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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED
DEC 22 2010

WILLIAM "MACK" VAUGHAN,

Plaintiff-Appellant,

vs.

ST. VINCENT HOSPITAL, INC.,

Defendant-Appellee.

No. 30,395
Santa Fe County
D-0101-CV-2006-00175

ST. VINCENT HOSPITAL, INC.'S ANSWER BRIEF

Appeal from the First Judicial District Court
County of Santa Fe, State of New Mexico
Honorable Barbara Vigil, District Judge

Respectfully submitted by:

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I. STATEMENT OF PROCEEDINGS

Plaintiff filed his "Complaint for Medical Negligence" on January 27, 2006, asserting that during an August 2002 admission, St. Vincent Hospital ("St. Vincent") negligently failed to distribute a copy of a radiology report to his treating surgeon, Dr. Anna Voltura, "through an administrative inadequacy." **RP 1-2.** Plaintiff's Complaint for Medical Negligence does not assert any other allegations against the hospital and does not assert any allegations regarding J.R. Damron, M.D., the independent contractor radiologist who interpreted the radiology study and dictated the report. ***See id.***

Plaintiff filed his "First Amended Complaint for Medical Negligence" on August 17, 2006 to correct a typographical error regarding the date of the hospitalization at issue. **RP 27.** Other than this one correction, Plaintiff's First Amended Complaint for Medical Negligence was identical to his initial complaint. ***See id.*** Plaintiff again failed to mention, much less assert a claim, regarding alleged acts or omissions by Dr. Damron, the radiologist. **RP 27-28.**

In an effort to obtain information regarding Plaintiff's claim, St. Vincent submitted interrogatories to Plaintiff in May of 2006, requesting that he identify all experts who will testify at trial. **RP 20, 108-109.** Plaintiff failed to identify any expert witnesses in response to St. Vincent's request. **RP 108-109.**

On June 30, 2009, after this case had been pending for nearly three and a half years with very little activity, St. Vincent filed its Motion for Summary Judgment. **RP 85.** St. Vincent's Motion established that summary judgment was proper because Plaintiff failed to provide expert testimony in support of his claim that the hospital was negligent in failing to forward his August 2002 CT scan report to Dr. Voltura "through an administrative inadequacy." **RP 85-90.** Although St. Vincent's Motion was based primarily on the fact that Plaintiff had not identified any experts in support of his claim and therefore could not meet his burden of proof, St. Vincent submitted the affidavit of Mark Kozlowski, M.D., a board-certified emergency medicine physician in Denver, Colorado, in support of its Motion. **RP 101.**

In an untimely response to St. Vincent's Motion, Plaintiff alleged that the hospital was not entitled to summary judgment because Dr. Voltura, Mr. Vaughan's treating surgeon, stated in a sworn statement that she would have expected Dr. Damron, the radiologist, to have communicated the possibility of a neoplasm to her either verbally or by sending her his report.[1] **RP 114-119.**

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[1] Plaintiff took Dr. Voltura's sworn statement without notice to counsel for St. Vincent. **RP 235.** Subsequently, in response to St. Vincent's discovery requests, Plaintiff alleged that the statement was attorney work product. The statement was eventually provided to St. Vincent by Dr. Voltura. Although Plaintiff's Brief in Chief alleges that his complaint was based on Dr. Voltura's statement, the statement was in fact taken two months after Plaintiff filed his complaint. **RP 1, 120.**

St. Vincent's reply memoranda demonstrated that: 1) during the nearly four years that this case was pending, Plaintiff never asserted a claim that Dr. Damron was negligent; 2) Plaintiff never alleged that St. Vincent was vicariously liable for any alleged acts or omissions of Dr. Damron under a theory of actual or apparent agency; 3) Dr. Voltura is not a radiologist and is not qualified to offer opinion testimony regarding the standard of care that applies to a radiologist; and 4) Plaintiff failed to provide expert testimony in support of his allegation that the St. Vincent administrative staff was negligent in failing to forward the radiology report to Dr. Voltura. **RP 132-139.**

On October 21, 2009, Plaintiff filed a Motion for Summary Judgment, attaching an Affidavit by John Bagwell, M.D., Mr. Vaughan's treating oncologist. Dr. Bagwell's affidavit relates to the effect of the alleged delay in diagnosis and does not address alleged breaches of the standard of care by either St. Vincent or Dr. Damron. **RP 190.**

