**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 25, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1790** **Cir. Ct. No. 2002CV191**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**NANCY LAMOREUX,**

**PLAINTIFF-APPELLANT,**

**V.**

**DR. STEPHEN L. ORECK, UW HEALTH/PHYSICIANS PLUS MEDICAL GROUP S.C. P/K/A PHYSICIANS PLUS MEDICAL GROUP S.C., WISCONSIN PATIENTS COMPENSATION FUND AND MEDICARE,**

**DEFENDANTS,**

**MERITER HOSPITAL, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Nancy Lamoreux appeals from a summary judgment order dismissing her medical malpractice claim against Meriter Hospital. We affirm.

## BACKGROUND

¶2 According to the amended complaint, Dr. Steven Oreck severed the median nerve in Lamoreux's right hand during surgery for carpal tunnel syndrome. Oreck was employed as a clinical faculty member of the University of Wisconsin Medical School under the auspices of the University of Wisconsin Medical Foundation. However, he also was "on staff" and had operating privileges at Meriter Hospital, where Lamoreux's surgery was performed. In a previous appeal, we determined that Oreck was acting in his capacity as a state employee when he operated on Lamoreux. *See* ***Lamoreux v. Oreck***, 2004 WI App 160, ¶50, 275 Wis. 2d 801, 686 N.W.2d 722. Additional facts regarding the relationship between Oreck and the hospital will be set forth in the discussion below.

## STANDARD OF REVIEW

¶3 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24.

## DISCUSSION

¶4 Lamoreux presents three theories of liability on appeal: respondeat superior; loaned employee; and apparent authority. Meriter Hospital contends Lamoreux waived the first two theories by failing to sufficiently allege them in her amended complaint. For the purpose of this opinion, we will assume that all three theories were sufficiently pleaded and will address each in turn.

### *Respondeat Superior*

¶5 Lamoreux first argues that Oreck was acting as the servant of Meriter under the doctrine of respondeat superior.

> Under the doctrine of respondeat superior, the master is subject to liability for the torts of the servant committed while acting in the scope of his or her employment.…
>
> .... A "servant" is one employed to perform service for another in his or her affairs and who, with respect to his or her physical conduct in the performance of the services, is subject to the other's control or right to control.…
>
> .... The right to control is the dominant test in determining whether an individual is a servant. However, other factors are considered, including the place of work, the time of the employment, the method of payment, the nature of the business or occupation, which party furnishes the instrumentalities or tools, the intent of the parties to the contract, and the right of summary discharge of employees.

***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300, ¶¶59-61, 249 Wis. 2d 142, 638 N.W.2d 355 (citations omitted).

¶6 Lamoreux points to the following facts from the summary judgment materials to support her theory of respondeat superior. Oreck was required to perform a certain number of procedures at Meriter each year. He had a

commitment to take calls from Meriter and was required to cover the emergency room at certain times. Oreck was only allowed to perform surgical procedures that Meriter approved and required him to demonstrate his proficiency on a periodic basis. Meriter retained the right to remove Oreck from its staff and take away his hospital privileges at any time. Meriter provided and controlled the surgical room, nurses and equipment. Meriter also required Oreck to commit to follow the same ethical and quality of care guidelines as its employees, as well as the "bylaws of the Medical Staff and Meriter Hospital."

¶7 We conclude that the summary judgment materials fail to show that Oreck was the servant of Meriter Hospital. It is true that Oreck performed the surgery in question at Meriter Hospital using its equipment and support staff and had to satisfy certain conditions to maintain his privileges. However, the release form provided to Lamoreux plainly shows that the hospital viewed Oreck as an independent contractor. Moreover, as we previously determined in ***Lamoreux***: "neither the Foundation nor any other entity supervised Oreck in his treatment of patients," ***id.***, ¶28; "the ultimate authority to hire and terminate Oreck resided with the UW Medical School," ***id.***, ¶30; the clinical care of patients was among Oreck's duties for the medical school, ***id.***, ¶33; and while "money generated by the faculty physicians from their clinical practices went to the Foundation," the Foundation in turn determined how much of that revenue to devote to physician compensation, ***id.***, ¶36. Looking at all of these factors together, we conclude the limited control the hospital exercised over Oreck in terms of general hospital policies was no more significant than that determined to be insufficient to establish a master/servant relationship in ***Pamperin v. Trinity Mem. Hosp.***, 144 Wis. 2d 188, 423 N.W.2d 848 (1988).

*Loaned Employee*

¶8 Lamoreux next contends that Oreck was acting as a loaned employee of the hospital. Her argument is premised on the logic that Oreck "was not acting as a faculty member when he performed the surgery" because the surgery did not involve teaching students or conducting research. However, we have already directly rejected the proposition that the performance of clinical functions was outside the scope of a medical school faculty member's duties. ***Lamoreux***, 275 Wis. 2d 801, ¶¶31-43. Our prior holding that Oreck was acting within the scope of his employment for the state necessarily implied that the state retained control over him and precludes the current argument that he was acting as a loaned employee for Meriter. ***Id.***, ¶22; *see also* ***State v. Brady***, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986) ("A decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.") (citation omitted); ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (An appellant may not relitigate matters previously decided, no matter how artfully rephrased.).

*Apparent Authority*

¶9 Finally, Lamoreux argues that Oreck was acting under the apparent authority of Meriter Hospital at the time of the surgery.

> [W]ith respect to the potential liability of hospitals under the doctrine of apparent authority, we held that liability exists if the following three elements are present:
>
> (1) the hospital, or its agent, acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance

> upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

***Kashishian v. Port***, 167 Wis. 2d 24, 39-40, 481 N.W.2d 277 (1992). A plaintiff "must show that [he or she is] seeking care from the hospital and not merely looking to the hospital as a place for his or her personal physician to provide medical care." ***Id.*** at 45.

¶10 The summary judgment materials do not establish a basis for liability under apparent authority in this case.

¶11 First, Lamoreux stated that it was her "understanding" that the clinic to which Oreck had moved his office was "part of the Meriter Hospital complex … [b]ecause you could go from one to the other basically without going outside" with the aid of walkways. However, she admitted that she did not think that Oreck's relationship with the hospital had changed when he moved to the connected clinic location, stating, "It was simply a matter of convenience." Furthermore, Lamoreux could not recall specifically what information led her to draw the conclusion that the clinic was part of a unified hospital complex. Without knowing the source of Lamoreux's information on that point, there is no basis for a reasonable inference that the hospital was aware of or acquiesced in disseminating that information.

¶12 Second, Lamoreux provided printouts of a current Meriter website that, she claims, would lead a reasonable person to conclude the physicians working there were its employees or agents. It could be reasonably inferred that the hospital acquiesced in the dissemination of that information. However, nothing in the summary judgment materials states that the website contained the same content, or even existed, in 2000, much less that Lamoreux visited the site

and relied upon it to choose to have her surgery there. To the contrary, Lamoreux stated at her deposition that she did not choose Meriter at all; instead, Oreck chose the site. She had a preexisting relationship with Oreck and did not question his choice of location because she trusted him as her doctor. This, then, is just the situation described in ***Kashishian*** where a plaintiff was merely looking to the hospital as a place for his or her personal physician to provide medical care, rather than relying on any representations from the hospital in choosing where to have surgery.

¶13 Finally, although Lamoreux now argues that she was prevented from reading the release form due to vision problems, she admitted at the deposition that she read through the highlights of the form before signing it. Furthermore, her alleged vision problems did not prevent her from reading the relevant provision off the form at her deposition. Rather, she stated at the deposition that the language in the release form did not alter her assumption that a physician would have to have some kind of a relationship with the hospital to perform surgery there. We are satisfied, however, that the plain language of the release form would lead any reasonable person to understand that—whatever relationship might have existed—the doctor was not, in fact, an employee or agent of the hospital.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.