SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

EVELINA TOTINO and MARIO TOTINO,

Plaintiffs,

- against -

NALESSA MAY LEE, D.D.S. and
FRONT STREET DENTAL SERVICES, P.C.,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 15121/10
Motion Seq. No.: 01
Motion Date: 11/17/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Front Street Dental Services, P.C. ("Front Street") moves, pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiffs' Verified Complaint insofar as asserted against it. Plaintiffs oppose the motion.

Plaintiffs in the instant action seek to recover for dental malpractice, lack of informed consent and loss of consortium. In their Verified Complaint, plaintiffs allege that plaintiff Evelina Totino sought dental services at defendants' medical office from January 29, 2009 through October 14, 2009, that defendants acted negligently in caring for plaintiff Evelina Totino

and that plaintiff Evelina Totino suffered pain, suffering and serious permanent injury as a result. Plaintiffs also allege in their Verified Complaint that defendants failed to adequately advise plaintiff Evelina Totino of the alternatives and the reasonably foreseeable risks and complications and, had they done so, plaintiff Evelina Totino, as a reasonably prudent person, would not have undergone the treatment. Finally, plaintiff Mario Totino seeks to recover for loss of consortium.

Defendant Front Street seeks summary judgment dismissing the Verified Complaint against it on the grounds that the treating doctor, defendant Dr. Nalessa May Lee, D.D.S. ("Dr. Lee"), was an independent contractor and that she was solely responsible for obtaining plaintiff Evelina Totino's informed consent.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *See Sheppard-Mobley v. King*, 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept. 2004), *aff'd as mod.* 4 N.Y.3d 627, 797 N.Y.S.2d 403 (2005) *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v. King, supra* at 74; *Alvarez v. Prospect Hosp., supra*; *Winegrad v. New York University Medical Center, supra.* Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *See Alvarez v. Prospect Hosp., supra* at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable

inference. *See Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 824 N.Y.S.2d 166 (2d Dept. 2006), *citing Secof v. Greens Condominium*, 158 A.D.2d 591, 551 N.Y.S.2d 563 (2d Dept. 1990).

Ordinarily, an employer like a hospital or clinic is liable for the negligent acts of its employees. *See Kavanaugh v. Nussbaum*, 71 N.Y.2d 535, 528 N.Y.S.2d 8 (1998). However, an employer who hires an independent contractor is generally not liable for his acts. *See Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 584 N.Y.S.2d 765 (1992). Nevertheless, "[t]he law is well settled that apparent agency may be found when [a practice] 'represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent.' " *Contu v. Albert*, 18 A.D.3d 692, 795 N.Y.S.2d 740 (2d Dept. 2005), *quoting Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 499 N.Y.S.2d 904 (1986). "The Court of Appeals first recognized in *Hannon v. Siegel-Cooper Co.*, 167 N.Y. 244 (1901), the doctrine of apparent or ostensible agency (sometimes referred to as agency by estoppel or by holding out) as a predicate for malpractice liability." *Santiago v. Archer*, 136 A.D.2d 690, 524 N.Y.S.2d 106 (2d Dept.1988). "This doctrine provides, in sum, that a plaintiff has a right to expect not only that the person upon whom he or she relies for special services will hire skillful employees, but also that if the servant is guilty of any malpractice, the person upon whom the plaintiff relied in the first instance will be answerable therefor in damages." *Santiago v. Archer*, *supra* at 691, *citing Hannon v. Siegel-Cooper Co.*, *supra* at 247; *Hill v. St. Clare's Hosp.*, *supra*. "Thus, where a hospital or clinic holds out an independent contractor to be its agent or employee, it may be stopped from asserting such independent contractor status if the patient has relied on that representation." *Nilsen v. Franklin Dental Health*, __ N.Y.S.2d __, 34 Misc.3d 1 (2d Dept.