On October 22, 2009, the day of the hearing on St. Vincent's Motion, Plaintiff submitted an affidavit by Donald Wolfel, M.D., a radiologist. **RP 221.** Dr. Wolfel's affidavit offers opinions regarding Dr. Damron's duty to communicate his findings to Dr. Voltura. ***Id.*** Dr. Wolfel also offers speculative

statements regarding the alleged failure to distribute the radiology report to Dr. Voltura.[2] *Id.*

At the October 22, 2009 hearing on St. Vincent's Motion, the Court requested that the parties submit memoranda addressing whether Plaintiff was required to plead vicarious liability or apparent agency allegations relating to Dr. Damron in his complaint. In response to this request, St. Vincent submitted a memorandum which demonstrated that Rule 1-008 NMRA 2009 required Plaintiff to assert allegations regarding the radiologist in his complaint if he intended to recover damages from St. Vincent under a theory of vicarious liability for the radiologist's alleged acts or omissions. **RP 266-276.** St. Vincent also established that under Rule 1-015 NMRA 2009 and the doctrine of laches, Plaintiff should not be permitted to amend his complaint to assert a vicarious liability claim almost four years after the case was filed and over seven years after the care at issue occurred. *Id.*

The Court held a second hearing on St. Vincent's Motion for Summary Judgment on February 25, 2010. At the hearing, the Court determined that summary judgment was proper because: Plaintiff failed to present expert

[2] Plaintiff's Brief in Chief assumes that Dr. Voltura did not receive the radiology report. In fact, Dr. Voltura testified during her deposition that the report was not in her office chart but that she could not rule out that it was transmitted to her office and was not placed in the chart. **RP 143.** Dr. Voltura's statement provides that she had "no idea" whether her office had received the radiology report." **RP 121.**

testimony to establish that the hospital was negligent in allegedly failing to deliver the radiology report; Plaintiff failed to provide notice that he was claiming that the radiologist was negligent through the complaint, amended complaint, or discovery responses; and the hospital would be prejudiced if Plaintiff was allowed to amend his complaint due to the significant amount of time that had elapsed since the complaint was filed. **RP 363-64.**

Plaintiff sought an appeal, and this Court issued a Notice of Proposed Summary Disposition on June 9, 2010, proposing to affirm the district court's entry of summary judgment. The Notice provides a thorough and accurate assessment of the facts of this case and the applicable law. Accordingly, for the reasons discussed below and in the Notice of Proposed Summary Disposition, the district court's entry of summary judgment should be affirmed.

II. ARGUMENT

THE DISTRICT COURT PROPERLY ENTERED SUMMARY JUDGMENT ON BEHALF OF ST. VINCENT.

Summary judgment is proper when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. **Rule 1-056 NMRA 2010; *Goradia v. Hahn, Co.*, 111 N.M. 779, 781, 810 P.2d 798, 800 (1991).** "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses . . ." ***Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).** A failure of proof regarding an essential element of the non-

moving party's case renders all other facts immaterial. ***Goradia*, 111 N.M. at 781** (citing *Celotex*, 477 U.S. at 322-23). In this case, summary judgment was proper because Plaintiff failed to provide expert testimony in support of the medical negligence claim asserted in his complaint.

A. Summary judgment was proper because Plaintiff failed to submit expert testimony in support of the medical malpractice claim alleged in his Complaint.

As this Court stated in the Notice of Proposed Summary Disposition, standard of care and causation must be proved by expert testimony. ***See* Notice of Proposed Summary Disposition at 7** (citing *Pharmaseal Lab., Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977)). In *Pharmaseal*, the court determined that a plaintiff must present expert medical testimony to establish a breach of the standard of care by a healthcare provider "which is peculiarly within the knowledge of doctors, and in which a layman would be presumed to be uninformed." ***See Pharmaseal Lab., Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977).** Similarly, in *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978), the court stated that in most medical malpractice suits, expert medical testimony must be adduced to establish a standard of care, to assess the provider's performance in light of the standard, and to prove causation. ***See Gerety*, 92 N.M. at 407, 589 P.2d at 191**; ***see also Jaramillo v. Kellogg*, 126 N.M. 84, 86, 1998-NMCA-142 ¶¶ 7-9** (stating that the defendant failed to prove that the negligence

of non-parties was responsible for the plaintiff's injuries because he did not present expert testimony establishing a standard of care).

