What's the Next Step in Applying Agency Principles to Hospitals?

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I. Introduction

In Diggs v. Novant Medical, Inc., 177 N.C. App. 290, 628 S.E.2d 851 (2006), the North Carolina Court of Appeals held that a hospital could be liable under apparent agency principles for the acts of an independent contractor physician. The North Carolina appellate courts have not yet addressed the related issue of whether a hospital could be vicariously liable because the non-employee physician was performing the hospital's non-delegable duty. This paper discusses the law regarding these theories of liability in North Carolina and other jurisdictions, as well as their potential application to a range of medical negligence cases.

II. Hypothetical Cases

A. Emergency Room

Your future client and her husband are involved in a car accident and your client is seriously injured. Drifting in and out of consciousness, she is transported by an EMS team to the closest hospital emergency room. When she arrives, she is immediately treated by staff in the emergency room. At the same time, her husband is handed a clipboard and he quickly signs a three-page admission and consent form without closely reading it. One paragraph in the form states that the physicians providing medical treatment in the emergency room are not employees of the hospital. In your client's case, the ER physician negligently prescribes a drug that was contraindicated, causing severe, permanent brain damage. Unfortunately, the negligent physician only has a $1 million liability policy. He is a member of a physician group that has a contract with the hospital to be the exclusive providers of emergency care.

B. Inpatient Surgery

Your future client is admitted to her local hospital because of respiratory distress. After a week of diagnostic tests, your client is told by a consulting thoracic surgeon that she needs lung surgery. The client has never met this physician previously and does not know his relationship to the hospital. The client signs a consent form for the surgical procedure, which states generally that some physicians in the hospital are not hospital employees, but rather independent contractors who have been granted hospital privileges. The status of the client's particular surgeon is not revealed. In fact, he is an independent contractor with hospital privileges. The

surgeon botches the operation, paralyzing your client. After you file suit against the surgeon, you learn that his insurance coverage has lapsed.

III. Applying Agency Principles in the Hospital

A. Actual Agency

Under the doctrine of *respondeat superior*, a hospital is vicariously liable for the negligence of a physician acting as its agent, but not for the negligence of a physician who is merely an independent contractor. Hylton v. Koontz, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000). Whether an agency relationship exists depends on the amount of control that the hospital has over the physician's work. Id. at 636, 532 S.E.2d at 257. Specifically, the hospital "must have the right to control both the means and the details of the process by which the agent is to accomplish his task in order for an agency relationship to exist." Wyatt v. Walt Disney World Co., 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002); see also McCown v. Hines, 353 N.C. 683, 686-87, 549 S.E.2d 175, 177 (2001) (setting out the common law standards for distinguishing between employees/agents and independent contractors).

While hospitals are thus liable for the negligence of the physicians they directly employ, courts are reluctant to find actual agency in other situations. The North Carolina Court of Appeals most recently confronted the question in Diggs v. Novant Medical, Inc., 177 N.C. App. 290, 628 S.E.2d 851 (2006). In Diggs, the plaintiff was diagnosed with gallstone complications and was referred to a general surgeon, Dr. Goco. Id. at 290, 628 S.E.2d at 854. Dr. Goco recommended surgery. Id. The plaintiff was admitted to defendant Forsyth Medical Center ("FMC"), where Dr. Goco had hospital privileges. Id.

The plaintiff's gall bladder surgery required general anesthesia. Id. Piedmont Anesthesia & Pain Consultants, P.A. ("Piedmont") had a contract with FMC that granted Piedmont the exclusive right to provide anesthesia services at FMC. Id. Two Piedmont employees, a doctor and a nurse, administered anesthesia to the plaintiff during her surgery. Id. In the process, they perforated the plaintiff's esophagus, a fact that was not discovered until after the gall bladder surgery was over. Id. The plaintiff contended that she suffered severe and permanent injuries as a result of the perforation. Id.

