

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

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IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2020L005550

JANE DOE,

Plaintiff,

v.

VERNON T. CANNON, M.D. and
DUPAGE MEDICAL GROUP LTD,

Defendants.

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**PLAINTIFF’S RESPONSE TO DEFENDANT DUPAGE MEDICAL GROUP LTD’S
RENEWED SECTION 2-615 MOTION TO DISMISS COUNT II AND III OF
PLAINTIFF’S SECOND AMENDED COMPLAINT AT LAW**

NOW COMES the plaintiff, JANE DOE, by her attorneys in this regard, Hurley McKenna & Mertz, and as her Response to Defendant DUPAGE MEDICAL GROUP LTD’s (DMG) Motion to Dismiss Pursuant to Section 2-615, she states as follows:

STATEMENT OF FACTS

On May 25, 2018, Plaintiff Jane Doe was an adult female gynecological patient of Defendant Vernon T. Cannon, M.D. and a longstanding patient of DMG. (Exhibit A, Count II at ¶ 1,6). Defendant Vernon T. Cannon, M.D. was a medical doctor practicing in obstetrics and gynecology as an employee, agent, apparent agent, principal, partner and/or shareholder of Defendant DMG. (Id. at ¶ 2,4).

Plaintiff scheduled a colposcopy with Dr. Cannon to proceed on May 25, 2018 on an outpatient basis at one of DMG’s medical offices. (Id. at ¶ 7, 9). A colposcopy is a magnified examination of the cervix, vagina, and vulva through the use of a medical instrument known as a colposcope. (Id. at ¶ 8).

On May 25, 2018, Plaintiff entered the examination room at DMG’s office and removed her pants and underwear, and draped her lower half in preparation for the medical

procedure. (Id. at ¶ 10). Dr. Cannon entered the exam room and instructed Plaintiff to place her feet up into stirrups for the examination. (Id. at ¶ 13). While Plaintiff was in a vulnerable position with her feet secured in the stirrups waiting for the exam to begin, Dr. Cannon violated the Plaintiff. (Id. at ¶ 13-14). Dr. Cannon placed his mouth and tongue on Plaintiff's vagina and anus without her consent. (Id. at ¶ 14, 18). After Dr. Cannon made unwanted, harmful, sexual contact with Plaintiff, he told her that she, "tasted good." (Id. at ¶ 15,18). After Dr. Cannon sexually assaulted the Plaintiff, he proceeded to perform the scheduled colposcopy. (Id. at ¶ 16).

In early 2018, prior to Dr. Cannon's sexual assault of the Plaintiff, Defendant DMG received complaints from other patients regarding his professionalism and alcoholism. (Id. at ¶ 21, 25). Another patient of Dr. Cannon reported to DMG that Dr. Cannon was "was under the influence of alcohol. He was slurring his words and had a strong odor of an alcoholic beverage coming from his breath." (Id. at ¶ 25). Shortly after Defendant DMG received that complaint, it received another written patient complaint describing Dr. Cannon as "very unprofessional." That patient indicated she "will never recommend" Dr. Cannon to anyone else. (Id. at ¶ 27-28).

Despite receiving complaints about Dr. Cannon's professionalism and alcohol abuse in early 2018, Defendant DMG allowed Dr. Cannon to continue to treat women at its medical facilities. (Id. at ¶ 29-30). On January 8, 2019, another patient reported to DMG that Dr. Cannon "was difficult to understand when he finally came in and seemed to be slurring when talking to me". (Id. at ¶ 29). Defendant DMG failed to take any disciplinary or remedial measures in response to the complaints they received from patients regarding Dr. Cannon's professionalism and alcoholism. (Id. at ¶ 31). It was not until October of 2019 that Dr. Cannon finally went to rehab.

Defendant DMG's human resources representative, Jodi Redding, testified that company policy dictated that an employee who received allegations on par with Dr. Cannon's conduct

would typically be suspended pending an investigation. (Id. at ¶ 33). According to Ms. Redding, an investigation normally would consist of interviews with relevant witnesses and the patients making the complaints. (Id. at ¶ 34). Normally, the member of the HR team conducting the investigation would maintain notes and interview materials about the investigation in Defendant DMG's internal files. (Id).

