2015 IL App (1st) 141147-U

THIRD DIVISION
September 9, 2015

No. 1-14-1147

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTINE TOMASIEWICZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	09 L 6808
	)	
LAMONT TYLER, D.O., NORTHSHORE UNIVERSITY HEALTHSYSTEM and NORTHSHORE UNIVERSITY HEALTHSYSTEM FACULTY PRACTICE ASSOCIATES.	)	
	)	The Honorable
	)	Kathy M. Flanagan
Defendants-Appellees.	)	Judge Presiding

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's entry of summary judgment in favor of medical corporate defendants was proper where they had no reason to know of the offending sexual conduct by defendant Dr. Lamont Tyler, as required to be liable under the Sexual Exploitation in Psychotherapy, Professional Health Services and Professional Mental Health Services Act. In addition, the knowledge of the doctor's brother, also defendants' alleged employee, could not be imputed to defendants because he possessed motives to keep this information from them. Furthermore, no genuine issue of material fact existed in that defendants were not otherwise liable for any malpractice on the doctor's part. Judgment affirmed.

¶ 2 This interlocutory appeal arises from the trial court's summary judgment in favor of defendants NorthShore University HealthSystem and NorthShore University HealthSystem Faculty Practice Associates (FPA), and against plaintiff Christine Tomasiewicz. Defendant Lamont Tyler, D.O. (Dr. Lamont), who has not filed a brief in this appeal, had engaged in a sexual relationship with plaintiff while he was allegedly employed by the aforementioned defendants. On appeal, plaintiff asserts that genuine issues of material fact precluded the entry of summary judgment on her complaint for violations of the Sexual Exploitation in Psychotherapy, Professional Health Services and Professional Mental Health Services Act (SEA) (740 ILCS 140/ 0.01 *et seq*. (West 2010)), for professional negligence and for negligent infliction of emotional distress. We affirm.

¶ 3 I. FACTUAL BACKGROUND

¶ 4 Beginning in 1997, plaintiff was a patient of Dr. Lamont. Intermittently over the next six years, she presented herself to the doctor's office for the treatment of various medical conditions, including pregnancies and the delivery of two children, the second of whom was born on May 21, 2002. Approximately seven months later, Dr. Lamont initiated a sexual relationship with plaintiff, which continued for roughly one year. Their various sexual encounters (said by plaintiff to be in excess of 60) took place in a variety of locations, including FPA's office in Deerfield. Dr. Lamont's twin brother, Lamarr Tyler, D.O. (Dr. Lamarr) is an obstetrician/gynecologist who also works for FPA in the Vernon Hills office. [1] According to plaintiff, just a month into this sexual relationship, Dr. Lamarr walked unannounced into the examining room of the Deerfield office, only to find Dr. Lamont with his pants unzipped and his patient, plaintiff, in the room. Dr.

[1] Although the parties' and the record differ regarding the correct corporate identity and name of the brothers' employer, this discrepancy has no bearing on the ultimate outcome of this appeal. The record also contains references to" Lamar" Tyler.

Lamont was said to have covered his pants with his jacket and engaged in medical small talk with his brother and his patient.

¶ 5 Plaintiff also testified in her deposition that she sent an email with provocative photographs of her and some of her friends to Dr. Lamarr. Plaintiff further testified that Dr. Lamarr asked her to have sex with him and his brother, Dr. Lamont. Dr. Lamarr's version of his involvement was not so colorful, however. He testified that it was not until September 2003 that he was aware that his brother was engaged in a sexual relationship with a patient and that he simply encouraged his brother to end the relationship, "forward her out of the practice," and inform their employer.

¶ 6 In October 2003, plaintiff's husband went through her email account and found evidence of this sordid activity and immediately wrote an email to Dr. Lamont (and later to others), who referred plaintiff out of his practice the following day, but waited a few more days before informing FPA's president of his activities with plaintiff. His employment was terminated a week later. Additionally, Dr. Lamarr was interviewed by his FPA chair and someone from Human Resources. He was given a "warning" about his inappropriate use of email.

¶ 7 II. PROCEDURAL BACKGROUND

¶ 8 Plaintiff's initial complaint was filed in Lake County, naming both Tyler brothers and their employer as defendants. After some time, that complaint was voluntarily dismissed and the case was refiled in Cook County, with Dr. Lamarr no longer named as a defendant. The operative second-amended complaint alleged, in essence, that Dr. Lamont was treating plaintiff for psychotherapy, thereby invoking the SEA. Plaintiff's claim that she was being treated for psychotherapeutic reasons was principally based upon the fact that Dr. Lamont prescribed her a

drug often used for treating depression, but there was no indication in the medical chart that it was prescribed for anything other than a physical, medical condition.

¶ 9 After a great deal of discovery and motion practice, FPA moved for summary judgment, arguing that there were no genuine issues of material fact as to the following controlling issues:

(1) Dr. Lamont never treated plaintiff for psychotherapeutic reasons;

(2) Any and all sexual activity between Dr. Lamont and his patient was demonstrably not performed in the course and scope of his employment with FPA;

(3) FPA never knew and never had any reason to know that Dr. Lamont was engaged in a sexual relationship with his patient;

(4) Any knowledge of Dr. Lamarr cannot be imputed to his employer, FPA, because he had a motive and/or interest in concealing the relevant details to FPA; and

(5) Plaintiff presented no evidence of substandard medical practice independent of the sexual misconduct and no evidence of proximate cause.

In a detailed written order, the trial court agreed and entered summary judgment on defendants' behalf. This timely appeal followed.

¶ 10 III. ANALYSIS

¶ 11 On appeal, plaintiff asserts the trial court erred in granting summary judgment because genuine issues of material fact exist regarding (1) whether Dr. Lamont engaged in psychotherapy; (2) whether defendants knew or had reason to know of Dr. Lamont's sexual contact with plaintiff ("FPA"); and (3) whether plaintiff provided sufficient expert testimony to demonstrate a causal nexus between her injuries and "the failure on the part of the defendants to diagnose and treat the Plaintiff's depression, separate and apart from the sexual misconduct of Dr. Lamont." Plaintiff further asserts, for the first time on appeal, that public policy demands that

medical malpractice actions be available in sexual misconduct cases based on breach of fiduciary duties or the physician-patient relationship.

¶ 12 It is axiomatic that a court shall enter summary judgment only if the pleadings, depositions, admissions and affidavits on file reveal the absence of any genuine issue of material fact. *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. In making this assessment, we consider such materials in the light most favorable to the nonmovant. *Gore v. Provena Hospital*, 2015 IL App (3d) 130446, ¶ 16. In addition, where evidentiary material supports multiple inferences that are reasonable, we must adopt the inference that favors the nonmovent. *Bloom Township High School v. Illinois Commerce Comm'n*, 309 Ill. App. 3d 163, 177 (1999). Our review is *de novo*, giving no deference to the trial court. *McKenna v. AlliedBarton Security Services*, 2015 IL App (1st) 133414, ¶ 20. Thus, contrary to plaintiff's assertion on appeal, we need not address the trial court's reasoning.

¶ 13 A. Potential Liability Under the SEA

¶ 14 Section 2 of the SEA provides that "[a] cause of action against a psychotherapist, unlicensed health professional, or unlicensed mental health professional for sexual exploitation exists for a patient or former patient for injury caused by sexual contact with the psychotherapist, unlicensed health professional, or unlicensed mental health professional" under certain circumstances where the patient was receiving psychotherapy. 740 ILCS 140/2 (West 2010). In addition, " 'Psychotherapy' means the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition." 740 ILCS 140/1(e) (West 2010). Section 3 of the SEA, however, limits an employer's liability:

> "An employer of a psychotherapist, unlicensed health professional, or unlicensed mental health professional may be liable under Section 2 if the employer fails or refuses to take reasonable action *when the employer knows or has reason to know* that the psychotherapist, unlicensed health professional, or unlicensed mental health professional engaged in sexual contact with the plaintiff or any other patient or former patient of the psychotherapist, unlicensed health professional, or unlicensed mental health professional." (Emphasis added.) 740 ILCS 140/3 (West 2010).

Assuming, without deciding, that plaintiff received psychotherapy from Dr. Lamont and that she may be able to establish a cause of action against him under section 2, plaintiff cannot demonstrate that FPA knew or had reason to know that Dr. Lamont engaged in sexual contact with plaintiff. Our detailed review of the record reveals that plaintiff has demonstrably failed to present any triable issues of material fact in this regard.

¶ 15 The only witness who testified that he was aware of Dr. Lamont's inappropriate relationship was his twin brother, Dr. Lamarr. He claimed that he did not become aware of this until a month before plaintiff's husband uncovered proof of the relationship. Plaintiff, however, implicates his knowledge at a much earlier date, when she claimed that he walked into an examination room when Dr. Lamont was in the process of some sort of inappropriate behavior. She also points to email exchanges between her and Dr. Lamarr that would suggest that he was not only aware of this relationship, but that he wanted to get involved as well. Scandalous though that may seem, it does absolutely nothing to impute this knowledge to FPA.

¶ 16 It is well settled that although knowledge acquired by an agent within the scope of his agency generally is imputed to the principal, such knowledge is not imputed where the agent has an interest or motive in concealing such knowledge from the principal, or, where the agent's

interests are adverse. *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 88; *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 589 (2009); *Lease Resolution Corp. v. Larney*, 308 Ill. App. 3d 80, 86 (1999); *McKey & Poague, Inc. v. Stackler*, 63 Ill. App. 3d 142, 152 (1978). Given his relationship to the alleged malefactor and his own alleged involvement in this scenario, Dr. Lamarr clearly had an interest that was adverse to revealing these activities to his employer. Despite his lofty claim that he encouraged his brother to cease the relationship, refer the patient out of the practice and self-report to their employer, it is transparent that he would have a motive to protect himself and his brother by keeping the information from FPA. In addition, Dr. Lamarr's decision not to report the improper conduct himself is entirely consistent with his adverse interest. Furthermore, all of the evidence that plaintiff supplies in an effort to inculpate Dr. Lamarr in these nefarious activities just adds to the proof of his motive to conceal the activities from their employer.

¶ 17 Still, plaintiff seeks to prove notice to the employer by offering speculative inferences of what Dr. Lamont's office staff "must have suspected" was going on behind the examination room door. Plaintiff offers that the staff was concerned about plaintiff's motives in spending so much time with the doctor. She suggests that the staff must have suspected that Dr. Lamont and plaintiff were involved in a sexual relationship based on their regularly "disheveled" appearance after they emerged from the examination room. Plaintiff avers that the fact that she had the doctor's private cell phone number and would make appointments without going through the front desk somehow establishes notice of the employer through the office staff. Plaintiff also points to evidence that one office staffer was concerned that plaintiff had a "crush" on Dr. Lamont. Given that the two protagonists went to great lengths to conceal their true relationship from all but a few close friends (hers), these sort of flimsy inferences are legally inadequate to

establish any notice by the employer. In this regard, defendants' citation of *Doe v. R.R. Donnelly & Sons*, 42 F. 3d 439, 447 (7th Cir. 1994) is quite on point. In that case, plaintiff sought to prove an employer's knowledge/notice of workplace harassment by evidence that a supervisor saw an employee attempt to give plaintiff a hug at work. Given that the action itself would not constitute harassment, the court held that it could not provide notice thereof. *Id.* Finally, the only sworn testimony of the office staffers revealed that none of them was suspicious of or aware of a sexual relationship between the doctor and his patient.

¶ 18 Thus, in our judgment, regardless of whether plaintiff could prove that she was receiving psychotherapeutic treatment from defendant, so as to invoke the SEA, her claim would still fail against FPA. Despite the rather salacious factual circumstances of the underlying relationship between Dr. Lamont and plaintiff, there are no triable issues of material fact that would impose liability on any defendant other than Dr. Lamont himself.

¶ 19 B. Vicarious Responsibility

¶ 20 Plaintiff alleged in one count of her complaint that Dr. Lamont's employer should be held responsible for Dr. Lamont's salacious conduct under the common law theory of *respondeat superior*. In order to impose any liability on a corporate medical employer for the negligence of its employee, however, a plaintiff must establish that the negligent actions were performed in the course and scope of his employment. *Bagent v. Blessing Care Corp.*,224 Ill. 2d 154, 163-164 (2007). Illinois law establishes that before any liability will attach, plaintiff must satisfy all three qualifying factors established in the Restatement (Second) of Agency. *Id*. at 165. The Restatement provides the following criteria:

"Conduct of a servant is within the scope of employment if, but only if:

(a) It is of the kind he is employed to perform;

(b) It occurs substantially within the authorized time and space limits;

(c) It is actuated at least in part, by a purpose to serve the master [.]"

Restatement (Second) of Agency § 228 (1958); see also *Bagent*, 224 Ill. 2d at 164-65.

¶ 21 Even a cursory review of the record concerning these numerous assignations suggests that Dr. Lamont was not advancing anything other than his own personal satisfaction. While it is true that some of these events occurred within the offices of the FPA, plaintiff has not in any way suggested that Dr. Lamont was employed to perform these "services" and has not given any credence to the possibility that he was furthering the interests of his employer. See *Doe ex rel. Doe v. Lawrence Hall Youth Services*, 2012 IL App (1st) 103758, ¶ 30 (observing that "sexual assault by its very nature precludes a conclusion that it occurred within the employee's scope of employment under the doctrine of *respondeat superior*"). As such, plaintiff has not presented a logical argument that would suggest that any of these three required criteria have been met in this case. Therefore, plaintiff cannot sustain a common law action against Dr. Lamont's employer for damages allegedly caused by this sexual relationship and the court properly granted summary judgment on this basis.

¶ 22 Plaintiff's final attempt to create a triable issue of fact that would keep FPA in this case involves her claim that Dr. Lamont was otherwise medically negligent in his treatment and that this alleged negligence was a cause of plaintiff's mental distress damages. This is a patently baseless allegation. Plaintiff has provided the expert testimony of various witnesses, all of whom condemn Dr. Lamont for his inappropriate activity with his patient. Several of them connect Dr. Lamont's inappropriate activity to exacerbating plaintiff's mental condition through medical transference. One of them, Gary Schoener, is not a medical doctor and is not qualified to testify against Dr. Lamont for malpractice. See *Smith v. Pavlovitch*, 394 Ill. App. 3d 458, 462 (2009)

(observing that a practitioner of one school of medicine may not testify as an expert in an action against a practitioner of a different school of medicine); *McWilliams v. Dettore,* 387 Ill. App. 3d 833, 843 (2009). In addition, there are suggestions in the deposition testimony of Dr. Finley Brown that Dr. Lamont should have referred plaintiff to a mental health professional, but there is absolutely no factual or medical proof that anything Dr. Lamont did, independent of the admittedly improper and potentially harmful sexual relationship, caused or contributed to any damages. In short, plaintiff's disingenuous attempt at parsing sexual conduct from the medical conduct it displaced, would not permit a *reasonable* trier of fact to find FPA liable.

¶ 23 Finally, plaintiff asserts that "[p]ublic policy and evolving case law demand that a cause of action may be brought against a *physician* in sexual misconduct cases based on a breach of fiduciary duties or based solely on the physical patient relationship." (Emphasis added.) This contention is forfeited, as plaintiff failed to raise this issue in the trial court. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 26. In addition, in the absence of any citation to legal authority, we are not persuaded by plaintiff's argument that it would have been inappropriate to raise this public policy argument below. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). We further note that the issue on appeal is whether plaintiff may be able to establish the liability of a physician's employer, not a physician. As a result, the trial court properly entered summary judgment.

¶ 24 IV. CONCLUSION

¶ 25 Plaintiff is unable to identify any triable issues of material fact that would support either a common law malpractice cause of action or one under the SEA against Dr. Lamont's employer. There is no question that the sexual activity involved did not take place in the course and scope of his employment and plaintiff has further failed to identify any issues of material fact related to

the alleged notice of the improper conduct to his employer. Furthermore, there are no triable issues of material fact regarding any potential malpractice on the part of defendant or his employer that are independent of the sexual activity allegations. Even though Dr. Lamont at times engaged in misconduct while on the clock, these defendants should not be on the hook.

¶ 26 For the foregoing reasons, we affirm the trial court's judgment.

¶ 27 Affirmed.