Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21195
O/kmg

_____AD3d_____ Argued - October 24, 2008

FRED T. SANTUCCI, J.P.
JOSEPH COVELLO
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

2007-10211 DECISION & ORDER

Josephine Schacherbauer, et al., respondents,
v University Associates in Obstetrics &
Gynecology, P.C., et al., appellants, et al., defendants.

(Index No. 2445/05)

Kelly, Rode & Kelly, LLP, Riverhead, N.Y. (Shawn P. Kelly, Camille Nieves, and John W. Hoefling of counsel), for appellants.

Bauman, Kunkis & Ocasio-Douglas, P.C. (Arnold E. DiJoseph, P.C., New York, N.Y., of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the defendants University Associates in Obstetrics & Gynecology, P.C., Michael Lydic, and Richard Bronson, appeal from an order of the Supreme Court, Suffolk County (Cohalan, J.), dated September 20, 2007, which denied their motion for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with costs.

While it may be true that the phlebotomist who performed the lab work upon the plaintiff Josephine Schacherbauer (hereinafter the injured plaintiff) was not an actual employee of the appellants, that circumstance alone is not dispositive of the issue of liability of the defendant University Associates in Obstetrics & Gynecology, P.C. (hereinafter University Associates) (*see Hill v St. Clare's Hosp*., 67 NY2d 72, 79). Even in the absence of an employment relationship between

the phlebotomist and University Associates, the latter may still be vicariously liable for the phlebotomist's alleged negligence if the phlebotomist acted as its agent or if University Associates exercised control over her (*id.* at 80; *see Mduba v Benedictine Hosp*., 52 AD2d 450, 452). The appellants adduced no evidence to negate the possibility that the phlebotomist who performed the procedure upon the injured plaintiff was in fact their agent or that she acted under their control (*see Mendez v White*, 40 AD3d 1057, 1058).

Moreover, the appellants' proof left unresolved triable issues of fact as to whether the plaintiff reasonably believed that the phlebotomist had been provided by University Associates and was "ostensibly acting as its agent in providing care to the plaintiff" (*id.* at 1058; *see Hill v St. Clare's Hosp*., 67 NY2d at 80; *cf. Soltis v State of New York*, 172 AD2d 919). Therefore, the appellants failed to establish their prima facie entitlement to judgment as a matter of law, which requires the denial of their motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp*., 68 NY2d 320, 324).

SANTUCCI, J.P., COVELLO, LEVENTHAL and BELEN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court