Aside from admitting it was aware that Dr. Cannon completed an alcohol rehabilitation program in October of 2019, Defendant DMG cannot produce any evidence that it took affirmative steps or actions to investigate or discipline Dr. Cannon. (Id. at ¶ 31-32). Defendant DMG further cannot provide any explanation for why it permitted Dr. Cannon to practice medicine and treat its patients well over a year after a patient first reported that Dr. Cannon was drunk while performing a gynecological exam. (Id. at ¶ 36).

An obstetrician has a duty to practice obstetrics sober. (Id. at ¶ 37). Based on the vulnerability of women during invasive obstetrical exams and procedures, an intoxicated obstetrician poses a particular risk to female patients of engaging in non-consensual sexual acts. (Id. at ¶ 38). Professional medical publications indicate that approximately one-half of sexual assault cases involve alcohol consumption by either the perpetrator, the victim, or both. (Id. at ¶ 39). Additional literature demonstrates that alcohol consumption by males is positively associated with committing sexual assault. (Id. at ¶ 40).

Defendant DMG knew that Dr. Cannon was practicing obstetrics under the influence of alcohol as early as the beginning of 2018. Knowing this, it allowed Dr. Cannon to continue practicing and placed its patients at risk for non-consensual sexual contact during gynecological exams. (Id. at ¶ 42). Defendant DMG knew by the very nature of gynecological exams, women are required to disrobe and expose their genital area to their obstetrician. (Id. at ¶ 10). Defendant DMG knew that permitting a drunk obstetrician like Dr. Cannon to encounter women while in a

vulnerable position would result in unwanted sexual advances and sexual assault. (Id. at ¶ 37-41). Defendant DMG’s failure to investigate, discipline, and remove Dr. Cannon resulted in Plaintiff’s sexual assault. (Id. at ¶ 44).

ARGUMENT

There can be fewer more vulnerable positions for a woman to be in than in stirrups at her gynecologist’s office. Similarly, fewer relationships require more trust, safety, and security than that of a doctor and his patient. DuPage Medical Group must recognize this. As one of the largest physician groups in Illinois, its core values emphasize trust: “If our customers understand they can trust us with their personal feelings as well as their health concerns, we will be able to build relationships that offer a lifetime of care.”¹

DMG does not dispute that Dr. Cannon practiced as a gynecologist while intoxicated. It cannot, because its human resource records document patient complaints about Dr. Cannon’s intoxication in early 2018 and again in 2019. DMG also does not dispute that its human resource records are completely devoid of *any* disciplinary measures related to that intoxication between when it is first reported in early 2018 and when Dr. Cannon goes to rehab in October of 2019. DMG’s own human resource representative confirmed that a complaint like the one made in early 2018 would warrant an investigation with interviews and other documentation. Inexplicably, no such documents exist.

Instead, Defendant argues that a drunk gynecologist does not pose the foreseeable risk of sexually assaulting women. Defendant claims that its continued retention of Dr. Cannon was not a proximate cause of Plaintiff’s injuries because, apparently, DMG believes intoxicated gynecologists should have free access to vulnerable patients.

¹ <https://www.dupagemedicalgroup.com/about-dmg>

Plainly, all gynecologists must make contact with the sexual organs of their patients during most obstetrical physical exams. For an institution to allow a gynecologist to make this contact while intoxicated invites abuse. But this begs a further question: did any woman Dr. Cannon care for while intoxicated truly consent to a drunk gynecologist touching their sexual organs? DMG allowed that to happen and the foreseeable result of that error was the harm suffered by Jane Doe.

A. The special relationship between DMG and its patients gives rise to a duty.

The most analogous case to the one before this court is *Gress v. Lakhani Hospitality, Inc.*, 2018 IL App (1st) 170380. As the Court stated in *Gress*, there is no “one free rape rule” in Illinois. *Id* at ¶28. The crux of Defendant’s argument here is the same argument the defendants lost in *Gress*. Here, like in *Gress*, Defendant claims that the criminal conduct of the perpetrator was not reasonably foreseeable to Defendant. The *Gress* Court rejected that argument for two reasons: 1) there was a special relationship between the defendant and the injured party; 2) the vulnerability of the injured party made the incident reasonably foreseeable despite the lack of prior similar incidents.