In this case, Plaintiff's "Complaint for Medical Negligence" and "First Amended Complaint for Medical Negligence" allege that he underwent a CT scan at St. Vincent which showed "diagnostic possibilities" of an abscess associated with diverticulitis or neoplasm. **RP 1-2, 27-28.** Plaintiff alleged that the radiologist who interpreted the CT scan called his treating surgeon, Dr. Voltura, but did not send her the report. ***Id.*** Plaintiff claimed that as a result of this "administrative inadequacy," Dr. Voltura did not work up or rule out the neoplasm. ***Id.*** Plaintiff further alleged that Dr. Voltura did not mention the diagnostic possibility of a neoplasm in her notes and did not discuss it with him. ***Id.***

Now that this case has been pending for nearly five years and Plaintiff has failed to identify an expert in support of his "administrative inadequacy claim," Plaintiff claims that expert testimony is not required because this case involves "ordinary negligence" rather than "medical negligence." **Brief in Chief at 24-27.** Plaintiff's claim constitutes a futile attempt to avoid the fact that he has failed to provide expert testimony in support of the claim asserted in his complaint.

First, Plaintiff's argument regarding this issue cites no legal authority or evidence. **Brief in Chief at 23-25.** Instead, Plaintiff offers unsupported speculation and opinions regarding the manner in which radiology reports are

prepared and transmitted. *Id.* Plaintiff has not cited any case law to support his claim. *Id.* Plaintiff's failure to provide any support for his argument that the alleged "administrative inadequacy" constitutes "ordinary negligence" demonstrates that the claim is unsubstantiated.

Second, Plaintiff's own actions demonstrate that he is asserting claims of medical negligence. Plaintiff's original complaint is titled, "Complaint for Medical Negligence," and Plaintiff's amended complaint is titled, "First Amended Complaint for Medical Negligence." **RP 1, 27.** Both pleadings allege that St. Vincent negligently failed to deliver the radiology report to Dr. Voltura and that Mr. Vaughan was treated for a diverticular abscess with antibiotics, allowing his cancer to grow. **RP 1-2, 27-28.** These pleadings demonstrate that Plaintiff intended to assert, and has in fact asserted, claims of medical negligence.

Third, as this Court notes in the Notice of Proposed Summary Disposition, Plaintiff's claims are not within the common knowledge of an average person. **Notice of Proposed Summary Disposition at 8; *Pharmaseal Lab., Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977).** The Notice of Proposed Summary Disposition lists many areas that require expert testimony in relation to the standard of care.[3] In addition to those areas, an average person would not have

[3] The Notice of Summary Disposition provides that expert testimony is required regarding: 1) whether radiology reports typically include differential diagnoses; 2) whether a differential diagnosis would have been followed up by a treating

knowledge, and expert testimony is required, regarding: 1) emergency department policies, procedures, and practices that relate to the distribution of radiology reports; 2) whether a radiologist is required to copy a treating physician on a radiology report when he reviewed the study with the physician and they agreed on the diagnosis; 3) the nature of the discussion that should occur between the radiologist and the treating physician; and 4) hospital policies regarding information conveyed by a radiologist to a treating physician.

Expert testimony was also required regarding causation. ***See, e.g., Gerety v. Demers*, 92 N.M. 396, 407, 589 P.2d 180, 191 (1978).** As this Court acknowledged in the Notice of Proposed Summary Disposition, Plaintiff must provide expert testimony to demonstrate: 1) whether the CT scan showed an actual cancer; 2) whether any cancer that Plaintiff had or developed worsened because the CT scan report was allegedly not delivered to Dr. Voltura; and 3) whether Dr. Voltura's apparent lack of knowledge that the CT scan report listed a neoplasm as

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physician or would have been considered as a possibility that could not be "ruled out"; 3) whether notes in a report regarding possible neoplasm would have changed the discussion and agreed-on diagnosis made by a treating physician and a radiologist; 4) whether a physician informed of a possible neoplasm would have provided different treatment than that provided by Dr. Voltura; 5) whether a physician that had viewed a CT scan with a radiologist would have considered the notes in the report to be a change in diagnosis; and 6) whether there is a standard practice that radiology reports be sent to or discussed with a treating physician. **Notice of Proposed Summary Disposition at 8.**

a second consideration caused the cancer to worsen. **Notice of Proposed Summary Disposition at 8-9.**

