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NEW YORK COURT OF APPEALS CASE COMPILATIONS: N.X. v. CABRINI MEDICAL CENTER

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*N.X. V. CABRINI MEDICAL CENTER*¹
(decided February 14, 2002)

I. SYNOPSIS

The New York Court of Appeals unanimously upheld summary judgment against a vicarious liability cause of action. The court held the defendant was not vicariously liable for a doctor's sexual assault because the act was not in furtherance of the defendant's business and it was not within the scope of the doctor's employment.² The court also reversed summary judgment holding that the defendant may be negligent because a hospital staff member has a duty to protect a patient from a third person if she knew or should have known that there was a reasonably foreseeable risk of harm to the patient under the circumstances.³

II. BACKGROUND

A. Facts

N.X. underwent surgery for genital warts at Cabrini Medical Center and was placed in a recovery room while still under anesthesia.⁴ The nurses, who had been taking care of N.X., were monitoring another patient in an adjacent bed when Dr. Andrea Favara entered the room wearing hospital scrubs and identification.⁵ Dr. Favara proceeded directly to N.X.'s bed; however, he was not one of the physicians listed on her chart.⁶

N.X. woke to find Dr. Favara pushing up her hospital gown and ordering her to open her legs.⁷ She claimed that Dr. Favara then placed his fingers inside her vagina and anus.⁸ N.X. repeatedly asked him to stop, but Dr. Favara did not remove his fingers

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1. 97 N.Y.2d 247 (2002).
 2. *Id.* at 251.
 3. *Id.* at 255.
 4. *N.X.* 97 N.Y.2d at 250.
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*

until her third plea. He then attempted to quickly leave the room, but was intercepted by the nurses.⁹

Despite their close proximity to N.X., the nurses did not admit to seeing or hearing the interaction between the doctor and the plaintiff.¹⁰ When N.X. complained to the nurses about the assault the head nurse questioned the doctor about it.¹¹ Upon questioning, the doctor admitted to examining the plaintiff without having a female witness present, as was required by hospital rules.¹² Dr. Favara was immediately suspended from treating patients and was terminated after an investigation.¹³

B. Procedural History

N.X. sued Dr. Favara and Cabrini Medical Center (Cabrini) in the Supreme Court of New York County claiming that Cabrini was both negligent in failing to protect her, and vicariously liable for Dr. Favara's conduct.¹⁴

Cabrini filed a motion for summary judgment on two grounds. First, the hospital asserted that the negligence cause of action failed for lack of evidence and second, vicarious liability could not be established because Dr. Favara's conduct was not within the scope of his employment.¹⁵

In opposing Cabrini's summary judgment motion, the plaintiff argued that there were several unsettled factual issues. A trial was necessary to determine whether Cabrini fulfilled its duty to protect the patient and whether Dr. Favara was acting within the scope of his employment.¹⁶ In support of her position, the plaintiff submitted an affidavit from Dr. G.P. Carrera stating that Cabrini had a "heightened responsibility" to protect the plaintiff since she was under anesthesia.¹⁷ This higher duty required the nurses in the

9. *N.X.*, 97 N.Y.2d at 250.

10. *Id.*

11. *Id.*

12. *Id.*

13. *N.X.*, 97 N.Y.2d at 250.

14. *N.X. v. Cabrini Medical Center*, 719 N.Y.S.2d 60, 62 (N.Y. App. Div., 1st Dept. 2001).

15. *Id.*

16. *Id.*

17. *N.X.*, 719 N.Y.S.2d at 60.

room to notice Dr. Favara, question his intentions, and observe his interaction with the plaintiff.¹⁸

The Supreme Court of New York County determined that summary judgment was inappropriate on both the negligence and vicarious liability claims.¹⁹ The court held that there was an issue of fact as to whether the defendant owed the plaintiff a higher responsibility due to her sedated state.²⁰ The court also held that there was a question of fact as to whether Dr. Favara's actions were within the scope of his employment.²¹ Additionally, the court dismissed the plaintiff's claim that Cabrini was negligent in hiring Dr. Favara because he was hired following a complete screening by the hospital's hiring committee.²²