Here, a special relationship exists between DMG and its patients. DMG is a physician group with a physician-governed board. It provides multi-specialty medical care to thousands of patients. The Illinois Supreme Court has recognized the long line of cases that characterize the “doctor-patient relationship as ‘a fiduciary one.’” *DeLuna v. Burciaga*, 223 Ill.2d 49, 70 (2006). While DMG is an entity that employs doctors, and not the physician itself, its relationship with its patients is virtually identical and inextricably intertwined with that of its physicians. Like other special relationships, it seeks the “trust and confidence” of its patients. *Id*. This warrants recognizing the special relationship.

Even setting aside the doctor-patient relationship, DMG treats its patients as “customers:” “if our **customers** understand they can trust **us**....” Like the physician-patient relationship, our Supreme Court recognizes that the business-invitee is a special relationship. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 438 (2006). As the *Marshall* Court noted, “certain special relationships may give rise to an affirmative duty to aid or protect another against unreasonable risk of physical harm.” *Id.*

Which brings us to *Gress*. There, an intoxicated hotel guest was raped by a hotel security guard that had access to her room. *Gress*, 2018 IL App (1st) 170380 at ¶6. The defendants claimed that they had no notice of the perpetrator’s propensity to commit the crime and no prior notice of similar crimes on the premises. *Id.* at ¶¶23-24. Nevertheless, the Court held that a motion to dismiss should be denied because “given the pervasiveness of sexual assaults and generalized crimes in hotels, it is reasonably foreseeable that hotel guests will from time to time be at such risk in hotels.” *Id.* The Court acknowledged that *Gress* presented the “all-too-familiar tale where a vulnerable woman is raped and the assault is enabled by the failure of a responsible party to protect the victim.” *Id.* At ¶34.

Here, DMG placed Jane Doe in an even *more* vulnerable position than the plaintiff found herself in in *Gress*. DMG knew that its patients, including Jane Doe, would come into contact with Dr. Cannon while at their most vulnerable. It knew, and encouraged, patients to trust DMG with their health needs and personal feelings. DMG knew that Dr. Cannon had a drinking problem, but chose not to document it, investigate it, or sanction Dr. Cannon. It knew Dr. Cannon was making dangerous decisions – becoming intoxicated while providing patient care – and it should have known that those dangerous decisions would eventually harm patients. Given the nature of the relationship between DMG and Jane Doe, DMG had a duty to protect Jane Doe.

DMG should have honored the very trust it sought from patients. Instead, it betrayed that trust and now seeks to avail itself of the non-existent “one free rape rule.”

B. Even in the absence of a special relationship, Dr. Cannon’s conduct was foreseeable.

Common sense also warrants denying Defendant’s Motion to Dismiss. Multiple patients reported that Dr. Cannon smelled of alcohol and could not properly speak while he provided care to them. These are not the actions of an individual that made a mistake by having a beer at lunch. These are the actions of an individual placing his patients at risk by practicing medicine, having consumed so much alcohol that he cannot make sense. Dr. Cannon’s actions were of the self-destructive nature that warranted, if not immediate termination, immediate intervention. Instead, DMG ignored the problem for nearly two years.

Anyone drinking and practicing medicine on women poses a threat to patients. The well-documented association between alcohol and sexual assault, as alleged in the First Amended Complaint, sufficiently demonstrates a nexus between intoxication and the threat of sexual assault. Apart from the medical literature referenced in the First Amended Complaint, the association between alcohol and sexual assault is a well-recognized societal problem. For these reasons alone, Dr. Cannon’s conduct was foreseeable and could have been prevented.

C. Each and every time Dr. Cannon performed an obstetrical examination while intoxicated, he committed a foreseeable sexual battery.

It cannot be DMG’s position that women consensually allowed an intoxicated obstetrician to examine their genitals. The undersigned represents one Plaintiff. But if DMG were to disclose to its patients that Dr. Cannon practiced while intoxicated, and survey its patients (this is how they initially received complaints) about whether they consented to a drunken vaginal exam, there would be hundreds of more complaints of non-consensual sexual contact. Women consent to the physical contact required by obstetrical care because they trust

the physician. When that trust is breached by a doctor's substance abuse, that physical contact is no longer consensual.