Plaintiff has failed to provide expert testimony on these issues. Most important, Dr. Voltura, Dr. Wolfel, and Dr. Bagwell do not offer any opinion regarding the policies and procedures that a hospital should follow in distributing radiology reports or state that St. Vincent's policies and procedures were inadequate. **RP 221-225, 267-272, 282-283.** In fact, Dr. Wolfel's affidavit concedes that he does not know why Dr. Voltura allegedly did not receive information regarding the neoplasm and claims that the alleged failure is evidence of negligence regardless of how it occurred. **RP 221-225.** These statements essentially amount to a claim of *res ipsa loquitor*. ***See* NM UJI 13-1623** (*res ipsa loquitor* may be shown when an occurrence which was under the exclusive control and management of the defendant and the event causing the injury or damage was of a kind which does not ordinarily occur in the absence of negligence on the part of the person in control of the instrumentality); ***see also Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994).** Dr. Wolfel's allegations are not helpful to Plaintiff because neither his complaint nor his amended complaint assert a claim of *res ipsa loquitor*. **RP 1-2, 27-28.**

Moreover, Dr. Voltura, Dr. Wolfel, and Dr. Bagwell are not qualified to offer opinions regarding emergency department policies and procedures because,

unlike Dr. Kozlowski, none of them are employed in, or administer, a hospital emergency department. **RP 103-107, 221-225, 267-272, 282-283; Rule 11-702 NMRA 2010** (expert testimony is permitted when a witness is qualified by knowledge, skill, experience, training or education). Because Plaintiff's only allegation against St. Vincent is that it was negligent in failing to distribute the radiology report "through an administrative inadequacy," Plaintiff's failure to present expert testimony on the alleged inadequacy is fatal to his claim and summary judgment was proper.

Plaintiff has also failed to provide expert testimony regarding causation. Neither Dr. Wolfel, Dr. Bagwell, nor Dr. Voltura has stated that the CT scan actually showed that Mr. Vaughan had cancer at the time of his visit to St. Vincent. **RP 221-225, 267-272, 282-283.** In fact, Dr. Voltura testified that she reviewed the CT scan with the radiologist and that based on the study and Plaintiff's lab results, she and the radiologist "came to the conclusion that [Plaintiff] had a diverticular abscess." **RP 94, 99, 121.** Dr. Voltura further testified that she had reviewed "enough" CT scans and that Plaintiff's study did not indicate that he had a perforated cancer. **RP 96, 122.** She also stated that the study did not appear to her to show cancer, and that she did not know whether Mr. Vaughan had cancer at the time of his August 2002 visit to St. Vincent. **RP 123, 143.** Thus, Plaintiff lacks

expert testimony to establish that the CT scan showed that Mr. Vaughan actually had cancer in August 2002.

Plaintiff has also failed to present expert testimony establishing that Dr. Voltura's alleged failure to receive the CT report caused a delay in diagnosis. Dr. Voltura believed Plaintiff should be admitted and discussed that fact with him, as well as the fact that his condition would require surgery. **RP 97-98, 141.** Despite these facts, Plaintiff refused admission.[4] **RP 97, 141.** Dr. Voltura testified that if Plaintiff had been admitted, the CT scan report would have been placed in Mr. Vaughan's chart and another CT scan likely would have been completed to evaluate whether the abscess had improved. **RP 144, 95.** Dr. Voltura informed Plaintiff that he needed to follow up with her in the office, but he did not do so. **RP 97.** Dr. Voltura testified that if Mr. Vaughan had followed up with her as he was instructed, she would likely have referred him to a gastroenterologist, who would have ordered additional studies which would have diagnosed the cancer if it was present. **RP 97.** In addition, Dr. Voltura testified that a screening colonoscopy was recommended to Mr. Vaughan in November 2002, which would likely have detected the cancer if it was present. **RP 98.** Dr. Voltura stated that a

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[4] Plaintiff's Brief in Chief claims that Mr. Vaughan "chose" not to be admitted in response to Dr. Voltura's "suggestion" rather than "refused" to be admitted. **Brief in Chief at 17.** Plaintiff offers no support for this claim and it is inconsistent with Dr. Voltura's testimony that she disagreed with Mr. Vaughan's decision and thought it was ill-advised. **RP 97, 141.**

cytoscopy was recommended to Mr. Vaughan in May of 2003, and that that study also would have diagnosed the cancer if it was present. **RP 99.** Mr. Vaughan did not undergo these studies. ***Id.*** Dr. Voltura's testimony does not establish that her alleged failure to receive the CT report actually caused a delay in diagnosis and Plaintiff has failed to present any expert testimony on that issue. Accordingly, Plaintiff cannot meet his burden of proof on causation.

