739 N.Y.S.2d 348
2002 N.Y. Slip Op. 01325
(Cite as: 97 N.Y.2d 247, 765 N.E.2d 844, 739 N.Y.S.2d 348)

Court of Appeals of New York.

N. X., Appellant,
v.
CABRINI MEDICAL CENTER, Respondent, et al., Defendant.

Feb. 14, 2002.

Patient sued hospital for injuries sustained when she was sexually assaulted by surgical resident, who was hospital employee, while patient was recovering from surgery. The Supreme Court, New York County, Karla Moskowitz, J., granted in part and denied in part hospital's motion for summary judgment, and both parties appealed. The Supreme Court, Appellate Division, modified and affirmed, 280 A.D.2d 34, 719 N.Y.S.2d 60. Patient appealed. The Court of Appeals, Wesley, J., held that: (1) resident's actions were not in furtherance of the business of hospital, or within the scope of his employment, and thus could not form basis for recovery under doctrine of respondeat superior, but (2) fact issues as to whether nurses who were present at time of assault failed to adequately protect patient precluded summary judgment.

Appellate Division order modified, and matter remitted.

West Headnotes

[1] Health k782
198Hk782
(Formerly 204k7 Hospitals)

Actions of physician who improperly touched patient, for purposes of his own sexual gratification, while patient was recovering from surgery, were not in furtherance of the business of hospital which employed physician, or within the scope of his employment, and thus could not form basis for recovery by patient against hospital under doctrine of respondeat superior; physician was not charged with patient's care, and his actions could not be characterized as an "examination," as an internal pelvic examination as contraindicated in light of nature of surgery patient had undergone.

[2] Master and Servant k302(2)
255k302(2)

Under the doctrine of "respondeat superior," an employer may be 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 employment.

[3] Health k782
198Hk782
(Formerly 204k7 Hospitals)

A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives, and thus may not form basis for imposition of liability against hospital under doctrine of respondeat superior.

[4] Principal and Agent k99
308k99

Liability premised on apparent authority, usually raised in a business or contractual dispute context, arises where a third party reasonably relies upon the misrepresentation of an agent's authority through conduct of the principal.

[5] Judgment k185.3(21)
228k185.3(21)

Genuine issue of material fact as to whether nurses who were present in room when patient who was recovering from surgery was sexually assaulted by surgical resident who was employed by hospital had failed to adequately protect patient, precluded summary judgment in patient's action against hospital for breach of duty to safeguard her welfare; resident was not charged with patient's care, and unusual circumstances surrounding his appearance in recovery room should have alerted nurses that patient was in jeopardy of harm.

[6] Health k656
198Hk656
(Formerly 204k7 Hospitals)

A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety; however, this sliding scale of duty is limited, and does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance.

[7] Health k656
198Hk656
(Formerly 204k7 Hospitals)

As with any liability in tort, the scope of a hospital's duty to safeguard the welfare of its patients is circumscribed by those risks which are reasonably foreseeable.

[8] Health k656
198Hk656
(Formerly 204k7 Hospitals)

Observations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger duty on part of hospital to protect the patient's welfare.

*****349 *248 **845** Kurzman Karelsen & Frank, LLP, New York City (**Charles Palella of counsel**), for appellant.

***249** Heidell Pittoni Murphy & Bach, LLP, New York City (**Daniel S. Ratner of counsel**), for respondent.

OPINION OF THE COURT

WESLEY, J.

This troubling case involves an egregious abuse of the physician-patient relationship--the conscious use of a doctor's *****350 **846** professional position to exploit a patient's vulnerabilities for self-gratification through sexual contact. Plaintiff N. X., a young woman recovering from vaginal surgery at Cabrini Medical Center, was sexually assaulted by a surgical resident employed by the hospital. There is no dispute about the assault or the resident's liability. However, we are called upon to determine whether Cabrini may be liable here under a theory ***250** of vicarious liability or for any negligence in its duty to protect plaintiff.

After undergoing a laser ablation of genital warts, plaintiff--still under the effects of anesthesia--was placed in the Phase I recovery room, a small, four-bed ambulatory surgical unit. Nurse Imelda Reyes, accompanied by another nurse, admitted plaintiff to the unit and monitored her vital signs. Minutes later, the nurses turned their attention to a second patient who had been placed on an adjacent bed just two feet away. They were soon joined by Nurse Gamboa, their supervisor. Although curtains existed between each patient area, the curtain between plaintiff and the second patient was not drawn. The remaining two beds in the unit were unoccupied.

Shortly thereafter, Dr. Andrea Favara, a surgical resident wearing Cabrini scrubs and identification, entered the recovery room and headed for plaintiff's bed. Favara was not one of the physicians listed on plaintiff's chart; none of the nurses knew him. According to plaintiff, she awoke to find Favara pulling up her hospital gown, pushing her thighs apart, and ordering her to open her legs. He then placed his fingers inside her vagina and anus. Plaintiff tried to sit up and cover herself with the gown, and repeatedly asked him to stop. Upon her third plea, he removed his fingers, causing her great pain. As the doctor was hastily leaving the recovery room, the nurses intercepted him and introduced themselves. Although all of the nurses were in close proximity to plaintiff's bed and appear to have been generally aware of Favara's presence, they denied seeing his interaction with plaintiff or hearing anything. After plaintiff complained to the nurses about what had taken place, the supervising nurse confronted Favara, who admitted he had "examined" plaintiff without the presence of a female witness as required by hospital rules. Following an investigation, Cabrini terminated Favara.

Plaintiff commenced this action asserting several causes of action against Cabrini, including negligent hiring, negligence in failing to safeguard her adequately and medical malpractice. She also claimed that Cabrini was vicariously liable for Favara's conduct, alleging that he was acting within the scope of his employment or under the cloak of apparent authority. Insofar as relevant here, Supreme Court concluded that questions of fact precluded defendant's motion for summary judgment ***251** with respect to the failure to safeguard claim and whether the assault was within Favara's scope of employment. [FN1]

> FN1. The negligent hiring claim was withdrawn and plaintiff's attorney informed the court that the only remaining claims to be considered were those for direct negligence and vicarious liability. A default judgment was entered against Favara.

A divided Appellate Division modified by granting Cabrini's motion in its entirety (280 A.D.2d 34, 719 N.Y.S.2d 60). The majority began its analysis with the assertion that "it is uncontroverted that the nurses were unaware of the assault until after it occurred"

(*id.* at 40, 719 N.Y.S.2d 60). It then reasoned that the direct negligence claim must fail because Favara's misconduct was not foreseeable as a matter of law and liability was further precluded ****847 ***351** by practical and policy considerations underlying the physician-nurse relationship. The Court also dismissed the vicarious liability claims because the doctor was unquestionably acting outside the scope of his authority. Two dissenters disagreed with the majority on both matters. They noted that the majority's holding on the direct negligence cause of action failed to consider the actual foreseeability of harm indicated by " observations the hospital staff could or *should have* made at the time immediately preceding the actual wrongdoing, of things sufficiently unusual or out of the ordinary as to strengthen the possibility of misconduct, in order to warrant some curative action or follow-up" (280 A.D.2d, at 50, 719 N.Y.S.2d 60). We agree, in part, with the dissent and reinstate plaintiff's direct negligence cause of action only.

[1][2][3] We reject plaintiff's assertion that Cabrini is vicariously liable for Favara's misconduct. Under the doctrine of respondeat superior, an employer may be 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 employment (*see, Riviello v. Waldron,* 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278). A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives (*see, Judith M. v. Sisters of Charity Hosp.,* 93 N.Y.2d 932, 933, 693 N.Y.S.2d 67, 715 N.E.2d 95). [FN2] In *Judith M.,* this Court rejected a claim of vicarious liability on similar facts. There, an orderly assigned ***252** to bathe a patient sexually abused her while doing so. We held that the employee "departed from his duties for solely personal motives unrelated to the furtherance of the Hospital's business" (*id.* at 933, 693 N.Y.S.2d 67, 715 N.E.2d 95; *see also, Cornell v. State of New York,* 46 N.Y.2d 1032, 416 N.Y.S.2d 542, 389 N.E.2d 1064, *affg.* 60 A.D.2d 714, 401 N.Y.S.2d 107; *Mataxas v. North Shore Univ. Hosp.,* 211 A.D.2d 762, 621 N.Y.S.2d 683).

