Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY 21 2010

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-431

MAY TERM, 2010

Robyn Levy	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
	}	
Estate of Peter J. McKenna and Linda McKenna	}	DOCKET NO. S0922-07 CnC
		Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Plaintiff in this malpractice and breach of contract action appeals from a summary judgment in favor of defendant Linda McKenna, the wife and part-time administrative assistant of her deceased husband, a psychiatrist who had treated plaintiff. Plaintiff contends the court erred in finding that defendant owed her no duty of care. We affirm.

The material facts are undisputed. Defendant's husband Peter McKenna, a psychiatrist, treated plaintiff from his home office in Essex Junction from approximately May 2003 to June 2005. Defendant Linda McKenna worked in the mornings as a teacher and for her husband in the afternoons, performing various administrative tasks such as scheduling, billing, and filing of patient notes. In October 2003, Dr. McKenna wrote a treatment note indicating that plaintiff had reported a sexual relationship with her former psychiatrist in Washington, D.C. Dr. McKenna expressed concern in the note that plaintiff, a borderline personality, might falsely accuse him of improper sexual advances, and stated that "[s]he is beyond the scope of a solo private practitioner due to her severe borderline traits" and "will need to find an intensive group based program or a community mental health center." Dr McKenna concluded, however, that "[i]n the meantime" he would "schedule [plaintiff] after 1:30 p.m. when [his] wife [was] in the office," noting, "[m]y wife is aware of this situation and has signed below." The signatures of Dr. McKenna and defendant follow, along with defendant's handwritten note stating, "I, Linda[,] am aware of the above situation and will remain in the office during each of [plaintiff's] visits."

Notwithstanding the stated intention in the note, some of plaintiff's appointments thereafter occurred when defendant was not in the office, and plaintiff has indicated that during some sessions Dr. McKenna engaged in certain inappropriate contact, such as hugging, rubbing plaintiff's back, and stroking her hair. Moreover, about a month after the treatment note, Dr. McKenna visited plaintiff at her apartment and commenced a sexual relationship with her that lasted until June 2005. During this time, plaintiff indicates that they met frequently at her apartment, as well as twice at Dr. McKenna's house when defendant was away, and once in a camper.

Dr. McKenna died after the affair came to light, and plaintiff commenced this action against his estate, alleging medical malpractice and sexual assault. Following discovery of the October 2003 treatment note, plaintiff amended the complaint to insert additional counts against defendant of medical malpractice, breach of contract, and premises liability. Defendant moved for summary judgment, alleging that she owed no duty of care to plaintiff, and that the treatment note provided no basis for the claims. The trial court agreed and issued a written decision in June 2009 granting the motion. The court denied plaintiff's subsequent motion for reconsideration and issued a final judgment order in favor of defendant. This appeal followed.

Without clearly dividing her claims, plaintiff asserts that certain material facts remained in dispute and that the trial court erroneously failed to consider defendant's alleged duty as Dr. McKenna's "agent." None of the arguments are persuasive. First, we note that plaintiff does not directly dispute the trial court's conclusion, based on the undisputed evidence, that defendant can not be sued for medical malpractice because she is not a licensed "health care professional," was not engaged in any professional therapeutic relationship with plaintiff, and obviously therefore could not have breached any duty of care arising from that relationship by failing to exercise "[t]he degree of knowledge or skill . . . ordinarily exercised" by such professionals. 12 V.S.A. § 1908(1); see generally Springfield Hydroelectic Co. v. Copp, 172 Vt. 311, 316-17 (2001) (there is no duty of care giving rise to a malpractice claim where defendants do not provide or hold themselves out "as providers of any licensed professional service"). Defendant cites no authority or grounds for extending a duty of professional care to a physician's administrative assistant on an "agency" theory, nor do we find any.