As discussed above and by the Court in the Notice of Proposed Summary Disposition, the standard of care, causation, and administrative inadequacy issues in this case were not within the common knowledge of an ordinary person and therefore required expert testimony. Plaintiff failed to provide expert testimony on these issues. Accordingly, the entry of summary judgment was proper and should be affirmed.

B. Plaintiff failed to provide St. Vincent with notice of a claim regarding vicarious liability for the alleged acts or omissions of the independent contractor radiologist as required by Rule 1-008 NMRA 2010.

As discussed above, Plaintiff's Complaint and First Amended Complaint allege only that St. Vincent was negligent in failing to distribute the radiology report to Dr. Voltura "through an administrative inadequacy." **RP 1, 27.** Neither pleading alleges that Dr. Damron was negligent or that St. Vincent is vicariously liable for his alleged acts or omissions. ***Id.*** Plaintiff's discovery responses similarly failed to provide the hospital with notice of any claim relating to Dr.

Damron. **RP 108-109.** The trial court: 1) held that Plaintiff's Complaint, Amended Complaint, and discovery responses failed to provide St. Vincent with notice of a potential claim relating to Dr. Damron; and 2) denied Plaintiff's request to amend his complaint to add a claim relating to Dr. Damron due to the fact that more than four years had elapsed since the complaint was filed. **RP 363; February 25, 2010 Tr. at 35.** This Court's Notice of Proposed Summary Disposition proposed to affirm these rulings. **Notice of Proposed Summary Disposition at 10-12.** The Notice of Proposed Summary Disposition is correct and the trial court's rulings should be affirmed.

Under Rule 1-008 NMRA 2010, a complaint must provide a "short and plain statement of the claim showing the pleader is entitled to relief." ***See* Rule 1-008(A)(2) NMRA 2010**. Section (E)(1) provides that "each averment of a pleading shall be simple, concise and direct." ***See* Rule 1-008(E)(1) NMRA 2010.** The purpose of pleadings is "to give the parties fair notice of both the claims and defenses and the grounds upon which they rest." ***See, e.g., Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 54, 636 P.2d 322, 325 (Ct. App. 1981).** Accordingly, a party is required to plead a particular theory of recovery before the theory can be presented to a jury. ***Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1990).**

In *Schmitz*, the court stated that under Rule 1-008, the allegations of a complaint must "show that the party is entitled to relief" and be "set forth with

sufficient detail *so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief*." *Schmitz*, **109 N.M. at 389-90, 785 P.2d at 729-30** (emphasis added). In that case, the court ruled that the complaint was sufficient under Rule 8 because it asserted all of the elements that were necessary to prove the plaintiff's cause of action. ***See id.***

In this case, Plaintiff's Complaint does not assert the elements that are necessary to recover against St. Vincent under a theory of actual or apparent agency for the alleged acts or omissions of Dr. Damron or provide notice to St. Vincent of any such claim because Plaintiff's Complaint does not allege that Dr. Damron was negligent. **RP 27-28.** Rather, Plaintiff's First Amended Complaint alleges that "whatever was said in the conversation [between Dr. Damron and Dr. Voltura], the radiology report itself was apparently never sent ***by St. Vincent Hospital*** to Dr. Voltura or Dr. Wilt." ***Id.*** (emphasis added). The Complaint does not allege that Dr. Damron was negligent in communicating with Dr. Voltura, either by failing to copy the report to her or otherwise. ***Id.***

In addition, Plaintiff's First Amended Complaint alleges that "[a]s a consequence of the apparent failure by St. Vincent ***through an administrative inadequacy*** to forward the radiology report on to Dr. Voltura, Mr. Vaughan was treated for a diverticular abscess with antibiotics, allowing the neoplasm to continue to grow." ***Id.*** (emphasis added). This allegation does not assert that Dr.

Damron was negligent in communicating with Dr. Voltura, and instead focuses on an "administrative inadequacy." Accordingly, Plaintiff's Complaint does not establish the basis for a claim of vicarious liability relating to Dr. Damron or provide St. Vincent with notice of such a claim. Under Rule 1-008 NMRA 2010, Plaintiff's failure to plead negligence by Dr. Damron is fatal to his alleged intent to assert a vicarious liability claim against the hospital based on Dr. Damron's alleged acts or omissions.