Based on the agreement between Piedmont and FMC, the plaintiff argued that Piedmont and its employees were actual agents of FMC. In addition to establishing the exclusive provision of services by Piedmont, the contract granted FMC the right to (1) require that Piedmont doctors become members of FMC's Medical-Dental Staff and that they comply with the rules and regulations governing that Staff; (2) approve and credential all Piedmont nurse anesthetists, and (3) require Piedmont to remove from FMC's anesthesia service any physician for specified grounds. Id. at 300, 628 S.E.2d at 858. On the other hand, the contract specifically provided that "FMC shall neither have nor exercise any control or direction over the methods by which [Piedmont] or any Physician shall perform it or his work and functions . . . ." Id. at 299, 628 S.E.2d at 857-58. Moreover, Piedmont managed its own scheduling and hiring needs, billed patients separately from the hospital, and its physicians could practice outside the hospital. Id. at 299, 628 S.E.2d at 858.

Accordingly, the court concluded that the hospital did not have the "right to control the manner or method of the anesthesiology work performed by Piedmont and its personnel," and thus did not have the requisite degree of control necessary for an actual agency relationship. Id. at 300, 628 S.E.2d at 858. This decision is in line with previous rulings. See Hylton, 138 N.C. App. at 636-37, 532 S.E.2d at 257-58 (finding no agency relationship when the anesthesiology agreement provided that the hospital would have no control over the method and means by which the anesthesiologists performed their work, the physicians were not precluded from practicing outside the hospital, the physicians received no compensation from the hospital, the parties billed the patient separately, and the hospital did not schedule the physicians); Hoffman v. Moore Reg'l Hosp., Inc., 114 N.C. App. 248, 250-51, 441 S.E.2d 567, 569 (1994) (finding no employee/agent relationship when the physician was a member of a private group, the physician's schedule was determined by the group rather than the hospital, and the patient was billed for the physician's services by the group and not the hospital).

B. Apparent Agency

If an actual agency relationship does not exist, apparent agency may provide an alternate basis for vicarious liability. The apparent agency doctrine is most often associated with contracts and the ability of an agent with "apparent authority" to bind the principal to a contract with a third party. "Apparent authority is the authority that a third person reasonably believes an agent to possess because of some manifestation from his principal." Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 148 (Ind. 1999); see also Restatement (Second) of Agency § 8.

Section 429 of the Restatement (Second) of Torts describes the application of apparent agency to tort law generally: "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants." See also Restatement (Second) of Agency § 267. This principle at its core is a theory of estoppel, and is at times expressed in those terms: "'Where a person, by words or conduct, represents or permits it to be represented that another is his agent, he will be estopped to deny the agency as against third persons, who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency exists in fact.'" Univ. of N.C. v. Shoemate, 113 N.C. App. 205, 215, 437 S.E.2d 892, 898 (1994) (quoting Barrow v. Barrow, 220 N.C. 70, 72, 16 S.E.2d 460, 461 (1941)).[1]

In recent years, as hospitals increasingly provide direct medical services instead of merely furnishing facilities for treatment, courts have begun to use the doctrine of apparent agency to find hospitals liable for the negligence of some independent contractor physicians. Diggs, 177 N.C. App. at 302, 628 S.E.2d at 859; Simmons v. Tuomey Reg'l Med. Ctr., 533 S.E.2d 312, 316-17 (S.C. 2000) (describing shift in public policy as hospitals have come to be seen as the provider of medical services). Most of these cases have arisen from negligent treatment provided by a hospital's emergency room physicians or anesthesiologists. Sword, 714

[1] "Courts holding hospitals liable under an agency theory often interchangeably describe the theory as 'apparent agency' and 'agency by estoppel.'" Sword, 714 N.E.2d at 147 n.3. "The distinction, if any, is that agency by estoppel requires both reliance and a change in position.." Id. (citing Restatement (Second) of Agency § 8 cmt. d).