> FN2. The medical profession itself recognizes the entirely personal motivation for such conduct (*see,* AMA Council on Ethical & Judicial Affairs, *Sexual Misconduct in the Practice of Medicine,* 266 JAMA 2741, 2742 [1991] ["self-gratification is the only basis for the behavior of physicians who engage in sexual contact with incompetent or unconscious patients"]).

[4] As the Appellate Division majority opinion aptly recognized, this case presents an even more compelling basis for dismissal of the vicarious liability claim than *Judith M.* Unlike the employee in *Judith M.,* who committed a sexual assault while engaged in his assigned duties, Favara was not charged with plaintiff's care. Furthermore, it is conceded that an internal pelvic exam was contraindicated in light of the nature of plaintiff's surgery. Thus, plaintiff's disingenuous attempt to characterize the misconduct as a purported "examination" that was within Favara's hospital duties is of no avail. We refuse to transmogrify Favara's egregious conduct into a medical procedure within the physician's scope of employment. This was a sexual assault that in no way advanced the business of the hospital. [FN3]

> FN3. Plaintiff's reliance on the doctrine of apparent authority is also unavailing. Liability premised on apparent authority, usually raised in a business or contractual dispute context, arises where a third party reasonably relies upon the misrepresentation of an agent's authority through conduct of the principal (*see, Hallock v. State of New York,* 64 N.Y.2d 224, 231, 485 N.Y.S.2d 510, 474 N.E.2d 1178). Plaintiff has made no showing that she relied on any representation by Cabrini with respect to Favara.

*****352 **848** [5] However, we disagree with the Appellate Division's determination that the hospital was entitled to summary judgment on plaintiff's claim that Cabrini's nurses failed to protect plaintiff adequately as she recovered from surgery. To reach this result we need not--and do not-- accept plaintiff's invitation to adopt a rule of "heightened" duty premised on plaintiff's sedated condition that would require nurses in such instances to stop doctors and other health care professionals to ascertain their purpose before allowing them to approach a patient. We conclude, however, that under the settled hospital-patient duty equation there are issues of fact as to whether the nurses actually observed or unreasonably ignored events immediately preceding the misconduct which indicated a risk of imminent harm to plaintiff, triggering the need for protective action.

[6][7] A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety (*see,* ***253** *Morris v. Lenox Hill Hosp.*, 232 A.D.2d 184, 185, 647 N.Y.S.2d 753, *affd. for reasons stated* 90 N.Y.2d 953, 665 N.Y.S.2d 399, 688 N.E.2d 255). This sliding scale of duty is limited, however; it does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance (*see, Killeen v. State of New York*, 66 N.Y.2d 850, 851, 498 N.Y.S.2d 358, 489 N.E.2d 245). As with any liability in tort, the scope of a hospital's duty is circumscribed by those risks which are reasonably foreseeable (*see, Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 727 N.Y.S.2d 7, 750 N.E.2d 1055; *see also, Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 679 N.E.2d 616).

Cabrini regards the sexual assault of a patient by a physician having no known history of sexual misconduct as a risk so remote that, as a matter of law, it can never be reasonably foreseeable. We do not disagree with that general conclusion insofar as it relates to the theoretical and unknown possibility of an attack taking place in the absence of a defendant's prior knowledge of an employee's dangerous propensities (*see, e.g., Cornell v. State of New York, supra* [no hospital liability because risk of sexual assault by attendant with clean record not foreseeable]; *see generally, Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519-520, 429 N.Y.S.2d 606, 407 N.E.2d 451). However, this reasoning should not be used in this case to preclude a hospital's liability for actually observed or readily observable misconduct committed in the very presence of hospital employees. Thus, the question presented here is whether the hospital's nurses had a duty to protect plaintiff once there were acts or events suggesting that an assault or unauthorized "examination" was about to take place--and did take place--in their presence.

