanent, debilitating injuries, and McCrosky sued Dr. Hayes and CTRCM alleging negligent care. Prior to trial, McCrosky settled with Dr. Hayes; however, they both signed a release that explicitly reserved "[a]ll rights against the hospital predicated upon the actions or omissions of Dr. Hayes".

In the suit against CTRMC, McCrosky alleged that CTRMC was directly negligent and vicariously liable for Dr. Hayes's alleged negligence. The jury rejected the first issue. CTRMC moved for partial summary judgment on the second issue, and the district court granted the motion. This appeal followed.

Discussion

The district court erred in granting summary judgment on the issue of vicarious liability

Summary judgment is proper if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.

NRS 41A.045 does not abrogate vicarious liability

The several liability statute (NRS 41A.045) provides that "in an action for injury or death…each defendant is liable to the plaintiff…severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant".[2] This

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[1] By Xheni Ristani.
[2] NEV. REV. STAT. § 41A.045 (2017).

statute substitutes a joint and several liability scheme, where each defendant is liable for all of the damages that all defendants caused, for a several liability scheme, where each defendant is responsible for his or her own share.[3]

Vicarious liability is a distinct concept from several liability. Vicarious liability is "[l]iability that a supervisory party…bears for the actionable conduct of a subordinate…based on the relationship between the two parties"[4] and applies regardless of whether several and joint liability or several liability governs. Since the several liability statute is silent regarding vicarious liability, vicarious liability survives the scheme created by the statute.

Settling with Dr. Hayes did not extinguish vicarious liability claims against CTRMC

The settlement statute (NRS 17.245) passed by the Nevada Legislature established that a settlement with one tortfeasor does not release others from liability, unless the settlement explicitly states so. The settlement with Dr. Hayes reserved all claims against the employer, therefore it does not extinguish CTRMC's vicarious liability. This does not result in double recovery, because any damages recovered by the hospital will be reduced by the amount McCrosky received from the settlement.

An issue of fact existed as to whether Dr. Hayes was an ostensible agent of CTRMC

The general rule of vicarious liability is that an employer is liable for the negligence of its employee, not of an independent contractor. However, the doctrine of ostensible agency creates an exception if the hospital selects the doctor, and if it is reasonable to believe that the doctor is an agent of the hospital.[5] This determination is a question of fact that must be left to the jury.[6]

The district court erred in finding that the COA established as a matter of law that Dr. Hayes was an independent contractor. Although the COA states that physicians are independent contractors and not employees of the hospital, it is unclear whether a patient would understand this to mean that the hospital is not liable for the physician's negligence. The COA highlights only the issue of billing and says nothing about liability. As such, the COA does not dispel the appearance of agency as a matter of law, and a material issue of fact exists as to whether an ostensible agency existed.

The district court erred in allowing CRTMC to introduce evidence of collateral payments made on behalf of McCrosky

Nevada has adopted a per se rule that bars admission of collateral source payments for any purpose. NRS 42.021(1) created an exception to this rule in medical malpractice cases, allowing defendants to introduce collateral payments from third parties, in order to prevent double dipping. The second part of the statute prohibits collateral sources from recovering directly from plaintiffs, in order to protect plaintiffs from having their awards overly diminished.

However, 42 U.S.C. § 2651(a) directly conflicts with NRS 42.021 because it allows the United States to recover Medicaid payments from a plaintiff who prevails in a medical malpractice

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[3] Piroozi v. Eighth Judicial Dist. Court, 131 Nev. Adv. Op. 100, 363 P. 3d 1168, 1171 (2015).
[4] *Vicarious Liability*, BLACK'S LAW DICTIONARY 1055 (10th. Ed. 2014).
[5] Renown Health, Inc. v. Vanderford, 126 Nev. 221, 228, 235 P.3d 614, 618 (2010).
[6] Schlotfeldt v. Charter Hosp. of Las Vegas, 112 Nev. 42, 48, 910 P.2d 271, 275 (1996).

suit. Federal law governs when state and federal law conflict, therefore NRS 42.021(2) is preempted.[7] Since severing NRS 42.021(2) from the statute would result in unintended consequences of doubly reducing the plaintiff's recoveries, the entire statute must be stricken. The Court reverts to the per se rule in Nevada that collateral source payments may not be admitted into evidence. On remand, CTRMC cannot introduce Medicaid payments into evidence.

McCrosky's remaining claims of error are without merit

First, there was no error in the district court's decision to put Dr. Hayes's name on the jury form, even though she was not a defendant in the case. Second, the jury's verdict was not "manifestly and palpably contrary to evidence", thus the jury's verdict as to CTRMC's negligence is affirmed.

Conclusion

The district court's order granting summary judgment is reversed. On remand, CTRMC may not introduce evidence of Medicaid payments because NRS 42.021 is preempted by federal law. The jury's verdict regarding CTRMC's negligence is affirmed.

[7] U.S. CONST. art. VI, cl. 2; Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp., 123 Nev. 362, 370–71, 168 P.3d 73, 79–80 (2007).