App. Term 2011), citing *Hill v. St. Clare's Hosp.*, *supra*. This is because "[p]atients seeking medical help and the plaintiffs seeking redress for alleged malpractice should not be bound by secret limitations contained in private contracts." *Santiago v. Archer*, *supra* at 691, *citing Mduba v. Benedictine Hosp.*, 52 A.D.2d 450, 384 N.Y.S.2d 527 (3d Dept. 1976); *Hannon v. Siegel-Cooper Co.*, *supra*; *Lanza v. Parkeast Hosp.*, 102 A.D.2d 741, 476 N.Y.S.2d 576 (1st Dept. 1984).

"In the context of evaluating whether a doctor is the apparent agent of a [practice], a court should consider all 'attendant circumstances . . . to determine whether the patient could properly have believed that the physician was provided by the [practice].' " *Contu v. Albert*, *supra* at 741, *quoting Augeri v. Massoff*, 134 A.D.2d 308, 520 N.Y.S.2d 787 (2d Dept. 1987).

> "In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal. The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill." *Dragotta v. Southampton Hosp.*, 39 A.D.3d 697, 833 N.Y.S.2d 638 (2d Dept. 2007), *citing Hallock v. State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984); *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 346 N.Y.S.2d 283 (1973); *King v. Mitchell*, 31 A.D.3d 958, 819 N.Y.S.2d 169 (3d Dept. 2006); *Searle v. Cayuga Med. Ctr. at Ithaca*, 28 A.D.3d 834, 813 N.Y.S.2d 552 (3d Dept. 2006).
>
> "There are two elements to such a claim of apparent or ostensible agency. To establish the 'holding out' element, the misleading words or conduct must be attributable to the principal. To establish the 'reliance' element, the third party must accept the agent's services and submit to the agent's care in reliance on the belief that the agent was an employee of the principal. In the context of a [dental] malpractice action, the patient must have reasonably believed that the [dentist] treating him or her were provided by the [practice] or acted on the [practice's] behalf." *Dragotta v. Southampton Hosp.*, *supra* at 698-699, *citing Dolan v. Jaeger*, 285 A.D.2d 844, 727 N.Y.S.2d 784 (3d Dept. 2001); *Gunther v. Staten Island Hosp.*, 226 A.D.2d 427, 640 N.Y.S.2d 601 (2d Dept.1996).

In support of its motion, defendant Front Street notes that defendant Dr. Lee also worked at three other offices, to wit, Ganz & Grossman, Richard Lyons and Holmdel Periodontics and Implantology and that she only worked at its office one day a week. In addition, defendant Front Street notes that it paid defendant Dr. Lee via an IRS-Form 1099, not a W-2. Additionally, plaintiffs were specifically referred to defendant Dr. Lee by their dentist, Dr. Pellegrino. Finally, the president of defendant Front Street, Dr. Ross Bederman, attests that defendant Front Street did not set defendant Dr. Lee's office hours, that defendant Dr. Lee was never prohibited from working in other offices and that defendant Front Street did not provide defendant Dr. Lee with dental malpractice insurance. Dr. Bederman also attests that defendant Front Street did not control, supervise or direct defendant Dr. Lee's treatment of plaintiff Evelina Totino or any of defendant Dr. Lee's patients at their office for that matter, nor did it set defendant Dr. Lee's billing rates.

Defendant Front Street has established that plaintiff Evelina Totino was defendant Dr. Lee's patient, that defendant Dr. Lee was not its employee and that defendant Dr. Lee simply provided care to plaintiff Evelina Totino at its facility. Defendant Front Street has accordingly established its entitlement to summary judgment dismissing the Verified Complaint against it thereby shifting the burden to plaintiffs to establish the existence of a material issue of fact.