N.E.2d at 150 (collecting cases); see Kenneth S. Abraham and Paul C. Weiler, Enterprise Medical Liability and the Evolution of the American Health Care System, 108 Harv. L. Rev. 381, 388 (1994) ("Although emergency room treatment is the most prominent setting for apparent-authority claims against hospitals, comparable vicarious liability suits have been successfully launched against hospitals for the alleged negligence of anesthesiologists, radiologists, pathologists, and even occasionally against a surgeon whose services the patient used *because* he was on the hospital staff.").

Courts that have held hospitals liable for the negligence of independent contractor physicians under apparent agency have sometimes referred to or explicitly adopted the standard from one of the Restatements. Sword, 714 N.E.2d at 150-51. Generally, however, they have employed a two-factor test. The first factor focuses on the hospital's conduct and examines whether the hospital acted in a manner that would lead a reasonable person to conclude that the allegedly negligent physician was an employee or agent of the hospital. Id. at 151. The second factor focuses on the patient's actions and examines whether the plaintiff reasonably acted in reliance upon the conduct of the hospital or its agent. Id. Some courts relax this second factor by presuming reliance absent evidence that the patient knew or should have known that the physician was not an employee and that the hospital was not responsible for her care. Id.[2] "Central to both of these factors . . . is the question of whether the hospital provided notice to the patient that the treating physician was an independent contractor and not an employee of the hospital." Id.

After surveying other jurisdictions, the Indiana Supreme Court in Sword adopted the Restatement (Second) of Torts § 429 as its standard for apparent agency in the hospital setting. Id. at 152. The court concluded 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." Id. Absent meaningful notice or special knowledge on the part of the patient regarding the nature of the physician's position, the patient's reliance is presumed. Id. The South Carolina Supreme Court similarly adopted Section 429 the next year, though it somewhat confusingly did so under the rubric of non-delegable duty instead of apparent authority. Simmons, 533 S.E.2d at 320-23.

In 2006, North Carolina joined the national trend in applying an apparent agency analysis to physicians working in hospitals. The Court of Appeals in Diggs reviewed Sword, Simmons, and apparent agency decisions in other jurisdictions. Diggs, 177 N.C. App. at 302-05, 628 S.E.2d at 859-61. The court concluded that the approach of the Restatement (Second) of Torts §

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[2] The presumption could be rebutted where the patient had previously established an independent relationship with the physician or selects a particular physician before going to the hospital. Id.; see Simmons, 533 S.E.2d at 323 (holding that a patient could not reasonably believe her physician is a hospital employee if she is treated in the hospital by her own physician after arranging to meet the physician there). This is how Diggs interpreted the older case of Hoffman v. Moore Reg'l Hosp., Inc., 114 N.C. App. 248, 441 S.E.2d 567 (1994). In that case, the patient was admitted to a hospital at the request of her private physician for a particular procedure. Although she did not choose the doctor who would perform that procedure, the consent form specifically listed five possible doctors and the patient was looking to one of those doctors to provide her care. Id. at 249-50, 441 S.E.2d at 569. Accordingly, the court required evidence that the patient "would have sought treatment elsewhere or done anything differently had she known for a fact that [the doctor] was not an employee of the hospital." Id. at 252, 441 S.E.2d at 570.

429 was consistent with North Carolina precedent and supported by the weight of authority from other jurisdictions. Id. at 307, 628 S.E.2d at 862. In order to hold a hospital vicariously liable due to apparent agency, "a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees." Id. "A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor." Id. (emphasis added).

The court in Diggs found sufficient evidence to support the claim of apparent agency. The hospital, FMC, held itself out as a provider of anesthesia services, with a Department of Anesthesiology, a Chief of Anesthesiology, and a Medical Director. Id. The plaintiff stated in her affidavit that she was looking to FMC to provide her medical care apart from her surgeon. Id. at 308, 628 S.E.2d at 863. She had no choice but to use the Piedmont providers as Piedmont had the exclusive contract with FMC. Id. Finally, the plaintiff's belief that the anesthesiologists were FMC employees was reasonable because the consent form she signed could have been read to indicate that the plaintiff was receiving anesthesia services from FMC. Id. at 308-09, 628 S.E.2d at 863. Accordingly, the trial court's grant of summary judgment in favor of FMC was reversed and the action was remanded for further proceedings.

