Defense UPDATE

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CASE NOTE:
Reverse Apparent Agency in Medical Malpractice Cases or, Can the Plaintiff Have it Both Ways?

Gene R. Haynes, Plaintiff v. Harry T. Byrne, D.P.M., Defendant, No. 99-CV-4230-MJR, Southern District of Illinois

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1. Introduction

The plaintiff, Haynes, filed his complaint on October 1, 1999 for alleged acts of medical malpractice by the defendant, Harry Byrne, a podiatrist. The plaintiff asserted that the defendant was negligent in treating his foot on October 10, 1997 and October 17, 1997, which resulted in need for a partial foot amputation. The plaintiff received treatment from the defendant, who was an employee of Union County Hospital District, at Union County Hospital District's clinic. The defendant sought and obtained summary judgment because the plaintiff failed to file his complaint against the doctor within the one year statute of limitations period of the Local Governmental and Governmental Employees Tort Immunity Act.[1] (Tort Immunity Act). In his attempts to defeat the summary judgment motion, the plaintiff argued that there was a genuine issue of fact as to whether the defendant was an "employee" of the hospital, including whether the defendant should be considered an apparent independent contractor which would prohibit applicability of the Tort Immunity Act.


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2. Controlling Law

Section 8-101 of the Tort Immunity Act provides that no civil action may be commenced against a local public entity or its employees for any injury unless it is brought within one year from the date that the injury was received or the cause of action accrued. Union County Hospital District, with whom the defendant was employed, was organized under the Hospital District Act,

■ *Continued on next page*

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which provides that "a hospital district shall constitute a municipal corporation."[2] The Tort Immunity Act's definition of "local public entity" includes municipal corporations.[3]

In *Tosado v. Miller*,[4] 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[5] two year statute of limitation applied to causes of action sounding in medical malpractice against municipal or county hospitals.[6] 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.[7] Under the holding of *Tosado*[8] 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."[9]

There is no case law interpreting this definition or providing guidance as to whether an employed doctor should be considered an "employee" of a municipal or county hospital under the Tort Immunity Act if there is nothing to indicate his actual employment relationship. There are no cases that set forth what must be established to establish the requisite employment relationship to fall within the protection of the Tort Immunity Act's one year statute of limitation period. This was the issue raised in the *Haynes v. Byrne* case.

3. Facts Necessary to Establish an Employment Relation and Protection Under the Tort Immunity Act

In support of his motion for summary judgment, the defendant argued that he was an employee of Union County Hospital District, which is a local public entity under the Tort Immunity Act. Accordingly, he asserted that under the Illinois Supreme Court holding in *Tosado*[10] and the language of the Tort Immunity Act,[11] the plaintiff was required to file suit against him within one year of the alleged injury.[12] Since the plaintiff filed suit more than one year after the alleged injury, it was untimely.

In support of the assertion that he was an employee of the hospital, the defendant provided the court with correspondence from the hospital administrator to him which the administrator testified memorialized the terms of his employment by the hospital. Testimony established that these terms, which included the provision of office space, nursing assistance, supplies and the handling of appointments and billing, were followed and renewed. In further support of his motion for summary judgment, the defendant introduced his hospital payroll information; his W2 and tax documents for the year of the treatment provided to the plaintiff; a copy of the hospital's certificate of insurance which covered the defendant and listed him as an "employed physician" (the hospital administrator further testified that the hospital only provides insurance for employees); a form signed by the defendant acknowledging receipt of the employee handbook; and deposition testimony of the defendant and the hospital administrator wherein each stated that the defendant was a hospital employee, not an independent contractor.

4. Plaintiff's Arguments in Opposition to Summary Judgment

In response to the motion for summary judgment, the plaintiff argued that the evidence presented a genuine issue of fact as to whether the defendant was an employee of the hospital. In so arguing he relied on documents that established that the doctor had requested staff privileges as a physician, not as an employee; portions of the employee handbook and testimony that the defendant did not participate in some of the benefits available to him as an employee (such as health benefits); the relationship of other doctors, who had offices in the clinic, to the hospital; and the "appearance" the doctor made to those who sought his treatment. Regarding this last argument, the plaintiff relied upon testimony that established that the doctor had control over his own schedule for appointments and surgeries; the hospital did not provide him with any clothing or signage in his office which revealed that he was an employee of the hospital; and he did not wear a hospital identification badge to alert patients to the fact that he was an employee of the hospital. In essence, the plaintiff argued that because the doctor did not appear to be a hospital employee, he should not

be found to be an employee for purposes of the statute of limitations. Since the plaintiff had no way of knowing the doctor was an employee, he was not required to file suit within one year. The plaintiff further argued that because the *Tosado*[13] case was not decided until after the alleged negligence, he should not have been required to file suit within one year.

