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## PROFESSIONAL MALPRACTICE

### The Doctrine of Apparent Employment

Hospitals can be held liable for the negligence of nonemployees

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Hospitals are vicariously liable for the negligence of their employees, including physicians employed by hospitals. In a trilogy of cases starting nearly 30 years ago and concluding with the recent decisions in *Basil v. Wolf*, 193 N.J. 38 (2007), and *Estate of Cordero v. Christ Hospital*, 403 N. J. Super. 306 (App. Div. 2008), the courts in New Jersey and elsewhere have established and reaffirmed the doctrine of 'apparent employment' and confirmed that hospitals can be liable for the negligence of those hospital-based physicians who are not actually employed by the hospital, but who appear to be employed by the hospital. Radiologists, pathologists, anesthesiologists, emergency department doctors are among those most likely to be involved, but physicians employed in clinics and many private corporate health care providers are also potential "apparent employees"

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The doctrine of apparent employment was first cited in a malpractice case in New Jersey in *Arthur v. St. Peter's Hospital*, 169 N.J. Super. 575 (Law Div. 1979), where the patient alleged that the defendant physicians failed to diagnose a fracture. The defendant hospital moved for summary judgment, contending that the physicians were independent contractors. The trial court observed 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." In reaching this conclusion, *Arthur* relied upon the Restatement, Torts 2d § 429 (1964), and a seminal New York case, *Mduba v. Benedictine Hospital*, 52 A.D.2d 450 (3d. Dept. 1976), where a patient 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 relied upon 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 assigned, despite their status as independent contractors. In reaching its conclusion, the *Mduba* 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 employment 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). Despite the growing number of out-of-state decisions that recognized this doctrine, the vitality of the doctrine in New Jersey was limited by the fact that *Arthur* is an older Law Division decision. However, the doctrine of apparent employment was revitalized by the court in *Basil*, supra, and finally explicitly adopted in the recently decided case of *Estate of Cordero*, supra.

In *Basil*, the plaintiff was referred by his workers' compensation carrier to Dr. Wolf, who had closed his practice but still performed medical evaluations for insurance companies. Dr. Wolf failed to diagnose a sarcoma, and the plaintiff asserted that the compensation carrier should be vicariously liable for Dr. Wolf's negligence. The trial court dismissed the case as to the carrier, and the appellate division affirmed. The Supreme Court rejected *Basil's* claim because the facts did not establish vicarious liability based upon apparent employment, but commented in dicta:

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. Peters Hosp.*, 169 N.J. Super. 575, 581 (Law Div. 1979). 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 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.

Most recently, in *Cordero*, supra, a New Jersey court explicitly approved the doctrine of apparent employment’s application to hospital-based physicians. Mrs. Cordero was admitted to Christ Hospital for surgery. The defendant, Dr. Zaklama, was an anesthesiologist and “was assigned, randomly” to Mrs. Cordero. The court observed that Dr. Zaklama “had one brief conversation with Cordero before the procedure . . . and did not tell Cordero that Christ Hospital assumed no responsibility for the care she would provide.” Additionally, Christ Hospital’s Web site merely identified Dr. Zaklama as “a member of its anesthesia department.” After the plaintiff settled with Dr. Zaklama, plaintiff contended that Christ Hospital was liable for Dr. Zaklama’s negligence under a theory of apparent employment. The trial court dis-

missed this claim, but the appellate division reversed, first reiterating that the doctrine of apparent employment applies when a “hospital, by its actions, has held out a particular physician as its agent and/or employee and . . . a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital.” The *Cordero* court then explained:

[W]hen a hospital provides a doctor for a patient and the totality of the circumstances created by the hospital’s action and inaction would lead a patient to reasonably believe the doctor’s care is rendered in behalf of the hospital, the hospital has held out that doctor as its agent. We also hold that when a hospital patient accepts a doctor’s care under such circumstances, the patient’s acceptance in the reasonable belief the doctor is rendering treatment in behalf of the hospital may be presumed unless rebutted.

The *Cordero* court reviewed the analysis of this issue in other jurisdictions and, placing reliance upon sections 2.03 of the “Restatement (Third) of Agency” and 429 of the “Restatement (Second) of Torts,” held “when a hospital provides a doctor for its patient and the totality of the circumstances created by the hospital’s action and inaction would lead a patient to reasonably believe that the doctor’s care is rendered on behalf of the hospital, the hospital has held out that doctor as its agent.”

The *Cordero* court then outlined the factors that the courts, as well as hospital risk managers and their counsel, should consider when addressing this issue:

- Whether the specialty, like anesthesiology, radiology or emergency

care, is typically provided in and is an integral part of medical treatment received in a hospital

- Whether notice of the doctor’s status or disclaimers of responsibility were provided
- Whether the patient had the opportunity to reject the doctor and select another doctor
- Whether the patient had any contact with the doctor prior to the incident at issue; and
- Whether the patient had any knowledge about the doctor’s arrangement with the hospital.

The common thread amongst all of the New Jersey and out-of-state cases is when a health care provider selects or assigns a physician for a patient; the provider will be liable for the negligence of the physicians, 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.

The recognition of the doctrine of apparent employment will have major implications in malpractice cases against hospitals. A hospital may be liable for the negligence of certain physicians, even though they are not paid employees of the hospital. Nothing contained in N.J.S.A. 2A:53A-8 limits the vicarious liability of the hospital for the negligence of its employees. Therefore, the doctrine of apparent authority may provide another source of compensation to a gravely injured patient when a hospital-based physician they were assigned is under-insured. ■