C. Apparent Agency After *Diggs*

The North Carolina appellate courts have not issued another decision on apparent agency since Diggs. The hospital's petition for discretionary review was denied by the Supreme Court. Diggs v. Novant Medical, Inc., 361 N.C. 426, 648 S.E.2d 209 (2007). On January 28, 2009, the Court of Appeals heard oral argument in Ray v. Forgy, a case in which the plaintiff seeks to hold the hospital liable under apparent agency principles for a surgeon who had no insurance coverage.

In 2008, in Boren v. Weeks, the Tennessee Supreme Court adopted the standard for apparent agency articulated by Diggs. 251 S.W.3d 426, 436 (Tenn. 2008) (citing Sword, Simmons, and Diggs). Boren turned on whether the hospital had provided "meaningful notice" to the patient that the emergency room physician was an independent contractor. Id. The plaintiff's husband had signed a three-page consent form when the plaintiff arrived in the ER that contained a disclaimer stating that the ER physicians were not agents or employees of the hospital. Id. at 429. The disclaimer was included in the second half of the first paragraph on the first page of the form in bold, normal size font. Id. There was no evidence that the hospital had called attention to the disclaimer. Id. at 437. In fact, several admission staff members testified that the form was completed in an electronic format, that patients and their representatives were simply asked if they consented to treatment, and hospital staff did not as a matter of practice explain that the physicians were independent contractors rather than employees or agents. Id. Based on these facts, the court could not say as a matter of law that the plaintiff had been provided with sufficient notice. Id. Accordingly, the trial's court grant of summary judgment to the hospital defendant was reversed. Id. See also Clark v. Southview Hosp., 628 N.E.2d 46, 54 n.1 (Ohio 1994) (rejecting suggestions that a hospital could insulate itself from liability by giving notice to patients through signs posted in the emergency room).

Similar disputes over "meaningful notice" are likely to arise under Diggs. In Cantrell v. Northeast Ga. Med. Ctr., 508 S.E.2d 716, 719-20 (Ga. Ct. App. 1998), cited in Diggs, the Georgia Court of Appeals concluded that the hospital provided sufficient notice where conspicuous signage was posted and forms signed by the patient or representative revealed the independent contractor status of the doctor. Diggs, 177 N.C. App. at 307, 628 S.E.2d at 862. If North Carolina courts adopt the reasoning in Cantrell instead of the Tennessee Supreme Court's more solicitous approach in Boren, they may foreclose claims by patients who hurriedly signed emergency room forms.

IV. Non-Delegable Duty to Provide Medical Care

A. Legal Background

The doctrine of non-delegable duty is an exception to the general rule of non-liability for the torts of independent contractors. Grounded in public policy, the doctrine turns on the nature of the underlying activity regardless of the relationship of the parties. "A nondelegable duty may arise from circumstances recognized at common law and statute, and in situations wherein the law views a person's duty as so important and so peremptory that it will be treated as nondelegable." Medley v. N.C. Dep't of Correction, 330 N.C. 837, 841, 412 S.E.2d 654, 657 (1992). The person subject to a non-delegable duty is free to delegate the duty, but will be liable to third parties for any negligence of the delegatee, regardless of any fault on the part of the delegator.