DMG knew Dr. Cannon was drinking. DMG knew patients would not consent to being physically touched by an intoxicated obstetrician. DMG knew each and every one of those exams would constitute a sexual battery due to the lack of consent. Yet, it did nothing to prevent the foreseeable sexual batteries of countless patients, including Plaintiff.

Moreover, even assuming Dr. Cannon was not drunk during a specific patient examination, it is unlikely any patient would consent to an exam with him knowing his history of drinking and practicing obstetrics. DMG chose not to inform its patients of his history and instead allowed him to continue practicing, thus facilitating countless additional sexual batteries.

That DMG knew of Dr. Cannon's drinking, but failed to intervene in his continued care of patients, and failed to inform patients of his drinking is reprehensible. That DMG actually facilitated that dangerous relationship by ignoring Dr. Cannon's drinking and continuing to send patients his way likely warrants punitive damages.

D. The alcohol cases cited by Defendant are not persuasive.

Plaintiff was sexually assaulted by Dr. Cannon when she was in a vulnerable and compromised position during a gynecological exam. The combination of Dr. Cannon's known history of treating patients while drunk in the vulnerable setting of a gynecological exam put Plaintiff at a very specific and known risk of harm from unwanted sexual contact. On the issue of Dr. Cannon's known alcoholism and the danger it posed, DMG cites caselaw that is unpersuasive.

The only Illinois appellate case cited by Defendant involving alcohol and a sexual assault is *Pesek v. Disceplo*, 130 ILL. App. 3d 785, 787. *Pesek*, is not on point. There, the minor plaintiff was raped in her own home by another minor. *Id.* The court held that the minor defendant's

previous propensity for truancy and drug and alcohol use was insufficient to state a claim against the minor defendant's parents and school for negligent supervision. *Id.* The facts and holding in *Pesek* are vastly different from this case. Here, Plaintiff was sexually assaulted in DMG's own medical office, just prior to a gynecological procedure while in a vulnerable position, by an obstetrician with a known history of unprofessionalism and alcoholism. Here, DMG stands in a special relationship with the Plaintiff-victim. In *Pesek*, no such relationship existed.

DMG's citation to federal trial court *dicta* in a sex discrimination case is also not persuasive. *Al-Dabbagh v. Greenpeace, Inc.*, 1995 WL 9246. (N.D. Ill.). That case is not controlling, not published, lacks evidence of a special relationship, and did not involve a plaintiff in a particularly vulnerable position.

E. Defendant's 2-622 procedural argument is not on point.

The claims against DMG arise from its negligent management of its medical practice. Count II is an institutional negligence claim; Count III is a negligent retention claim. There are no negligence allegations in the Complaint against Dr. Cannon. Rather, the count against Dr. Cannon is a sexual battery allegation. If Plaintiff was alleging negligence obstetrical care, the 622 report would need to identify the area of practice of the authoring physician. The report would need to outline what specific errors Dr. Cannon made while providing obstetrical care.

This case is different. Here, Plaintiff alleges that the management of the practice and continued access the practice gave one of its physicians was negligent. The allegations have nothing to do with negligent obstetrical care but, rather, the failure of an institution to prevent a sexual battery.

At the pleadings stage of an institutional negligence claim, a Plaintiff *never* has access to a medical facility's policies and procedures. Even once litigation begins, medical defendants often resist turning over policies and procedures. What is plain from the pleadings and limited

discovery to date is this: DMG knew Dr. Cannon was practicing while intoxicated and still allowed him to see obstetrical patients. That led to Jane Doe's assault. Plaintiff's 622 supports this position insofar as certain policies – such as requiring a chaperone with Dr. Cannon given his drinking history – would have prevented Doe's abuse.

CONCLUSION

DMG touts trust as a one of its core values. Plaintiff trusted DMG to supervise its physicians in a reasonably careful manner. Instead of honoring that trust and the special relationship DMG had with Plaintiff, DMG allowed Dr. Cannon to continue practicing despite his known alcohol abuse. This led to foreseeable results. Defendant's Motion should be denied.

/s/ Evan M. Smola
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One of the Attorneys for Plaintiff

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