CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Whitlow v Rideout Memorial Hospital

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Summary Judgment; Ostensible Agency; Hospital & Emergency Room Physicians

Decedent's son, Dean Whitlow, submitted a declaration in opposition to the defendant hospital's motion for summary judgment in which he described his mother's condition in the early morning hours of August 24, 2008. At approximately 1:00 a.m. his mother woke him up, screaming in pain that "she had the worst headache she had ever had in her life." Inconsolable and in excruciating pain, she begged him to take her to the hospital's emergency room. She complained of a headache with pain radiating to her neck. Initially she rated the pain at a 6 on a scale of 10, but within a short time she reported the pain at 10 of 10. She had high blood pressure, nausea, vomiting, and dizziness.

As she sat crying in horrible pain, a patient registration processor asked her to sign a "Conditions of Admission" form. Her son declared, "My mother was still suffering horribly, she was crying and she was nauseous and was unable to read the document. At no time during the admission process was my mother capable of reading the admissions form, nor did she attempt to read the admissions form." He attests that at no time did the registration processor explain the contents of the admissions form or read it to her. She instructed his mother to sign the form and to initial it in certain places.

His mother complied. The form provided that "all physicians and surgeons furnishing services to the patient, including the radiologist, pathologist, anesthesiologist and the like, are independent contractors and are not employees or agents of the hospital." There was a sign on the wall of the registration area of

the emergency department that stated: "Emergency physician services will be billed to you separately from the hospital's services."

Dr. Robert Martin diagnosed decedent with a muscle tension headache and discharged her at approximately 6:50 a.m. Her subjective description of her pain had diminished to a 5 out of 10. At 9:00 p.m. she fainted and was taken by ambulance to another hospital. She was transferred to UC Davis Medical Center, where she died two days later of a massive left temporal hemorrhage.

In a deposition, the patient registration processor testified that she did not remember decedent, whether decedent had read the form, or anything about decedent and her signing of the form. Nor did the registration processor remember if she followed the hospital's custom and practice to advise decedent of the physician's status as an independent contractor. She certainly did not have any recollection of decedent's mental acuity at the time she signed the form.

A neurosurgeon reviewed decedent's medical records and her son's declaration. He opined that at the time of decedent's admission to the hospital in the early morning hours of August 24, 2008, she was suffering from a massive left temporal hemorrhage and "was incapable of understanding the admissions form and/or incapable of understanding what was contained in the form." A radiographic image of her brain taken at the second hospital confirmed decedent had a large left temporal intraparenchymal hemorrhage.

In deposition, Dr. Martin testified that the insignia on the clothing he was wearing while treating decedent identified him as an employee of "California Emergency Physicians."

The trial court granted the hospital's motion for summary judgment. Relying on decedent's signature on the admissions form, the physician's clothing, and the custom and practice of the admissions staff, the court concluded: "The hospital has presented competent undisputed evidence that it made affirmative representations as a matter of course to each patient as to the independent contractor status of physicians." The court further explained: "Here, the only evidence before the Court on the issue of whether the patient should have known the physician was not the hospital's agent is that the hospital

advised the patient in writing of this fact. Plaintiffs seek to infer that there is a triable issue of fact due to decedent's mental and/or physical condition at the time of admission, but this does not rebut the undisputed fact that the hospital's actions were such that any reasonable third person would be placed on notice that physicians were not agents of the hospital. Whether there was any reliance is not at issue as the first element cannot be met."

Decedent's children, plaintiffs Dean Whitlow and Candace Whitlow-Powell, appealed the judgment. They argued the record disclosed the existence of disputed issues of material fact that must be resolved in determining whether the Conditions of Admission form signed by their mother in the emergency room is enforceable so as to preclude their claim against the hospital.

The Third District Court of Appeal commenced its opinion with this reference to hospital liability and agency: "A hospital is liable for a physician's malpractice when the physician is actually employed by or is the ostensible agent of the hospital." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103.) Normally the issue of agency is a question of fact; but the hospital here, attempting to shed its vicarious liability for the negligence of the physicians who provide services in its emergency room, compelled patients to sign a form acknowledging the physicians are independent contractors and posts signs delivering the same information. The question thus presented is whether the hospital's form and signage entitles the hospital to judgment as a matter of law. Both sides rely on the same pivotal case to support opposite outcomes—*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448.

