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by: Colin E. Flora
Associate Civil Litigation Attorney

Court Finds Hospital Can be Liable Where Doctors Were Apparent Agents and Claims Against the Doctors Could No Longer be Brought

Yesterday, the Indiana Court of Appeals issued an important decision that impacts both medical malpractice law as well as agency law. The basic issue in the case was whether claims for medical malpractice could proceed against a hospital where the plaintiff did not name the doctors as defendants and the statute of limitations to do so had passed. The unanimous Court of Appeals held that plaintiff's case could proceed to a jury trial. Due to the importance of this decision the case was closely monitored by the plaintiff's bar – the attorneys who represent plaintiffs in cases – resulting in an amicus curiae brief being filed on behalf of the Indiana Trial Lawyers Association (ITLA) of which Pavlack Law, LLC is a proud member.

Before we dive into the case, it is important to understand some terminology of agency law. Under agency law, the person in charge of the agent is known as either the principal or the master. The agent can also be known as the servant. A classic example of a principal/agent relationship is an employer and employee. For

example, a person employed by Wal-Mart would be the agent of Wal-Mart and Wal-Mart would be the principal/master.

The case, captioned as *Columbus Regional Hospital v. Amburgey*, was based upon an alleged incidence of medical malpractice that occurred in May 2005. Two years later, on the final day in which plaintiff could file his complaint, he served a copy of a proposed complaint to Indiana Department of Insurance. Recall from our discussion last week that before a medical malpractice claim can be brought in Indiana a would-be plaintiff must first file a proposed complaint to the Indiana Department of Insurance.

Three and a half years later, in November 2010, the Medical Review Panel found: "As to [the Hospital] there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury." After the findings by the Panel, plaintiff amended his complaint to add two doctors to the case. Both doctors were employees of the hospital. Where the issue arises, is that two other doctors were not employees of the hospital but were "independent contractors." The Hospital argued that it could not be held liable if the two independently contracted doctors could not be found liable. The only reason that the two independently contracted doctors could not be found liable was because they were not named as defendants prior to the expiration of the statute of limitations.

The plaintiff's position was that it was irrelevant whether the doctors were employees of the Hospital or not. His argument was that the two doctors were the apparent agents of the Hospital and thus it could be held liable for their actions through agency law. The trial court determined that the issue of whether the two doctors were apparent agents was an issue to be decided at trial. The Hospital, dissatisfied with this decision, appealed the issue.

In what was ultimately a fairly short opinion by the Court of Appeals – only 13 pages – the court dedicated two and a half pages to just laying out the precise issue to be decided. While it is not uncommon for a court to specifically identify the issues to be decided, especially the Indiana Court of Appeals that writes very methodical and well-formatted opinions, it is quite unusual to dedicate almost 20% of the opinion to identifying the issue. The court identified the positions of each party as:

> **Hospital**– "prior to apparent or ostensible agency imposing liability upon the hospital as the principal, a basis of liability must exist as to the independent contractor physician." Because the doctors could no longer be held liable due to the expiration of the statute of limitations, the Hospital could no longer be held liable.

> **Plaintiff**– argues that the Hospital's argument is contrary to Indiana law "where it is well recognized that under the doctrine of *respondeat superior*, the master or principal is chargeable with and liable for any negligent acts committed by its agent or servant while the servant is acting in the course and scope of his employment."
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> **ITLA**– argues that "even when an agent is not named in a suit, the agent may still be found to have been negligent; and that is sufficient to make the principal vicariously liable." . . . And that "[i]f an agent has committed a negligent act, a limitations bar against the agent does not render the act non-negligent."

Before ultimately resolving the issue in favor of the positions held by the plaintiff and by ITLA the court had to dive into the intricacies of agency law. Agency law exists under the umbrella of "vicarious liability." "It is a legal fiction by which a court can hold a party legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party's relationship to the wrongdoer."

For both its discussion on the law of vicarious liability and its ultimate decision, the court looked extensively to the 1999 Indiana Supreme Court decision in *Sword v. NKC Hospitals, Inc*. Relying on *Sword*, the court noted, "Apparent authority 'is the authority that a third person reasonably believes an agent to possess because of some manifestation from his principal.'" Furthermore, "[t]he manifestation must be made by the principal to a third party and reasonably cause the third party to believe that an individual is an agent of the principal and to act upon that belief." So what this basically means is that for a person to be considered the "apparent agent" of another, the principal must take some action that represents the other person to be his agent. There are numerous ways that this can occur. The manifestation can either stem from a direct or indirect communication. It can even derive from an advertisement.

Though apparent agency is most typically an issue of contract law, it can also be the basis for liability under tort law such as a medical malpractice case. In such a case, the standard for determining whether such a relationship exists is stated as such:

> One who 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 is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Thus, the issues in a case such as this are: (1) whether there has been a representation made by the Hospital and (2) the person justifiably relied upon that representation.

In answering that question for this case, the court turned to the holding in *Sword* in which the Supreme Court determined "that a hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital." In general, the hospital can avoid liability by "providing meaningful written notice to the patient" that the patient's care is being provided by someone who is not acting on behalf of the hospital. As to reliance, it is presumed unless the hospital has given meaningful written notice to the patient.

Having determined that the Hospital could be held liable for the acts of an apparent agent such as the two doctors, the court returned to the primary issue at hand – whether the Hospital could be held liable where the two doctors were not named defendants and the statute of limitations to do so had passed. Acknowledging that there was no Indiana decision on point, the court looked to decisions from Tennessee and Wisconsin that found that where the only issue is that a claim against an individual doctor was barred by a statute of limitations, the timely filed claim against the hospital could still proceed. The basic concept being that substantively the negligent act occurred actually occurred and only on a procedural basis is the doctor alleviated from liability. Since there is no question that the hospital could otherwise be found liable, the mere fact of a procedural protection for the doctor cannot obviate the hospital from liability.

To summarize, the court held that where a hospital does not make it meaningfully clear that a doctor is not an independent contractor the hospital can be found to be liable for that doctor's actions in the same way that it could for any actual employee. Further, where the only bar to a claim directly against the doctor is the statute of limitations, the hospital can still be held liable.

Join us again for further insight into the complex nature of the law.

Sources

- *Columbus Reg'l Hosp. v. Amburgey*, 976 N.E.2d 709 (Ind. Ct. App. 2012).
- *Sword v. NKC Hosps. Inc.*, 714 N.E.2d 142 (Ind. 1999).

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