The trial court also correctly found no common law duty inuring to plaintiff's benefit. As the court recognized, the existence of a duty—the first element of common law negligence—is primarily a question of law predicated on a number of factors, including the foreseeability of harm, the relationship of the parties, and the public interest. Endres v. Endres, 2008 VT 124, ¶ 11, 185 Vt. 63; Hamill v. Pawtucket Mut. Ins. Co., 2005 VT 133, ¶ 6, 179 Vt. 250. As noted, defendant had no therapeutic relationship with plaintiff, and there is no basis to conclude that the treatment note gave rise to a duty of care toward plaintiff; it was intended to protect Dr. McKenna from false allegations of professional misconduct, not to protect plaintiff from Dr. McKenna. Although plaintiff asserts that material disputes remain as to plaintiff's knowledge of the risk of harm to plaintiff from Dr. McKenna, there is no claim or evidence that defendant had any knowledge or awareness of the sexual misconduct, or that such misconduct by Dr. McKenna was reasonably foreseeable. Thus, we find no basis to disturb the court's conclusion on the duty of care.

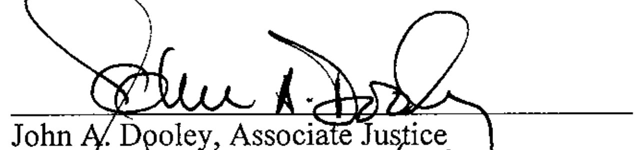
Plaintiff also asserts that the treatment note was in the nature of a contract for her protection by requiring that defendant be present during her appointments with Dr. McKenna. The claim is unavailing. Even if the note could be construed as a contract, plaintiff was obviously not a party to it, nor—as noted—is there any evidence that it was intended by defendant or Dr. McKenna to benefit plaintiff. See McMurphy v. State, 171 Vt. 9, 16 (2000) (whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, depends on the intent of the original contracting parties, who must intend to directly benefit the third party). It is also worth noting with respect to both the negligence and contract claims that the principal misconduct by Dr. McKenna occurred outside the office; thus, even if it could be said that defendant breached a common law or contractual duty to be present during the appointments, there is no evidentiary basis to conclude that the breach caused the harm. O'Connell v. Killington, Ltd., 164 Vt. 73, 76 (1995) (negligence requires a legal duty, breach of the duty, and that "such breach be the proximate cause of plaintiff's harm"); A. Brown, Inc. v. Vt. Justin Corp., 148 Vt. 192, 195-6 (1987) (direct damages from breach of contract must

naturally flow from breach itself, consequential damages must have been within specific contemplation of parties). Moreover, Dr. McKenna scheduled plaintiff's appointments and scheduled them in the morning when defendant was not present.

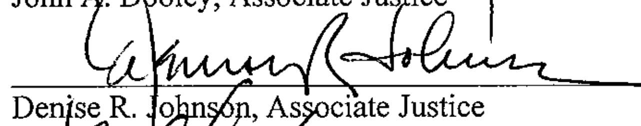
Plaintiff also asserts that material facts remained in dispute as to defendant's liability "as agent and premises owner." Even if agency principles somehow applied in this case, there is no basis for liability. While in some circumstances a principal may be held vicariously liable for the actions of an agent in the service of the principal, Sweet v. Roy, 173 Vt. 418, 430-33 (2002), plaintiff cites no authority for holding an agent liable for the principal's misconduct, particularly where there is no evidence that the agent had any awareness of the misconduct or sought to facilitate it. The trial court also correctly found virtually no basis for a claim of "premises liability," noting that there was nothing unsafe about the premises itself, and no evidence that defendant had any awareness of the risk of harm posed by her husband. Accordingly, we find no basis to disturb the judgment.

Affirmed.

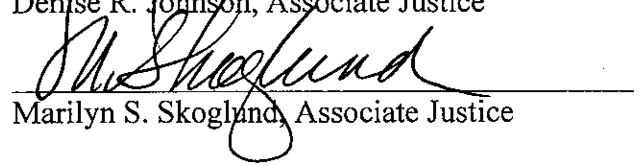
BY THE COURT:



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice