CASE NOTE:
Reverse Apparent Agency Revisited:
Continued Attempts to Transform an Employed Physician to an
Independent Contractor to Avoid the Local Governmental and
Governmental Employees Tort Immunity Act


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1. Introduction
The plaintiffs, Larry and Elizabeth Wheaton, filed suit on March 23, 2001 against Dr. Suwana alleging medical malpractice. The plaintiffs alleged that the physician was negligent on October 15, 1999, in his treatment of Larry Wheaton’s abscess. At that time, Dr. Suwana was an employee of Union County Hospital District. (Hospital). A motion to dismiss was filed based upon the one year statute of limitations period of the Local Governmental and Governmental Employees Tort Immunity Act.1 (Tort Immunity Act).

As in the federal case of Haynes v. Byrne, No. 99-CV-4230-MJR, Southern District of Illinois,2 the plaintiffs attempted to argue that despite the contract of employment the physician was an independent contractor to whom the one year statute of limitations did not apply. The plaintiffs also argued a theory of “reverse apparent agency” in an attempt to defeat the application of the one year statute of limitations period. In other words, they argued that because the physician did not “appear” to be an employee of the hospital, he should not be considered one. They further argued that the equitable doctrines of estoppel and tolling should be applied to the facts of this case to defeat the one year statute of limitations. The trial court found that the facts established the employment relationship and dismissed the plaintiffs’ complaint. The appellate court affirmed the dismissal. A petition for leave to appeal is currently pending before the Illinois Supreme Court.

2. Controlling Law
At the time of the plaintiff’s treatment and the date the suit was filed, section 8-101 of the Tort Immunity Act provided that no civil action could be commenced against a local public entity or its employees for any injury unless it was brought within one year from the date that the injury was received or the cause of action accrued.3 The Hospital, with whom the defendant was employed, was organized under

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the Hospital District Act, which provides that “a hospital district shall constitute a municipal corporation.” The Tort Immunity Act’s definition of “local public entity” includes municipal corporations.

In *Tosado v. Miller*, the Illinois Supreme Court was called upon to determine whether the Tort Immunity Act’s one year statute of limitations or the Code of Civil Procedure’s two year statute of limitation applied to causes of action sounding in medical malpractice against municipal or county hospitals. After examining the language of both statutory provisions, the court held that the Tort Immunity Act’s one year statute of limitations period governed claims brought against local public entities and their employees. Under the holding of *Tosado* and the language of the Tort Immunity Act, the one year statute of limitations period would also apply to employees of municipal or county hospitals covered by the Act.

“Employee” is defined in the Tort Immunity Act as including: “a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee, whether or not compensated, but does not include an independent contractor.”

In determining whether the physician could be considered the hospital’s employee under the Tort Immunity Act, neither the appellate court nor the trial court had the benefit of any case law interpreting the definition of employee or whether an employed physician should be considered an “employee” of a municipal or county hospital under the Tort Immunity Act. Although the federal court in an unpublished decision in the case of *Haynes v. Byrne*, No. 99-CV-4230-MJR, Southern District of Illinois, concluded that the physician in that case was a hospital employee, it did not provide any guidance as to how the courts should decide the issue. The federal court did not set forth any general factors or principles which would guide litigators in developing the requisite proof necessary for the court to conclude that a physician was an employee of a hospital. The appellate court in *Wheaton*, however, has provided this guidance.

### 3. Relevant Factors to Determine a Physician’s Employment Status

In reaching its decision that the physician was an employee of the hospital, thereby entitling him to the protection of the Tort Immunity Act’s one year statute of limitations period, the court considered eight factors. These factors include: (a) The right to control the manner in which the work is done; (b) the skill involved in the work to be done; (c) the method of payment; (d) the work schedule; (e) the right to discharge; (f) who provides the tools, materials or equipment; (g) whether the worker’s occupation is related to that of the employer; and (h) who deducts or pays for insurance, social security, and taxes. Of these factors, the only one that was seriously disputed by the plaintiffs was the first — the right to control the manner in which the work is done.

The plaintiffs argued that because the hospital did not control the manner and method of the physician’s utilization of his medical judgment and his actual surgical actions, the physician could not be an employee. The plaintiffs asserted that in order for the physician to be considered a hospital employee, he would need to obtain the hospital’s permission before reaching any medical decision. The appellate court rejected this position. The court stated:

> By the very nature of the practice of medicine, this premise is off base. Individuals engaged in highly skilled professions must largely utilize their own judgment in skill-based decisions. Making independent medical decisions does not mean that the individual is precluded from being an employee simply because the employer did not specifically control every medical decision made by the employee.