The Justices noted that *Mejia* is not a case exonerating a hospital. To the contrary, the Court of Appeal reversed a nonsuit that had been granted to the hospital. The court in that case went to great lengths to describe the evolution of the law imposing greater and greater liability on hospitals as their roles in their communities changed and patients came to expect that the hospitals would try to cure them, not that the nurses and physicians would act on their own responsibility. The doctrine of ostensible agency was utilized as a mechanism to impose liability on hospitals for the negligence of independent contractor physicians.

Mejia explored the nuances of ostensible agency as a means of holding the hospital liable for the conduct of independent contractor physicians. **Section 2300 of the Civil Code states: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civil Code section 2334 further provides: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." At the heart of these statutes, the court distilled two essential elements: "(1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff."** (*Mejia* at p. 1457.)

Citing a clear nationwide trend, the court wrote that ostensible agency can be inferred "from the mere fact that the plaintiff sought treatment at the hospital without being informed that the doctors were independent contractors." Reversing the nonsuit in favor of the hospital, the court concluded: "When this standard is applied to the case law governing ostensible agency in the hospital context, it appears difficult, if not impossible, for a hospital to ever obtain a nonsuit based on the lack of ostensible agency. Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Mejia*, at p. 1458.)

Defendant hospital insists that it provided the very type of notice that "conclusively indicates that the patient should have known that the treating physician was not the hospital's agent." Even in California, where the courts assume the physician appears to be an agent, defendant maintains that it provided the requisite notice to the contrary. The trial court agreed, focusing on the conduct of the hospital, not the patient. It was persuaded that the Conditions of Admission form, the signs, the insignia on the doctor's clothing, and the hospital's customs and practices provided notice to the patient and exonerated the hospital. Defendant hospital, however, failed to cite a single case in which a California court has found that a patient who enters an emergency room of a

hospital in dire distress and excruciating pain and who is forced to sign admission forms that include the agency disclaimer is provided "notice" the hospital is not responsible for her care and the apparent agency of the emergency room physician is dispelled as a matter of law.

Mejia itself casts doubt on the hospital's position. Relying on compelling jurisprudence from other states, the court advised: "Many courts have even concluded that prior notice may not be sufficient to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information." The analysis provided by other courts is instructive.

In *Clark v. Southview Hosp. & Family Health Ctr.* (1994) 68 Ohio St.3d 435 [628 N.E.2d 46,] the court recognized the unique role of emergency rooms in our health care system. "With hospitals now being complex full-service institutions, the emergency room has become the community medical center, serving as the portal of entry to the myriad of services available at the hospital. As an industry, hospitals spend enormous amounts of money advertising in an effort to compete with each other for the health care dollar, thereby inducing the public to rely on them in their time of medical need. The public, in looking to the hospital to provide such care, is unaware of and unconcerned with the technical complexities and nuances surrounding the contractual and employment arrangements between the hospital and the various medical personnel operating therein. Indeed, often the very nature of a medical emergency precludes choice. Public policy dictates that the public has every right to assume and expect that the hospital is the medical provider it purports to be."

It is true that factually the hospital in *Clark*, unlike defendant hospital here, did not provide any notice to the decedent that the emergency room physician was an independent contractor. Nevertheless, the court's rationale is sound. The court explained, "As to notice to the plaintiff that care is being provided by independent medical practitioners, we stress that such notice, to be effective, must come at a meaningful time." To be more specific, the court admonished that posting signs in an emergency room would rarely provide a patient with the ability to choose at a meaningful time. We agree with the further analysis the court adopted from a pertinent law review article: "The plaintiff, who by

definition is injured and under stress, is relying upon the hospital to provide the services that the hospital has held out that it can provide. The plaintiff's reliance upon the hospital's competence has been demonstrated by her walking (or being wheeled) into the emergency room. Simply informing her that some doctors and staff have a different technical relationship with the hospital than the one she expected does not lessen the reasonableness of her reliance upon the hospital. Even if the patient understood the difference between an employee and an independent-contractor relationship, informing her of the nature of the relationship after she arrives is too late. The purpose of any notice requirement is to impart knowledge sufficient to enable the plaintiff to exercise an informed choice. The signs . . . are too little, too late." [Evolution of Hospital Liability: Wisconsin Adopts Apparent Agency (1990), Wis.L.Rev. 1129,] 1147.

A federal district court in California reversed a summary judgment in a case involving an incarcerated woman who was "shackled, in pain, and 'forced' to sign" a conditions of admission form, which stated that the physicians were not the hospital's agents but, rather, independent contractors. (*Van Horn v. Hornbeak* (E.D.Cal. Feb. 18, 2010, 2010 U.S.Dist. Lexis 14321 at *31.) The court emphasized that "the question of ostensible agency is generally a question for the trier of fact unless the evidence conclusively establishes that the patient knew or should have known that the treating physician was not an agent of the hospital. Generally, under California law, ostensible authority is for a trier of fact to resolve and the issue should not be decided by an order granting summary judgment." The court held that the form did not conclusively establish that the inmate should have known there was no agency. Thus, in light of her affirmations regarding the manner in which she was purportedly given notice, the court concluded there remained triable issues of material fact.

The provision of medical services in an emergency implicates the public interest. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101). In *Tunkl*, the court found an agreement to relieve the hospital of liability for the negligence of its employees invalid on the ground it violated public policy. As explained by the court in *Tunkl*: "In insisting that the patient accept the provision of waiver in the contract, the hospital certainly exercises a decisive advantage in bargaining. The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find

another hospital. The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract. As a result, we cannot but conclude that the instant agreement manifested the characteristics of the so-called adhesion contract. Finally, when the patient signed the contract, he completely placed himself in the control of the hospital; he subjected himself to the risk of its carelessness."

While the "notice" provided in the Conditions of Admission form here did not constitute a release agreement as in *Tunkl*, the same public policy concerns apply where the hospital attempts to absolve itself of liability for the actions of the physicians and others manning the emergency room. These concerns are most acute in an emergency room setting, where a patient often arrives in pain and distress and cannot reasonably be expected to discern from a boilerplate admissions form that the emergency physician he or she is provided by the hospital is not the hospital's agent. For this reason, "many courts have even concluded that prior notice may not be sufficient to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information." (*Mejia*, at p. 1454.)

Thus, we reject the trial court's finding that defendant hospital successfully absolved itself of liability as a matter of law when a woman, writhing in pain and vomiting as a result of the worst headache she had had in her life, signed a boilerplate admissions form disclaiming the agency of the emergency room physician who treated her. Viewing the document in the light most favorable to the nonmoving party, we conclude the mere existence of a boilerplate admissions form is not sufficient to "conclusively indicate that decedent should have known that the treating physician was not the hospital's agent . . . ." (*Mejia*, at p. 1458.) Nor did the addition of the posted signs and the insignia on the doctor's clothing, in addition to the Conditions of Admission form, compel summary judgment. A jury will weigh the significance of these indicia of notice, but defendant's evidence constitutes only half of the story.

The jurors will also have the opportunity to consider decedent's son's testimony about his mother's condition at the time she signed the form and to weigh the neurosurgeon's expert opinion that, since decedent was suffering from

a brain hemorrhage at the time she signed the form, she would be incapable of understanding its content. It is a question of fact whether the acknowledgment decedent signed in such a stressful situation was signed under duress. The jurors will determine whether the size, location, and content of the signs posted in the emergency room would give a reasonable person notice of the hospital's disclaimer and whether the insignia on the doctor's clothing identifying him as an employee of "California Emergency Physicians" would convey a lack of agency. The jurors will also weigh the son's testimony that the patient registration processor did not read or explain the form to his distressed mother against the processor's testimony that it was her custom and practice to do so. These are all questions of fact the jury must ultimately resolve to determine whether the patient had notice of the doctor's independent contractor status. But the adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital.

Simply put, we reject the notion that a signature on an admissions form conclusively constitutes notice to a patient seeking care in an emergency room that the treating physician, whom she did not choose and did not know, is not an agent of the hospital. The trial court erred in granting summary judgment, thereby absolving the hospital of liability as a matter of law. The Justices explained at length that plaintiffs have demonstrated triable issues of fact regarding an ostensible agency theory of vicarious liability, and thus, the judgment must be reversed.

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