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The 'Doctrine of Apparent Authority' in Medical Malpractice Cases

Will have major implications in cases against hospitals

BY E. DREW BRITCHER AND ABBOTT S. BROWN

Hospitals are vicariously liable for the negligence of their employees, including physicians employed by hospitals. But are hospitals also liable for the negligence of those hospital-based physicians who appear to be employed by the hospital, such as radiologists, pathologists, anesthesiologists, and emergency department physicians, even if those practitioners are really independent contractors? Viewed from the patient's perspective, these specialties consist of doctors selected by and assigned to them by the hospital. Most patients do not know that these doctors are independent contractors, and not employees of the hospital.

In fact, every New Jersey hospital is liable for the negligence of any physician that a hospital holds out as its "apparent employee." The statement is

Britcher is a partner with the firm of Britcher, Leone and Roth in Glen Rock. Britcher argued the cause for amicus curiae, Association of Trial Lawyers of America-New Jersey in Basil. Brown is a partner with the law firm of Bendit Weinstock in West Orange and is the author of "New Jersey Medical Malpractice Law" (ICLE 4th Ed., 2009).

based upon the "Doctrine of Apparent Authority," first cited in a malpractice case in New Jersey by *Arthur v. St. Peter's Hospital*, 169 N.J. Super. 575 (Law Div. 1979). The vitality of the doctrine of apparent authority was no doubt limited in malpractice cases by the fact that *Arthur* is an older Law Division decision. However, the doctrine of apparent authority was revitalized by the New Jersey Supreme Court in *Basil v. Wolf*, 193 N.J. 38 (2007).

The increased use of the doctrine of apparent authority will have major implications in malpractice cases against hospitals. These decisions establish that a hospital is liable for the negligence of certain physicians, even though they are not paid employees of the hospital. The limitation on liability found in N.J.S.A. 2A:53A-8 does not limit the vicarious liability of the hospital for the negligence of its employees. Therefore the doctrine of apparent authority provides another source of compensation to an injured patient when such a hospital-based physician is under-insured.

In *Arthur*, the patient alleged that the defendant physicians committed malpractice by failing to diagnose a fracture. The defendant hospital moved for summary judgment, arguing that the

physicians were independent contractors. The court noted that hospitals are generally not liable for the acts of physicians who are not employees but rather independent contractors. However, the court concluded that where a hospital holds out a physician as its employee, the "plaintiff had a right to assume that the treatment that was being received was being rendered through hospital employees and that any negligence associated with that treatment would render the hospital responsible." The *Arthur* Court explained that "The question...is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question." Quoting *Miklos v. Liberty Coach Co.*, 48 N.J. Super. 591, 602 (App. Div. 1958), and relying upon the *Restatement, Torts 2d* § 429 (1964). In the absence of a specific disclosure that the doctor is not an employee of the hospital, when the hospital assigns an anesthesiologist to a patient, the patient may reasonably believe that the care is being rendered by the hospital's employee.

Arthur is not the only reported case in New Jersey to touch upon this issue in the medical malpractice context. In *Marek v. Professional Health Services, Inc.*, 179 N.J. Super. 433 (App. Div. 1981), the court also relied on the *Restatement, Torts 2d* § 429 in concluding that a health care clinic was vicariously liable for the negligence of an independent radiologist. Most recently, the doc-

trine of apparent authority was revisited by the New Jersey Supreme Court in *Basil v. Wolf*, 193 N.J. 38 (2007). Mr. Basil suffered an injury while at work. He was referred by the compensation carrier to an orthopedist, Dr. Wolf, who had closed his practice and no longer treated patients, but performed medical evaluations for insurance companies and attorneys. Dr. Wolf observed an "area of fullness" in the abdomen, diagnosed an injury to the abdominal muscles, and recommended physical therapy. The plaintiff claimed that Dr. Wolf negligently failed to investigate the "fullness," which was a sarcoma, and that the compensation carrier was vicariously liable. The trial court dismissed the case as to the compensation carrier, and the appellate division affirmed.

In ratifying the decisions of the lower courts, the Supreme Court rejected Basil's claim based upon vicarious liability or apparent authority. The Court explained:

The Estate asserts one additional theory for the imputation of liability. If a principal cloaks an independent contractor with apparent authority or agency, the principal can be held liable as if the contractor were its own employee if it held out the contractor to the plaintiff as its own servant or agent. See *Arthur v. St. Peter's Hosp.*, 169 N.J. Super. 575, 581 (Law Div. 1979)... As best explained in *Arthur*, supra, apparent authority imposes liability on the principal "not as the result of the reality of a contractual relationship but rather because of the actions of a principal or an employer in somehow misleading the public into believing that the relationship or the authority exists." 169 N.J. Super. at 580... Thus, in the context of a hospital and its independent contractor physicians, there would be apparent authority "[i]n those cases where it can be shown that a hospital, by its

actions, has held out a particular physician as its agent and/or employee and that a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital."

Nevertheless, the *Basil* Court concluded that there was no actual evidence to support the claim that the compensation carrier "conveyed and intended to convey that Dr. Wolf was its treating physician for Basil, and that Basil acted in reliance on such a reasonable, but falsely created, impression to that effect." The court therefore affirmed the dismissal. However, it is fair to say that in *Basil* the New Jersey Supreme Court has ratified the holding of *Arthur*.

This brings New Jersey straight in line with the majority of other jurisdictions that have addressed this issue. *Arthur*, in fact, relied upon a New York case, *Mduba v. Benedictine Hospital*, 52 A.D.2d 450 (3d. Dept. 1976). In *Mduba*, the patient was treated in an emergency room after a car accident and died after a physician failed to obtain a blood sample so that a transfusion could be ordered in a timely fashion. The *Mduba* court also applied the *Restatement, Torts 2d* § 429, supra, and held that because the hospital held itself out to the public as furnishing emergency care, it was vicariously liable for the negligence of the doctors it furnished, despite their status as independent contractors. In reaching its conclusion, the court noted that "[s]uch patients are not bound by secret limitations as are contained in a private contract between the hospital and the doctor." In fact, the majority of jurisdictions that have considered this issue have employed the doctrine of apparent agency doctrine to impose liability on hospitals for the negligence of independent contractor physicians. See, "Note: Hospital Vicarious Liability for Negligence by Independent Contractor Physicians: a New Rule for New Times" 2005 U. Ill L. Rev. 1291, 1323 (2005). See also *Duncan v. Mount St. Mary's Hospital*, 672 N.Y.S.2d

657 (1998), and *Clair v. St. James Mercy Hospital*, 747 N.Y.S. 2d 648 (4th Dept. 2002), applying the "Mduba Doctrine" to anesthesiologists. See also *Mejia v. Comm. Hosp. of San Bernardino*, 99 Cal. App. 4th 1448 (2002). The rationale of these decisions is compelling. For example, in *Mejia*, supra, the court explained that:

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.

The common thread amongst these cases is that a hospital will be deemed to have held itself out as the provider of care, unless it gives the patient notice that the doctor was an independent contractor. A hospital should not be permitted to utilize what *Mduba*, supra, called "a secret contract" to insulate itself from paying the full value of damages caused by its apparent employee. Any other outcome would not only be contrary to the doctrine of apparent authority, but also to the important public policy upon which the doctrine of apparent employment is predicated. ■