Plaintiff's failure to assert allegations of actual or apparent agency is also fatal to his proposed agency claim. Plaintiff's Complaint does not allege that Dr. Damron was an employee or agent of St. Vincent in August of 2002. **RP 27-28.** Plaintiff claims that he was not required to assert agency allegations in the Complaint because under *Houghland v. Grant*, 119 N.M. 422, 891 P.2d 563 (Ct. App. 1995), the hospital is automatically liable for all care provided by hospital-based physicians. **Brief in Chief at 31-34.** Plaintiff's reliance on *Houghland* is misplaced for several reasons.

First, *Houghland* did not involve or address pleading requirements. Rather, the Court identified the elements of an apparent agency claim that must be established for purposes of summary judgment. ***Houghland v. Grant*, 119 N.M. 422, 425, 891 P.2d 563, 566 (Ct. App. 1995).** Although the Court determined that a patient need not investigate a physician's employment status to sustain a claim of

apparent agency, the opinion does not state that a plaintiff does not need to assert allegations of actual or apparent agency in a complaint. ***Id.*** The case certainly did not supercede the notice requirements of Rule 1-008 NMRA 2009. ***See id.***

Second, Plaintiff fails to acknowledge that he did not assert *any* vicarious liability allegations in his complaint. **RP 1-2, 27-28; Brief in Chief at 31-34.** Accordingly, even if Plaintiff's interpretation of *Houghland* is correct, which St. Vincent denies, the case only involves apparent agency. *Houghland* does not address vicarious liability claims in general or support a claim that a plaintiff is not required to allege, at the very least, that the purported agent was negligent.

Third, *Houghland* does not provide that a hospital is automatically liable for all care that is provided by "hospital-based physicians." In *Houghland,* this Court considered two elements in evaluating whether a plaintiff had met the elements of apparent agency in relation to an emergency department physician.[5] ***See Houghland*, 119 N.M. at 428, 891 P.2d at 569.** The Court first examined whether the hospital had engaged in conduct that led to the creation of an apparent agency relationship, and then evaluated whether the plaintiff justifiably relied on that relationship. ***See id.*; *see also* NM UJI 13-1120B NMRA 2010** (a hospital is

[5] *Houghland* specifically applied to emergency department physicians. St. Vincent disputes that the doctrine applies to other types of physicians, such as radiologists, but has included this discussion for the purpose of establishing that Plaintiff's complaint fails to meet the requirements of the doctrine regardless of whether it is applicable.

vicariously liable for the negligence of non-employee physicians when, through its conduct, it creates the appearance that it is the provider of the services to the public). Thus, a plaintiff must establish specific criteria to recover against a hospital for the alleged negligence of a non-employee physician under a theory of vicarious liability. Plaintiff's claim that such liability is automatic, and that he is therefore not required to provide the hospital with notice of the claim, is inconsistent with New Mexico law. **Brief in Chief at 34.**

Fourth, although New Mexico appellate courts have not addressed whether a plaintiff must assert vicarious liability allegations in a complaint, courts in other states have determined that a plaintiff must do so. In *Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795 (Iowa 1994), the plaintiffs brought a medical negligence action against the treating physician, the hospital where treatment occurred and the municipality that owned the hospital. The plaintiffs' complaint alleged two causes of action, one based upon the negligence of the treating physician and the other asserting negligence claims against hospital personnel. Plaintiffs did not assert an allegation of vicarious liability against the hospital in relation to the alleged acts of the treating physician. Plaintiffs took the position that "a reasonable person reading the petition as a whole would surely be on notice that the litigation sought to hold the hospital liable for the negligence of the [treating physician]." ***Biddle,* 518 N.W.2d at 797.** The Court responded:

> Even our liberal notice pleading rules require a simple statement of the prima facie elements of a claim. ***Stessman v. American Black Hawk Broadcasting Co.***, 416 N.W.2d 685, 686 (Iowa 1987). A claim of vicarious liability under the doctrine of respondeat superior rests on two elements: proof of an employer/employee relationship, and proof that the injury occurred within the scope of that employment.