In our view, plaintiff has identified several unusual circumstances surrounding Favara's appearance in the recovery room that should have alerted the nurses that plaintiff was in obvious jeopardy of imminent harm. Plaintiff's family physician affirmed that he was familiar with Cabrini's practices and that residents, such as Favara, are seldom called to the recovery room. Nurse Reyes acknowledged that residents were not directly assigned to the recovery room. Her deposition testimony further indicated that she was aware of the identity of all of plaintiff's physicians, and that Favara was not one of those assigned to plaintiff's care. In fact, all of the nurses in the recovery room were unacquainted with Favara. Reyes also admitted that she saw Favara enter the recovery room and proceed directly to plaintiff's bedside. *****353 **849** Moreover, although the nurses maintained that they never saw Favara wear, remove or dispose of any gloves in the recovery room, gloves were available near plaintiff's bed and plaintiff in her affidavit asserted that after the assault, she observed blood on the doctor's gloves.

***254** All of the nurses knew of the hospital's policy requiring the presence of a female staff member during a male physician's pelvic examination of a female patient. Indeed, Cabrini concedes that the result below "might be different if a nurse had observed a violation of [its] policy and failed to intervene" (defendant's brief, at 27). Thus, a factfinder could reasonably conclude that the nurses, who concededly knew that an internal examination was contraindicated for plaintiff, were on notice that an unknown doctor wearing surgical gloves--usually worn for internal examinations--approached plaintiff's bedside ostensibly intent on examining her.

According to plaintiff's testimony, Favara pulled up her gown, ordered her to open her legs and then instructed her to open them wider. She repeatedly asked him to stop as he began the examination. Despite the nurses' assertions that they saw or heard nothing, an additional key question of credibility arises from the inference created by the undisputed close proximity of all of the nurses to plaintiff's bed. The entire recovery room was approximately 18 by 14 feet, and contained four beds, each of which was only about two feet from the adjacent bed; only two of the beds were occupied. The curtain between plaintiff's bed, which was nearest the wall, and that of the second patient was not drawn.

Although her back was turned to plaintiff, Nurse Reyes was only three to four feet from the foot of plaintiff's bed--easily within earshot--as Reyes filled in the second patient's chart. She observed Favara pass her and go to plaintiff's bed. Nurse Gamboa was situated between the second and third beds in the room, facing the patient in the second bed. Given the arrangement of the room, she would also have been facing the first, uncurtained bed, where plaintiff was located. Indeed, Nurse Gamboa admitted that nothing obstructed her view of plaintiff's bed. Notably, at her deposition, Nurse Gamboa initially testified that she had overheard conversation between

plaintiff and Favara while she was at the bedside of the second patient. Finally, there is some disagreement as to the length of time Favara was in the room. Nurse Reyes testified it was less than a minute, although she also claimed she had time to fill in a multiple-entry, seven page chart for the other patient.

In our view, contrary to the Appellate Division majority, this confluence of factors provides a sufficient basis from which a jury could determine that the nurses unreasonably disregarded that which was readily there to be seen and heard, alerting them to the risk of misconduct against plaintiff by Favara, which could have been prevented.

[8] ***255** We emphasize that our holding today does not establish a broader duty than that historically placed upon hospitals to their patients. Our holding does not impose a "gatekeeping" function upon nurses to stop and question physicians, ascertain reasons for their presence, or to stand guard and monitor their interactions with patients. We simply hold that observations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect. This commonsense approach safeguards patients when there is reason to take action for their protection and does not burden the practice of medicine ****850 ***354** or intrude upon the traditional relationship between doctors and nurses (*see, Toth v. Community Hosp. at Glen Cove,* 22 N.Y.2d 255, 265, 292 N.Y.S.2d 440, 239 N.E.2d 368, *rearg. denied* 22 N.Y.2d 973, 295 N.Y.S.2d 1033, 242 N.E.2d 499).

Accordingly, the Appellate Division order should be modified, with costs to plaintiff, by remitting to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, ROSENBLATT and GRAFFEO concur.

Order modified, etc.

739 N.Y.S.2d 348, 97 N.Y.2d 247, 765 N.E.2d 844, 2002 N.Y. Slip Op. 01325