Some of the duties considered non-delegable under common law are the duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, of a municipality to keep its streets in repair, and of an employer to provide employees with a safe place to work. Jackson v. Power, 743 P.2d 1376, 1383 (Alaska 1987). Also non-delegable is the duty to protect the safety of others when conducting inherently dangerous activities. Evans v. Rockingham Homes, Inc., 220 N.C. 253, 258-59, 17 S.E.2d 125, 128 (1941) (defining inherently dangerous). As Prosser notably commented, "It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Medley, 330 N.C. at 841, 412 S.E.2d at 657 (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 71, at 512 (5th ed. 1984)).

B. Decisions in Other States

The leading case applying the doctrine of non-delegable duty to hospitals is Jackson v. Power. In that case, the plaintiff was seriously injured when he fell from a cliff and was airlifted to Fairbanks Memorial Hospital ("FMH"). Jackson, 743 P.2d at 1377. The plaintiff was treated by an independent contractor physician in the emergency room who failed to test for kidney damage. Id. As a result, the plaintiff's kidney injury went undetected for 9 or 10 hours, ultimately leading to the loss of his kidneys. Id. The plaintiff sued FHM for the physician's

negligence on the grounds of enterprise liability, apparent agency, and non-delegable duty. Id. After rejecting the first theory and accepting the second, the Alaska Supreme Court turned to the question of non-delegable duty.

The issue was framed as whether FMH, a general acute care hospital, had a non-delegable duty to provide non-negligent physician care in its emergency room. Id. at 1382. The court first examined whether FMH had a duty to provide emergency room care. Id. That question was easily answered in the affirmative because (1) FMH was licensed as a "general acute care hospital" under state statutes and regulations, which imposed a duty on FMH to provide emergency care physicians on a 24-hour basis; (2) FHM was accredited by the Joint Committee on the Accreditation of Hospitals ("JCAH"), and thus had to comply with the JCAH's standards promulgated in the *Accreditation Manual For Hospitals, Emergency Services*; and (3) FMH's own bylaws provided for the establishment and maintenance of an emergency room. Id. at 1382-83.

To decide whether this duty was non-delegable, the court first looked to its earlier decision, Alaska Airlines v. Sweat, 568 P.2d 916, 925-26 (Alaska 1977), which had held that the airline owed a common law non-delegable duty of safety to its passengers. Id. at 1384. The court found emergency room patients equally entitled to protection because "the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers." Id. In addition, hospitals are heavily regulated entities like airlines, and similarly bear the ultimate responsibility of complying with safety requirements. Id.

Considering the nature of modern hospitals, the court concluded that recognizing a non-delegable duty would be "consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, [and] it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine." Id. at 1385. "Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient." Id.

Accordingly, the court held that a general acute care hospital's duty to provide physicians for emergency room care is non-delegable. Id. The court sensibly made an exception in the rule when a patient is treated by her own doctor in an emergency room provided for the convenience of the doctor. Id. Thus the rule only applies when "a patient comes to the hospital, as an institution, seeking emergency room services and is treated by a physician provided by the hospital." Id. In such situations, the hospital will always be vicariously liable for negligence of the physician. Id.

Following Jackson, some other state courts have applied non-delegable duty principles to hospitals. In Wolbers v. The Finley Hosp., 673 N.W.2d 728 (Iowa 2003), the Iowa Supreme Court held that a hospital has a non-delegable duty to provide competent medical care to emergency room patients and inpatients relying on an emergency response in the absence of their chosen physician. Cf. Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991) (adopting the doctrine of corporate liability under which the hospital is liable if it fails to uphold the proper

standard of care owed its patient, though the hospital must have had actual or constructive knowledge of the defect or procedures that created the harm). In Simmons v. Tuomey Reg'l Med. Ctr., 533 S.E.2d 312, 320-22 (S.C. 2000), the South Carolina Supreme Court, applying the principles in Restatement (Second) of Torts § 429, recognized a qualified non-delegable duty for hospitals. The Simmons court articulated the same-three part test that Diggs later adopted, holding that the hospital is vicariously liable under the non-delegable duty doctrine when the three conditions are met. Id. at 322-23. The difference with the approach in Diggs, if any, depends on what type of notice allows the hospital to escape vicarious liability.