Defendant appealed the supreme court's decision to the New York Appellate Division, First Department, which granted summary judgment to the defendant on both causes of action.²³

The appellate division held that Cabrini was not vicariously liable for Dr. Favara's actions.²⁴ In order to hold an employer vicariously liable, the plaintiff must show that the employee committed the act in furtherance of the employer's business and that the act was within the scope of his employment.²⁵ When a hospital employee sexually assaults a patient, his conduct is neither deemed to further the employer's business, nor is it within the scope of his employment. Therefore, a sexual assault by a hospital employee cannot be the basis for vicarious liability.²⁶

In support of its decision, the appellate division cited *Judith M. v. Sisters of Charity House*, 93 N.Y.2d 932 (1997), in which the court held that a hospital was not vicariously liable to a patient who was sexually assaulted by an orderly assigned to bathe her.²⁷ The court in *Judith M.* determined that the orderly was not acting in furtherance of the employer's business, and was not within the scope of his

18. N.X., 719 N.Y.S.2d at 60.

19. *Id.*

20. *Id.*

21. *Id.* at 62-3.

22. *Id.* at 63.

23. N.X., 719 N.Y.S.2d at 60.

24. N.X., 719 N.Y.S.2d at 63.

25. *Id.*

26. *Id.*

27. *Id.* at 63-64.

employment because his actions were purely for personal gratification.²⁸ The appellate division found that in the present case, Dr. Favara did not act in furtherance of Cabrini's business when he sexually assaulted the plaintiff.²⁹ In fact, the Court found that there was a "more compelling basis" to dismiss the vicarious liability claim against Cabrini because, unlike *Judith M.*, where the orderly who committed the sexual assault was assigned to bathe the patient; Dr. Favara was not assigned to the plaintiff, but assaulted her on his own.³⁰

The appellate division also held that Cabrini was not negligent for failing to prevent Dr. Favara's assault.³¹ The court determined that the hospital did not have a "heightened responsibility", as the supreme court posited, but rather had a duty to use reasonable care and diligence to protect a patient from third persons as long as the harm was reasonably foreseeable.³² The appellate division did not consider Dr. Favara's assault to be reasonably foreseeable, because the possibility that a doctor with no history of sexual misconduct would sexually assault a patient was too remote to be considered legally foreseeable; nor was the assault within "a class of foreseeable hazards."³³ The court also found that the plaintiff did not prove that Cabrini was negligent in failing to supervise Dr. Favara.³⁴ Specifically, the plaintiff did not show that Cabrini knew, or should have known about the employee's tendency to commit an assault.³⁵

Justice Saxe, in a dissenting opinion, argued that Cabrini should have been denied summary judgment because both issues raised factual questions.³⁶ With regard to the issue of vicarious liability, the dissent argued that even though Dr. Favara was not assigned to take care of plaintiff, the question of whether he was actually unauthorized to perform a pelvic exam was not addressed.³⁷ If the doctor was unauthorized to perform a pelvic exam

28. N.X., 719 N.Y.S.2d at 63-4.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 65.

33. *Id.*

34. N.X., 719 N.Y.S.2d at 65.

35. *Id.* at 65-66.

36. *Id.* at 69.

37. *Id.* at 75.

then he was acting outside the scope of his employment. However, if he were authorized to perform a pelvic exam then he was within the scope of his employment, and Cabrini could be vicariously liable.³⁸ He argued that this determination was necessary before granting a motion for summary judgment.