Biddle cited two cases in support of the court's reasoning on the pleading issue. In *Stein v. Baum*, 232 N.E.2d 96 (Ill. App. 1967), the plaintiff alleged fraudulent concealment against both the treating physician and a hospital. The fraudulent concealment claim was premised on plaintiff's belief that her medical condition was not accurately disclosed by her treating physician. The court dismissed the claim against the hospital on the ground that the plaintiff's complaint failed to allege the existence of an agency relationship between the doctor and hospital. ***Stein*, 232 N.E.2d at 99.**

The *Biddle* decision also relied upon *Emory Univ. v. Porter*, 120 S.E.2d 668 (Ga. App. 1961). In that case, Plaintiff asserted a products liability claim based upon the treating physician and the defendant hospital's use of a defective incubator device. The complaint clearly alleged that the incubator was in "absolute manual control" of the defendant physician but did not allege that the defendant physician was an agent or employee of the defendant hospital. ***Emory Univ.*, 120 S.E.2d at 669.** The court determined that "properly construed, on general demurrer the pleadings must be construed as showing that he was not such an agent." ***Id.***

In accordance with Rule 1-008 NMRA 2010, *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1990), *Houghland v. Grant*, 119 N.M. 422, 425, 891 P.2d 563, 566 (Ct. App. 1995), and the decisions discussed above, Plaintiff was required to assert allegations of agency or vicarious liability in his complaint if he intended to recover damages from the hospital in relation to the alleged acts or omissions of Dr. Damron. Plaintiff's Complaint does not assert that Dr. Damron was negligent, much less allegations of agency in relation to the care that he provided. Accordingly, for the four years that this case has been pending, St. Vincent did not have notice of Plaintiff's alleged intent to assert a vicarious liability claim pertaining to Dr. Damron. Because Plaintiff neither asserted a vicarious liability claim nor provided the hospital with notice of such a claim, the entry of summary judgment was proper and should be affirmed.

C. The district court properly denied Plaintiff's request for leave to amend his Complaint to assert a vicarious liability claim regarding the independent contractor radiologist.

At the February 25, 2010 hearing on St. Vincent's Motion for Summary Judgment, the Court ruled that Plaintiff was denied leave to amend his complaint to assert a vicarious liability claim relating to Dr. Damron due to the fact that more than four years had elapsed since the initial complaint was filed. **February 25, 2010 Tr. at 34; RP 363.** As this Court noted in the Notice of Proposed Summary Disposition, it is within the trial court's discretion to allow or refuse to allow

amendment of pleadings. **Notice of Proposed Summary Disposition at 10** (*citing Schmitz v. Smentowski*, 109 N.M. 386, 389-90, 785 P.2d 726, 729-30 (1990)). In this case, the trial court's denial of Plaintiff's request was proper and should be affirmed.

Plaintiff's proposed vicarious liability claim was barred by Rule 1-015 NMRA 2010. Rule 1-015 permits the amendment of pleadings "when justice so requires." ***See* Rule 1-015 NMRA 2010**. This provision, in so far as it relates to notions of prejudice and fairness, is related to due process and the notice requirements of Rule 1-008, discussed above. ***See Schmitz,* 109 NM at 392, 785 P.2d at 733.** Amendment should not be permitted when it would unfairly prejudice the opposing party. ***See id.* at 390, 785 P.2d at 730.**

In *Lovato v. Crawford & Co.*, 2003-NMCA-088, 73 P.3d 246, the New Mexico Court of Appeals held that amendments to pleadings should not be allowed when the motion is unduly delayed or when amendment would unfairly prejudice the non-movant. ***Lovato* at ¶ 6, 73 P.3d at 250.** *Lovato* is similar to this case in several respects. In *Lovato*, Plaintiffs initially filed their complaint alleging multiple causes of action based on theories of negligence. Prior to trial, plaintiffs attempted to assert new causes of action sounding in breach of contract and bad faith. Plaintiffs asserted that these theories were not "new," as they had been raised in response to defendant's motion for summary judgment. ***Lovato* at ¶15,**

73 P.3d at 251. The court denied Plaintiffs leave to amend their complaint, stating that that the "mere mention" of the cause of action, with no accompanying facts to support the theory, was insufficient notice for the defendant to conduct discovery or prepare a trial defense. ***Lovato* at ¶18, 73 P.3d at 252.** The trial court's denial of the motion to amend was affirmed. ***See id.; see also Roark v. Farmers Group, Inc.*, 2007-NMCA-074, 162 P.3d 896** (motion for leave to amend complaint properly denied when filed 20 months after filing of the original complaint).

In this case, Plaintiff waited almost four years to attempt to assert a vicarious liability claim against St. Vincent. **RP 1, 114-118.** Because Plaintiff failed to assert a vicarious liability claim or give St. Vincent timely notice of such a claim, St. Vincent conducted discovery and retained experts to testify regarding Plaintiff's claim of "inadministrative inadequacy." **RP 85-92.** It would have been unfairly prejudicial for the court to have required St. Vincent to conduct discovery and retain experts to address an entirely new theory of liability more than 45 months after the complaint was filed. Rule 1-015 does not permit such a result.