Three days after the Alaska Supreme Court issued its decision in Jackson, a thoughtful New York trial court reached the same conclusion. In Martell v. St. Charles Hosp., 523 N.Y.S.2d 342 (Sup. Ct. 1987), the court considered and rejected the apparent agency or agency by estoppel theories used by other courts to find hospitals liable for independent contractor negligence. Id. at 348-51. According to the New York judge, such theories are based on a fictitious notion of reliance and choice, especially when considered in the emergency room context: "Here, we are faced with the situation of injured or ill patients in need of emergency medical treatment. Realistically, a person has no meaningful choice under the circumstances. He needs treatment and will turn to his local hospital to provide it regardless of prior notice that the physicians are independent contractors." Id. at 351 (quoting Hannola v City of Lakewood, 426 N.E.2d 1187, 1190 (Ohio App. Ct. 1980)). Legal fictions aside, "it is the hospital's location and reputation which draw patients to its emergency room, as well as the exigencies of the moment, and, in this regard, the contractual relationship between the hospital and the emergency room physicians is irrelevant as a practical matter." Id. at 352. Moreover, the apparent agency theory is flawed because it may allow hospitals to escape liability by providing some sort of notice to patients, even if the notice would never, in a practical sense, affect a patient's decision-making process. Id. Because hospitals should be liable for the malpractice of physicians in hospital emergency rooms irrespective of their private contractual relationships and the patient's awareness, the imposition of a non-delegable duty is a sounder public policy choice. Id.

In contrast, Texas and Missouri courts have rejected the non-delegable duty doctrine in connection with care provided by emergency room physicians. Baptist Mem'l Hosp. System v. Sampson, 969 S.W.2d 945, 949 (Tex. 1998) (finding it unnecessary to adopt non-delegable duty doctrine because the patient may sue the negligent physician and sue the hospital for violation of any duties owed directly to patients); Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391, 395-96 (Mo. Ct. App. 1992) (declining to apply non-delegable duty because such a duty does not appear in statutes or regulations, and practice of medicine in emergency room is not an inherently dangerous activity); see also Estates of Milliron v. Francke, 793 P.2d 824, 827 (Mont. 1990) (refusing to apply non-delegable duty doctrine to hold hospital liable for the negligent acts of an independent contractor radiologist). The Texas court noted that if reliance is always presumed under the apparent agency theory, regardless of notice, it would be equivalent to imposing a non-delegable duty on the hospital. Baptist Mem'l Hosp. System v. Sampson, 969 S.W.2d at 948-49.

C. Adoption of Non-Delegable Duty in North Carolina?

It remains to be seen whether North Carolina courts will adopt the non-delegable duty doctrine with regard to hospitals. Having found hospital liability on the basis of apparent agency, the Court of Appeals in Diggs declined to reach the question. Diggs v. Novant Medical, Inc., 177 N.C. App. at 309, 628 S.E.2d at 863.

Medley v. North Carolina Department of Correction, 330 N.C. 837, 412 S.E.2d 654 (1992), may indicate an openness to the theory that the provision of emergency room care is a non-delegable duty. In Medley, a prison inmate filed a medical negligence claim against the State based on his treatment by an independent contractor physician. Id. at 838, 412 S.E.2d at 655. The Court held that "the duty to provide adequate medical care to inmates, imposed by the state and federal Constitutions, and recognized in state statute and case law, is such a fundamental and paramount obligation of the state that the state cannot absolve itself of responsibility by delegating it to another." Id. at 844, 412 S.E.2d at 659.

The emergency room is the most likely arena for applying the non-delegable duty doctrine to hospitals. Unlike apparent agency, the non-delegable duty doctrine does not require an analysis of notice and reliance – concepts that have little meaning for most emergency room patients. Finding the provision of emergency room services to be a non-delegable duty would be a logical extension of Medley, consistent with sound public policy.

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