With regard to the issue of Cabrini's negligence in protecting the plaintiff, the dissent argued that, "the question of whether an injury is foreseeable is ordinarily for the jury to decide."³⁹ Specifically, the jury had to consider what the nurses knew or should have known at the time.⁴⁰

The plaintiff appealed the appellate court's decision to the New York Court of Appeals.⁴¹ The New York Court of Appeals considered whether summary judgment should be upheld for both the vicarious liability and negligence claims.⁴² Specifically, the court had to determine whether Cabrini was vicariously liable to the plaintiff for Dr. Favara's assault and whether Cabrini was negligent in failing to protect the plaintiff.⁴³

III. DISCUSSION

A. Vicarious Liability

The court of appeals first considered plaintiff's claim that Cabrini was vicariously liable for Dr. Favara's actions. Under the doctrine of *respondeat superior* "an employer is vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of the employment."⁴⁴ The general rule is that a sexual assault performed by a hospital employee is not in furtherance of the hospital's business, nor is it within the scope of the doctor's employment, because it is committed solely for personal motives.⁴⁵ The court of appeals relied on the appellate division's analysis of the present

38. N.X., 719 N.Y.S.2d at 75.

39. *Id.*

40. *Id.* at 71.

41. *N.X. v. Cabrini Medical Center*, 97 N.Y.2d 247 (2002).

42. *Id.* at 251.

43. *Id.*

44. N.X., 97 N.Y.2d at 251.

45. *Id.*

case in light of *Judith M. v. Sisters of Charity Hospital* and held that Cabrini was not vicariously liable.⁴⁶

B. Negligence

The court next considered plaintiff's claim that Cabrini was liable for negligence because its nurses did not protect her from the assault.⁴⁷ The court found that a hospital has a duty to safeguard the welfare of its patients from harm by third persons as long as the harm was reasonably foreseeable.⁴⁸

The court established that Dr. Favara's conduct was reasonably foreseeable as a matter of law. It disagreed with defendant's argument that because Dr. Favara had no known history of sexual assault and the misconduct was readily observable by the nurses in the room, his conduct was not reasonably foreseeable.⁴⁹ The court noted that Dr. Favara's presence in the plaintiff's room should have alerted the nurses that the plaintiff could potentially be in danger of imminent harm for a number of reasons.⁵⁰ Nurse Reyes admitted that residents are not allowed in the recovery room, that she knew the identity of all of the plaintiff's doctors, and that she saw Dr. Favara enter the room and go to the plaintiff.⁵¹

The court also questioned the nurses' credibility because they claimed to be unaware of Dr. Favara's actions despite their close proximity to the plaintiff.⁵² The court noted that the entire room only contained four beds, one of which was occupied by the plaintiff and another where the nurses stood.⁵³ One of the nurses was only three feet away from plaintiff's bed, therefore "easily within earshot."⁵⁴ Another nurse had initially admitted to hearing the conversation between Dr. Favara and plaintiff, but later claimed that she had not.⁵⁵

46. N.X., 97 N.Y.2d at 252.

47. *Id.*

48. *Id.* at 253.

49. N.X., 97 N.Y.2d at 252.

50. *Id.*

51. *Id.* at 252-253.

52. *Id.* at 254.

53. *Id.*

54. *Id.*

55. N.X., 97 N.Y.2d at 252.

These factors led the court to determine that it was likely for a jury to find that the nurses disregarded readily observable factors that would have alerted them to Dr. Favara's actions.⁵⁶ The court specified that its holding did not require nurses to interrogate physicians or to monitor interaction between the patient and physician.⁵⁷ It did, however, require a common sense approach triggering in hospital staffs a duty to protect the patient when "observations and information known to or readily perceivable" indicate a risk of harm to a patient under the circumstances."⁵⁸

IV. CONCLUSION

In *N.X. v. Cabrini Medical Center* the New York Court of Appeals held that the hospital was not vicariously liable for Dr. Favara's actions because his sexual assault was neither in furtherance of Cabrini's business, nor was it within the scope of his duties.⁵⁹ The court also held that whether the hospital was negligent in protecting the plaintiff raises questions of fact, and thereby denied Cabrini's motion for summary judgement on this issue.⁶⁰ The court remanded the negligence claim to the supreme court for further proceedings.⁶¹

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56. *N.X.*, 97 N.Y.2d at 252.

57. *Id.* at 255.

58. *Id.*

59. *Id.*

60. *Id.* 252.

61. *Id.*