5. Defendant's Reply to Plaintiff's Arguments That a Genuine Issue of Fact Existed to Deny Summary Judgment

The plaintiff's arguments concerning the defendant's lack of appearance as an employee was essentially a "reverse apparent agency" theory which has not been discussed in any reported appellate or supreme court decision. Illinois courts have consistently held that unless there is some evidence to establish that the doctor was not an employee of the hospital and the plaintiff knew or should have known that he was not an employee, then the hospital could be held vicariously liable for the acts of those physicians that practice medicine at the hospital.[14] In other words, based upon "appearances," a hospital can be held liable for the acts of an apparent agent, i.e. employee. The plaintiff in *Haynes*, however, asked the court to reverse this theory and find that based upon the "appearance" of the doctor as an independent contractor, he should not be found to be an employee. Defendant asked the court to reject this position because the endorsement of this position would directly conflict the established law regarding apparent agency.[15] Furthermore, the defendant pointed out that the issue was not what the defendant "appeared" to be, but what his actual relationship was with the hospital. Likewise, the relationship of other doctors, who also practiced in the clinic, with the hospital, or whether he took advantage of all the benefits afforded him as a hospital employee, did not refute the documents or testimony presented by the defendant and hospital which established his employment by the hospital at the time he treated the plaintiff.

6. Court Order Granting Summary Judgment

In granting the defendant's motion for summary judgment, the court found that there "is actually no genuine dispute of material fact, but only a dispute regarding what legal conclusion is to be drawn from those undisputed facts. Therefore, the issue of whether Byrne was an employee of Union County Hospital is appropriate for this court to decide. . . . In essence, the legal effect of the undisputed facts is a question of law."[16]

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Relying upon the Illinois Supreme Court decision in *Tosado*,[17] the court concluded that the Tort Immunity Act's one year statute of limitations period applied over the Code of Civil Procedure's two year statute of limitations period. Accordingly, the court found that since the defendant was an employee of the hospital at the time of his treatment, the complaint was not timely and the plaintiff's cause of action was barred because it was filed more than one year after the treatment (plaintiff's alleged injury).

In reaching this conclusion the court relied upon the deposition testimony and documents produced by the defendant establishing his employment relationship to the hospital. The court, however, did not specifically address the plaintiff's "reverse apparent agency" theory based upon the defendant's appearance to his patients. Accordingly, this issue remains open to future litigation. Finally, the court concluded that because the Illinois Supreme Court in *Tosado*[18] specifically stated that their ruling would apply retroactively, it was bound to apply the one-year statute of limitations period even though this case was filed before *Tosado*[19] was decided.

7. Conclusion

When representing a hospital district or its employed doctors in a medical malpractice action, the Tort Immunity Act's one-year statute of limitation will apply. If you represent a doctor who falls within the Tort Immunity Act's protections, the issue will most likely be whether the doctor was an employee. Despite *Tosado*, there is no direct case law interpreting the Tort Immunity Act's definition of "employee." The question as to who is to be considered an employee and what is required to establish that relationship remains an open question. Likewise, no Illinois appellate court has determined whether plaintiff's "reverse apparent agency" theory can be used to defeat employment status or avoid the one year statute of limitations based upon a doctor's "appearance" to a plaintiff

as an independent contractor. This same issue has arisen in another case that is pending in Union County, Illinois. One can expect that plaintiffs will continue to argue that since it was not apparent that a doctor was not an employee he should be found to be an apparent independent contractor and not subject to the Tort Immunity Act's one year statute of limitations.

Endnotes

[1] 745 ILCS 10/8-101.
[2] 70 ILCS 910/15.
[3] 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).
[4] 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
[5] 735 ILCS 5/13-212.
[6] *Tosado*, 188 Ill. 2d at ___, 720 N.E.2d at 1078, 242 Ill. Dec. at 123.
[7] *Tosado*, 188 Ill. 2d at ___, 720 N.E.2d at 1081, 242 Ill. Dec. 126. It should be noted that *Tosado* was a plurality opinion which some have argued has no precedential effect and should not be used in other cases. *See Ferguson v. McKenzie*, 2001 Ill. LEXIS 6 (2001)(Justice McMorrow's dissent citing 5 Am. Jur. 2d *Appellate Review* '602, at 298 (1995)); *See also Roark v. Macoupin Creek Drainage Dist.*, 316 Ill. App. 3d 835, 738 N.E.2d 574, 250 Ill. Dec. 358 (4th Dist. 2000).
[8] 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
[9] 745 ILCS 10/1-202.
[10] 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
[11] 745 ILCS 10/8-101.
[12] The plaintiff did not raise the issue of whether the discovery rule applied to prevent the statute of limitations from beginning at the time of the alleged negligent treatment.
[13] 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
[14] *See Gilbert v. Sycamore Municipal Hospital,* 156 Ill. 2d 511, 622 N.E.2d 788, 190 Ill. Dec. 758 (1993).
[15] It should be noted that a similar argument based upon public policy grounds was rejected by the Illinois Supreme Court in *Tosado v. Miller*, 188 Ill. 2d 186, ___, 720 N.E.2d 1075, 1081, 242 Ill. Dec. 120, 126 (1999) (Plaintiff's argued that "a claim for medical malpractice is often not immediately apparent to the injured party; that medical malpractice claims involve complex issues requiring substantial prefiling investigation; and that the fact that a hospital is a municipal hospital may not be readily apparent to someone who had been injured in such a facility. They, therefore, conclude that the status of the facility may not be obvious to an injured party until it is too late and that public policy should favor the two-year limitation period.")
[16] *Haynes v. Byrne*, No. 99-CV-4230-MJR, slip op. at 2, n. 2 (S.D. IL Sept. 18, 2001).
[17] 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)
[18] 188 Ill. 2d 186, ___, 720 N.E.2d 1075, 1081, 242 Ill. Dec. 120, 126 (1999)
[19] 188 Ill. 2d 186, 720 N.E.2d 1075, 242 Ill. Dec. 120 (1999)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GENE R. HAYNES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-cv-4230-MJR
	)	
HARRY T. BYRNE, D.P.M.,	)	
	)	
Defendant.	)	

ORDER

REAGAN, District Judge:

I. Introduction

On October 1, 1999, Plaintiff, Gene R. Haynes ("Haynes"), filed a two-count complaint against Defendant, Harry T. Byrne, D.P.M. ("Byrne"), for medical malpractice. Specifically, Haynes alleges that Byrne was negligent in his treatment of one of Haynes' feet[1] on October 10, 1997 and October 17, 1997 and that such negligence resulted in its partial amputation.

Now pending before this Court is Byrne's motion for summary judgment (Doc. 52), wherein he asserts that Haynes' complaint was filed outside the applicable statute of limitations. The Court agrees, and for the reasons given below, grants Byrne's motion for summary judgment (Doc. 52).

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[1] It is unclear which foot Haynes claims was injured. Haynes' original complaint refers to the right foot. His first amended complaint refers to the left foot. His second amended complaint refers to the right foot.

II. Standard of Review

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Fed. R. Civ. P. 56(c); *Wyatt v. UNUM Life Insurance Company of America*, 223 F.3d 543, 545 (7th Cir. 2000); *Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir. 1997); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).** The movant bears the burden of establishing the absence of fact issues and entitlement to judgment as a matter of law. ***Wollin v. Gondert*, 192 F.3d 616, 621-22 (7th Cir. 1999).** The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. ***Schneiker v. Fortis Insurance Co.*, 200 F.3d 1055, 1057 (7th Cir. 2000); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999).**

III. Analysis

There are no disputed facts in this case. The only dispute arises over one legal conclusion upon which the statute of limitations hinges - whether Byrne was an employee of Union County Hospital District at the time he treated Haynes.[2]

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[2] Haynes argues that Byrne was not an employee of the Hospital and that this issue is one of disputed fact for the jury to decide. On this basis, Haynes asserts Byrne's motion for summary judgment should be denied. The Court disagrees. The Court finds there is actually no genuine dispute of material fact, but only a dispute regarding what legal conclusion is to be drawn from those undisputed facts. Therefore, the issue of whether Byrne was an employee of Union County Hospital is appropriate for this Court to decide. ***Sec. of Labor, United States Labor Dept. v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1988); *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 270 n.4 (5th Cir. 1982); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 325 (9th Cir. 1996).** In essence, the legal effect of the undisputed facts is a question of law. ***Sec. of Labor*, 835 F.2d at 1535.** The Court certainly recognizes that the determination of employment status may be a factual question which precludes summary judgment, but finds that such is not the case here. Regardless, as discussed *supra*, none of the facts Plaintiff puts before this Court can be construed as outcome determinative on the employment status issue. In fact, the Court finds Haynes' facts to be benign and devoid of ability to prove or disprove his employment status.