Plaintiff's proposed vicarious liability claim was also barred by the doctrine of laches. The equitable defense of laches bars a claim when "there has been an unexplainable delay of such duration in asserting a claim as to render enforcement of such claim inequitable." ***Village of Wagon Mound v. Mora Trust*, 2003-**

NMCA-035, ¶ 35, 62 P.3d 1255. The elements of laches include: 1) conduct on the part of another which forms the basis for the litigation in question; 2) delay in the assertion of the complaining party's rights; 3) lack of knowledge or notice on the part of the defendant that the complaining party would assert such rights; and 4) injury or prejudice to the defendant in the event relief is accorded to the complaining party or the suit is not barred. ***See id.***

In this case, all of the elements of laches were met. Plaintiff's Complaint relates to care that he received at St. Vincent in August of 2002, more than eight years ago. **RP 1.** Plaintiff offered no justification for his 45 month delay in asserting a vicarious liability claim. **RP 114-119.** Plaintiff simply let the statute of limitations expire on any potential claim against Dr. Voltura, Dr. Wilt, and Dr. Damron, and realized that he had no expert testimony to support his long-standing allegation of "administrative inadequacy." **See NMSA 1978 § 41-5-13** ("[n]o claim for malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred."). It was for those reasons, rather than discovery of any new facts, that Plaintiff belatedly sought to assert a vicarious liability claim against St. Vincent. Plaintiff's lack of action does not warrant the belated amendment of his complaint. ***See Bonanni v. Starlight Arrow Publishers, Inc.,*** **133A.D.2d 585 (N.Y. 1st Dept. 1990)** (leave to assert new cause of action denied following four year period of inactivity).

Moreover, as discussed above, St. Vincent had no notice of a vicarious liability claim during the four years that this case was pending. As a result of the delay and the length of time that had passed, critical witnesses, including Dr. Damron and Dr. Wilt, are unlikely to recall any of the events that occurred during Mr. Vaughan's August 2002 hospitalization or any of the circumstances surrounding the radiology report at issue. This testimony would have been critical to St. Vincent's ability to defend a vicarious liability claim. If Plaintiff had asserted his claim in a timely manner, St. Vincent would have deposed these witnesses years ago, when they would have been more likely to recall the circumstances surrounding their involvement in Mr. Vaughan's care. Thus, Plaintiff's failure to assert the claim in a timely manner effectively denied St. Vincent an opportunity to present a complete defense to the claim.

Plaintiff's delay also caused St. Vincent to incur costs and expenses defending against the claim that Plaintiff has asserted for the past four years rather than his proposed new claim. As the district court acknowledged, Plaintiff's claims were a moving target for St. Vincent. **February 25, 2010 Transcript at 34.** The Rules of Civil Procedure and the doctrine of laches are designed to prevent such a result, especially when the 45 month delay resulted from Plaintiff's unjustified and inexcusable delay.

CONCLUSION

Plaintiff failed to provide expert testimony in support of the "administrative inadequacy" claim asserted in his Complaint for Medical Negligence and failed to provide St. Vincent with notice of a claim regarding the alleged acts or omissions of Dr. Damron as required by New Mexico law. Plaintiff failed to seek leave to amend his complaint to assert a vicarious liability claim until almost four years after he filed his complaint. Accordingly, the trial court's entry of summary judgment and denial of leave to amend was proper and should be affirmed.

Respectfully submitted,

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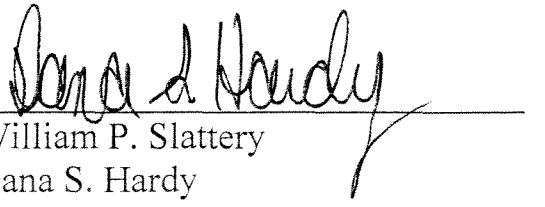

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief was sent by first-class mail, postage prepaid, on this 22nd day of December 2010 to:

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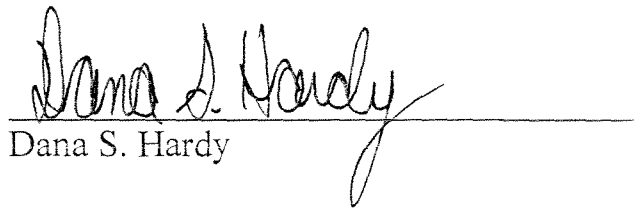

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