In support of this conclusion the court cited to comment (i) of section 220 of the Restatement (Second) of Agency. The court concluded that in determining whether the first factor — the right to control the manner in which the work is done — is met, the focus should be on whether the employer maintained the right to control the employee, as opposed to actually utilizing that power. The court concluded that the contract and other evidence presented by the physician established the hospital maintained the requisite control over the physician.

The court further concluded that the employment contract and other evidence of record established the remaining factors and concluded that the physician was an employee. The court rejected the plaintiffs’ arguments that the physician’s “appearance” defeated the conclusion that the physician was a hospital employee.
The plaintiffs’ argued that the physician should not be considered an employee because he did not “appear” to be one. In support of this argument they relied upon the following facts: (1) there were no signs in the office that indicated that the physician was an employee of the hospital; (2) neither the physician or his staff wore hospital identification badges; (3) the physician’s office was in the hospital annex, not the hospital; (4) the hospital’s name was not on the physician’s prescription forms; and (5) the billing was in the name of the physician, not the hospital.\textsuperscript{16} In rejecting these arguments, the court noted that although these were interesting facts, none of them were factors to be considered in determining whether the physician was an actual employee or an independent contractor.

Because the court concluded that the physician was a hospital employee, he was entitled to the protection of the Tort Immunity Act’s one year statute of limitations. Accordingly, the appellate court affirmed the dismissal of the plaintiffs’ complaint for their failure to file suit within one year of the date of the alleged improper treatment.

4. Reverse Apparent Agency

After concluding that the physician was an employee, the court addressed the plaintiffs’ arguments for equitable relief.\textsuperscript{17} In the court’s discussion of the plaintiffs’ equitable estoppel argument, it did not address the six elements that the Illinois courts have determined the plaintiff must prove in order to invoke the equitable estoppel doctrine.\textsuperscript{18} Instead, the court addressed the plaintiffs’ “reverse apparent agency” theory.

In their discussion of this theory, the court acknowledged that no legal authority in support of a reverse apparent authority theory was cited, nor was the court aware of any case similar to the one before them. The court’s opinion, however, is ambiguous as to whether it would recognize such a theory under the different facts. Within the opinion, the court stated:

Even if we concluded that such a theory was valid, we could not apply it to the facts of this case. The Wheatons do not allege or argue that their choice in medical care was made because Dr. Suwana was an independent physician, instead of a hospital employee. In other words, the Wheatons do not establish detrimental reliance. They argue that they detrimentally relied upon his status in filing this untimely medical malpractice action. We find that the reliance must be connected to the core of the case — to the medical malpractice at issue. Whether the Wheatons’ attorney was unable to determine how the suit should be structured and timed does not relate to the Wheatons’ choice of physician to perform the surgery Mr. Wheaton required. In a slip-and-fall example with property owned by a local governmental entity, if such a detrimental reliance theory was appropriate, then this entity could not rely upon the relevant limitations period if the plaintiffs sued the wrong property owner, only to discover the true ownership after the limitations period expired. The plaintiffs could just claim that they detrimentally relied upon a business sign on the front door of the building as an excuse for failing to determine the actual owner of the property — the true tortfeasor.

The court’s reference to detrimental reliance on a physician’s appearance as an independent contractor implies that this theory has not been rejected outright. The remaining portion of the opinion regarding this issue, however, raises questions as to whether a plaintiff would ever be able to rely upon a reverse apparent agency theory, even if it were found to exist, to avoid a statute of limitations. This is because the court concludes that the detrimental reliance required for the doctrine to apply must relate to the claim of medical malpractice, not the timing of the suit.

5. Impact of Court’s Opinion on Future Cases

Effective June 4, 2003, the legislature amended § 8-101 of the Tort Immunity Act and extended the statute of limitations period against local public entities and their employees to two years. This, however, does not lessen the importance of the appellate court’s opinion concerning the factors used to determine whether a physician is an employee of a local public entity. There remain two additional Tort Immunity provisions which are applicable to hospitals and physicians. Section 6-105 of the Tort Immunity Act\textsuperscript{19} provides immunity to local public entities and their employees for claims of failure to perform an examination or failure to perform an adequate examination. Likewise, § 6-106 of the Tort Immunity Act\textsuperscript{20} pro-
vides immunity for local public entities and their employees for claims of failure to diagnose a mental or physical condition or failure to treat that condition. Accordingly, although the issues addressed in this case may no longer be relevant for a defense based upon the statute of limitations, it still may affect certain defenses available to medical malpractice defendants. Likewise, if a plaintiff is faced with a situation where his medical malpractice claim against a physician is based upon one of the two types of claims where immunity exists, the plaintiff may attempt to assert a claim of “reverse apparent agency” to avoid the immunity provisions. Despite the appellate court’s rejection of the reverse apparent agency theory in this case, which was grounded on a statute of limitations defense, it is unclear from the court’s decision as to whether such a theory might be applied in cases involving other immunity defenses.