The Illinois Local Governmental and Governmental Employees Tort Immunity Act provides:

> No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued.

745 ILCS 10/8-101. The Illinois Supreme Court has interpreted this section and clearly held, as the plain language states, that a one-year statute of limitations applies to all actions against a local entity or its employees. ***Tosado v. Miller*, 720 N.E.2d 1075 (Ill. 1999).** This one-year limit overrides the two-year statute of limitations applicable to all other medical malpractice claims. ***Id.* at 1081.**

In this case, Haynes was treated by Byrne at Union County Hospital ("the Hospital"). Haynes concedes that Union County Hospital is a local entity which falls under the Tort Immunity Act and the one-year statute of limitations. Therefore, if this Court finds that Byrne was an employee of Union County Hospital in 1997, the one-year statute of limitations applies to the case at bar.

Byrne has filed many exhibits which all support his contention that he was an employee of Union County Hospital at the time he treated Haynes. First, he points to his own deposition wherein he states his belief and understanding that he was an employee of Union County Hospital. Second, he cites the deposition of Carol Goodman, the Union County Hospital Administrator, wherein she refers to Byrne as a part-time "employee" of the Hospital several times during her deposition. Third, he attaches a Certificate of Liability Insurance which provided him insurance coverage in 1997 under the Hospital's professional liability policy. In fact, the certificate specifically states that "Harry T. Byrne is included in above hospital professional liability policy as

an employed podiatrist." Last, he attaches his Hospital payroll receipts, a W-2 Wage and Tax Statement indicating that he was an employee of the Hospital in 1997, letters from Goodman indicating that the Hospital would "employ" him on a part-time basis, and a copy of his written acknowledgment of the Union County Hospital Employee Handbook.

In response, Haynes provides the Court with several exhibits he contends show that Byrne merely had staff privileges at the Hospital and was not an employee. However, Haynes cites no case law to support the premise upon which his response is based - that a physician with staff privileges is not an employee of the hospital. Although such a failure to support his argument should end this Court's analysis, the Court's review of Haynes' exhibits provides further basis for the Court's rejection of Haynes' argument.[3]

First, Haynes attaches a July 20, 1991 letter from Byrne to Union County Hospital which encloses his application to the medical staff at Union County Hospital. The Court finds this letter irrelevant. First, it was written in 1991, six years from 1997, the time in question. Second, there is no discussion of whether Byrne was seeking to be an employee of the Hospital or not, just that he was seeking appointment to the medical staff. Certainly, at this point, the specific details and nature of a possible relationship between the Hospital and Byrne were far from established.

Next, Haynes attaches a September 26, 1991 letter from a former Hospital Administrator which welcomes Byrne to the Hospital medical staff. The Court also finds this letter irrelevant for the same reasons given above. It was written six years before the time in question and does not contain any information regarding the nature of their relationship.

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[3] Furthermore, Haynes' argument neither proves nor disproves that Byrne was an employee of the Hospital. In order to provide medical services and enjoy admitting privileges, all physicians must apply for and receive staff privileges whether they are a hospital employee or not.

Next, Haynes attaches Byrne's 1997 application for renewal of his medical staff membership and clinical privileges, Hospital Board Minutes approving Byrne's 1997 application, and a February 2, 1998 letter from Goodman approving Byrne's application for reappointment. Although these documents address the time in question, they do not delineate any agreement or specific relationship between Byrne and the Hospital. Therefore, they do not support Haynes' argument that Byrne was not an employee.