Plaintiffs may not rely on defendant Front Street's alleged wrongful or negligent hiring, training, or supervision of defendant Dr. Lee because such a claim was not advanced in their Verified Complaint. *See Alami v. 215 E. 68th Street, L.P.*, 88 A.D.3d 924, 931 N.Y.S.2d 647 (2d Dept. 2011) ("a bill of particulars may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint"). In said Verified Complaint, plaintiffs allege "[t]hat the defendants, in attempting to treat plaintiff's dental condition, did so in a negligent,

unskillful and incompetent manner so as to cause personal injury, pain, suffering and other attendant damage to the plaintiff, EVELINA TOTINO." Contrary to plaintiffs' argument, the mere use of the word "negligent" in the Verified Complaint hardly equates with a cause of action for negligent hiring, training, supervision and/or retention. *See Alami v. 215 E. 68th Street, L.P.*, *supra*.

Nevertheless, plaintiffs point out that before going to defendant Front Street, plaintiff Evelina Totino was a patient at Glen Cove Dental Associates since 2008, which was also owned by Dr. Bederman. Dr. Pellegrino, a dentist who worked at Glen Cove Dental who appears to have treated plaintiff Evelina Totino there, referred her to periodontist defendant Dr. Lee **at defendant Front Street** (emphasis added), not at any of the other offices where defendant Dr. Lee also worked. In fact, Dr. Pellegrino actually worked at both of Dr. Bederman's dental practices, as did defendant Dr. Lee until 2009, at which time she limited her work to defendant Front Street. Furthermore, when plaintiff Evelina Totino was treated at defendant Front Street, a copy of her chart from Glen Cove Dental was used, as were x-rays which had been taken at Glen Cove Dental. Additionally, defendant Front Street supplied not only the facility, but the dentists, the support staff, the instruments and processed the insurance. Finally, on August 12, 2009, plaintiff Evelina Totino paid her fees to defendant Front Street.

Plaintiffs have established the existence of a material issue of fact as to whether defendant Front Street is vicariously liable for defendant Dr. Lee's possible negligence. *See Nilsen v. Franklin Dental Health*, *supra*. *See also Hannon v. Siegel-Cooper Co.*, *supra*; *Brown v. LaFontaine-Rish Med. Assoc.*, 33 A.D.3d 470, 822 N.Y.S.2d 527 (1st Dept 2006); *Welch v. Scheinfeld*, 21 A.D.3d 802, 801 N.Y.S.2d 277 (1st Dept 2005).

It is the responsibility of a private attending doctor, not the hospital or facility at which

he/she treats his patient, to obtain a patient's informed consent. *See Sela v. Katz*, 78 A.D.3d 681, 911 N.Y.S.2d112 (2d Dept. 2010), *citing Salandy v. Bryk*, 55 A.D.3d 147, 864 N.Y.S.2d 46 (2d Dept. 2008); *Sita v. Long Island Jewish-Hillside Medical Center*, 22 A.D.3d 743, 803 N.Y.S.2d 112 (2d Dept. 2005). *See also Fiorentino v. Wagner*, 19 N.Y.2d 407, 280 N.Y.S.2d 373 (1967). Accordingly, plaintiffs' lack of informed consent claim fails and is hereby **DISMISSED**.

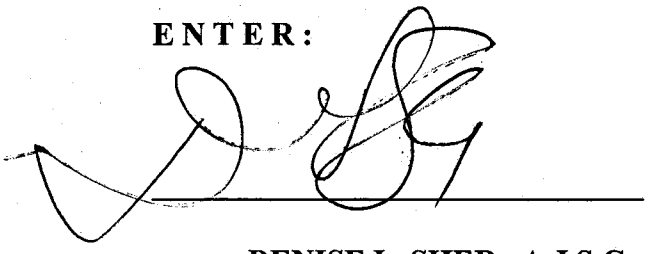
In view of the foregoing, plaintiff Mario Totino's cause of action for loss of consortium cannot be dismissed.

With the exception plaintiffs' lack of informed consent claim, defendant Front Street's motion, pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiffs' Verified Complaint insofar as asserted against it is hereby **DENIED**.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on January 26, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 13, 2012