Endnotes

1 745 ILCS 10/8-101.
2 This decision was the subject of a previous case note in the Defense Update, Vol. 2, No. 5
3 745 ILCS 10/8-101. Section 8-101 of the Tort Immunity Act has since been amended, effective June 4, 2003. The amendment extended the statute of limitations period to two years and is applicable to any action or proceeding pending on or after the effective date unless the change takes away or impairs a vested right that was acquired under existing law. If the one year statute of limitations period elapsed prior to the amendatory act’s effective date, then the local public entity has a vested right in the one year statute of limitations and the new amendment will not apply. See Sepmeyer v. Holman, 162 Ill. 3d 249, 253-255, 642 N.E.2d 1242, 1244-1245, 205 Ill. Dec. 125, 127-128 (1994).
4 70 ILCS 910/15.
5 745 ILCS 10/1:206; See also Sappington v. Sparta Municipal Hospital District, 106 Ill. App. 2d, 255, 245 N.E.2d 262 (5th Dist. 1969) (hospital district is a municipal corporation which is covered by the Tort Immunity Act).
6 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
7 745 ILCS 5:13-212.
8 Tosado, 188 Ill. 2d at 188. Illegible.
9 Tosado, 188 Ill. 2d at 1078, 242 Ill. Dec. at 123.
10 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
11 745 ILCS 10/1:201-202
12 This decision was the subject of a previous case note in the Defense Update, Vol. 2, No. 5
13 Restatement (Second) of Agency §220, Comment i, at 489 (1958). “Even where skill is required, if the occupation is one which ordinarily is considered as a function of the regular members of the household staff or an incident of the business establishment of the employer, there is an inference that the actor is a servant. Thus, highly skilled cooks or gardeners, who resent and even confound the cook or gardener’s declaration that he is a servant, are normally servants if regularly employed. So too, the skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are servants.”
14 Wheaton, 793 N.E.2d at 984, 276 Ill. Dec. at 225.
15 The contract of employment allowed the hospital to bill for the physician’s services under the physician’s name and provider number. The hospital employed the physician’s office staff who undertook the billing. The hospital received the money for these services, not the physician. The physician’s sole source of income was the salary he was paid by the hospital plus any payment for unused vacation time.
16 The plaintiff argued that either the doctrine of equitable estoppel or equitable tolling should be applied to allow the plaintiffs’ to proceed with their claims. A review of Illinois case law provides little guidance regarding the doctrine of equitable tolling. Within the Illinois Supreme Court case of Clay v. Kuhl, 189 Ill. 2d 603, 727 N.E.2d 217, 244 Ill. Dec. 918 (2000), the court seems to confuse the equitable estoppel doctrine with the equitable tolling doctrine. The federal courts, however, appear to provide the best guidance as to the difference between the two doctrines. In the case of Singletary v. Continental Illinois National Bank, 9 F.3d 1236 (7th Cir. 1993), the court explained the difference between the two doctrines. “Equitable estoppel suspends the running of the statute of limitations during any period in which the defendant took active steps to prevent the plaintiff from suing, as by promising the plaintiff not to plead the statute of limitations pending settlement talks or by concealing evidence from the plaintiff that he needed in order to determine that he had a claim.” Singletary, 9 F.3d at 1241. The equitable tolling doctrine, however, “permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.” Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990); Singletary, 9 F.3d at 1241. Stated differently, “[e]quitable tolling is appropriate when a movant timely files because of extraordinary circumstances that neither his control and unavailability of evidence with diligence.” Sandvik v. United States, 177 F.3d 1289, 1271 (11th Cir. 1999); See also Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996). In other words, the focus is different depending on which doctrine is being invoked. With a claim of equitable estoppel the focus is on whether the defendant misled the plaintiff or took other affirmative acts to prevent the plaintiff from timely filing her claims. With a claim of equitable tolling, however, the focus is on whether the plaintiff exercised due diligence to obtain information bearing on the existence of her claim.
17 “Equitable estoppel has been defined as the effect of the voluntary conduct of a party whereby he is precluded from asserting rights which might otherwise have existed against another party who has, in good faith, relied upon such conduct and has been led thereby to change his position for the worse.” Gary-Wheaton Bank v. Burt, 104 Ill. App. 3d 767, 433 N.E.2d 315, 324, 60 Ill. Dec. 518, 527 (2d Dist. 1982). The courts have set forth six elements that the plaintiff must establish for the equitable estoppel doctrine to apply: (1) Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations or concealment were untrue; (3) the party claiming the benefit of an estoppel must have known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the benefit of the estoppel must have relied or acted upon the representations; and (6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representations made.
18 745 ILCS 10/6-105.
19 745 ILCS 10/6-106.