The next exhibits are a June 11, 1997 Certificate of Insurance endorsing Byrne as an insured and a complete copy of the Union County Hospital Employee Handbook. Haynes' brief is silent regarding how these exhibits show that Byrne was not an employee of the Hospital and the Court finds that they do not support this contention. First, the Certificate of Insurance specifically endorses Byrne as an *employed* physician. Second, the handbook specifically states that it "is intended as a guide to familiarize *employees* with employment policies." (Emphasis added). Moreover, the Court finds that Byrne's acknowledgment and receipt of the Employee Handbook in writing certainly imply that he, as well as the Hospital, considered Byrne an employee.

The last exhibit Haynes attaches is Goodman's deposition, upon which Haynes relies heavily. Haynes points to certain portions of the deposition wherein Goodman testified that Byrne could perform surgeries whenever it fit his schedule, could select the days and times he would see patients at the Hospital podiatry clinic, provided his own work garments, did not wear an I.D. badge, and did not participate in any employee benefits which were offered to him. Haynes argues that this testimony shows that Byrne was not a Hospital employee. The Court disagrees. First, Goodman specifically states that she considered Byrne to be "a part-time employee"of the Hospital. She even explained that some physicians were not employees of the Hospital, but that Haynes was. As the

Hospital Administrator in charge of all Hospital personnel, the Court finds this testimony carries great weight and dispels even the slightest inference that could be construed from Haynes' arguments.

Therefore, after a review of Haynes' response and exhibits filed in support, the Court finds that Haynes has not provided this Court with any evidence which disputes Byrne's contention that he was a Hospital employee in 1997. To the contrary, all evidence supports Byrne's assertion that he was a Hospital employee. Since Haynes concedes that the Hospital and its employees fall under the Illinois Local Governmental and Governmental Employees Tort Immunity Act, a one-year statute of limitations applies.

Since the one-year statute of limitations applies, the Court must now determine when the statute began to run. Under the Illinois Local Governmental and Governmental Employees Tort Immunity Act, the statute of limitations begins to run from the date of the injury or from the date the cause of action accrues. The latter application is known as the discovery rule. This tolls the statute of limitations from running until the plaintiff knows or reasonably should have known that his injury was wrongfully caused. ***Khalil v. Town of Cicero*, 916 F.2d 715, 1990 WL 157082 at *3 (7th Cir. 1990).** Haynes makes no argument that the discovery rule applies in this case or prevented the statute of limitations from beginning to run on the date of the injury. Therefore, the Court must use the dates of injury alleged by Haynes in his complaint as the beginning of the one-year statute of limitations.

Haynes has alleged that he was injured once on October 10, 1997 and again on October 17, 1997. Therefore, under the Act, Haynes had until October 10, 1998 and October 17, 1998 in which to file suit against Byrne for his injuries. Haynes did not file suit until October 1,

1999, more than eleven months after the statute of limitations had already run. Therefore, his suit is barred.

Haynes argues that because he filed suit on October 1, 1999, twenty days before the ***Tosado*** opinion was handed down, the one-year statute of limitations should not apply. The Court disagrees. The Illinois Supreme Court specifically addressed this issue and found that because it was merely interpreting a statute which had long been Illinois law, its holding would be applied retroactively as well as prospectively: ***Tosado*, 720 N.E.2d at 1081.** Accordingly, this Court is bound to apply the one-year statute of limitations to this case even though it was filed before ***Tosado*** was handed down.

Last, Haynes argues that this Court should "equitably toll" the statute of limitations mandated by the Illinois Supreme Court as a Texas District Court did when it tolled the statute of limitations in a social security case. The Court is not persuaded by this argument and does not find this case to be at all similar to the case at bar. Furthermore, this Court is not bound by a Texas district court. Therefore, the Court rejects Haynes' argument and applies the statute of limitations mandated by the Illinois Supreme Court.

IV. Conclusion

Because Haynes failed to file his complaint within the one-year statute limitations as mandated by the Illinois Local Governmental and Governmental Employees Tort Immunity Act, **745 ILCS 10/8-101**, and the Illinois Supreme Court in ***Tosado v. Miller*, 720 N.E.2d 1075 (Ill. 1999)**, his claims are barred. Accordingly, the Court **GRANTS** Byrne's motion for summary judgment (Doc. 52) and **DIRECTS** the Circuit Clerk to enter judgment in favor of Defendant, Harry T. Byrne, D.P.M., and against Plaintiff, Gene R. Haynes.

IT IS SO ORDERED.

DATED this 18th day of September, 2001.

Michael J Reagan

MICHAEL J. REAGAN
United States District Judge