Proving ostensible agency against a hospital for physician malpractice following *Wicks*

By Benjamin Ikuta

In California, the ban against the corporate practice of medicine prevents hospitals from practicing medicine. (See Bus. & Prof. Code, § 2400.) Accordingly, with limited exceptions, physicians at a hospital are almost always independent contractors and not employees. (Health & Saf. Code, § 32129.) A hospital's liability for the malpractice of a physician, therefore, must be based on the theory that the physician was an ostensible agent while practicing at the hospital.

Proving ostensible agency is a difficult burden because the plaintiff usually must establish that the defendant either intentionally or carelessly created the impression that the wrongful actor was the defendant's employee or agent. (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal. App.4th 1040, 1053.)

In the hospital setting, particularly in the context of emergency care, those requirements were historically relaxed. The standard jury instruction on ostensible agency *should not* be used in the hospital setting. (CACI 3709: Directions for Use.) Instead, "the only relevant factual issue is whether the patient had reason to know that the physician was not an agent of the hospital." (*Id*.) As such, it was very difficult for a hospital to obtain summary judgment or a nonsuit on the vicarious liability claims.

Several recent decisions have developed the scope of ostensible agency. *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866 recently restricted a plaintiff's claim against hospitals based on ostensible agency. It is critical that in asserting claims for ostensible agency you fully comprehend the *Wicks,* and earlier competing decisions, to survive summary judgment or a nonsuit and maximize probability of success at trial.

I. *Mejia v. Community Hospital:* Developing the Law of Ostensible Agency

In *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, from the Fourth District, Division Two, the patient presented to the emergency department with severe neck pain. The ER physician ordered an x-ray, which was read as negative by the radiologist. Accordingly, the ER physician prescribed pain medication and sent the patient home. In fact, the radiologist missed that the patient actually had a broken neck. The next day, as a result of the missed read and the delay in treatment, the patient ended up paralyzed.

At trial, the court granted the nonsuit of the hospital on the basis that the radiologist was an independent contractor and not an employee. (*Id.*) The case proceeded against the radiologist, whom jury found negligent in the care and treatment of the plaintiff. (*Id.*)

The appellate court reversed the nonsuit, holding that the trial court erred. (*Id.* at 1452.) The Court of Appeal reviewed the nationwide evolution of the law of ostensible agency. The appellate court noted that the two elements required to establish an ostensible agency claim: (1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff. (*Id.*)

As for the first element, it is established simply when a hospital holds itself out to the public as a provider of care. As such, "a hospital is generally deemed to have held itself out as the provider of care, unless it gave the patient contrary notice." (*Id*. at 1453.)

The second element "is established when the plaintiff 'looks to' the hospital for services, rather than to an individual physician." (*Id.* at 1454.) For this element, the *Mejia* court noted that "many courts presume reliance, absent evidence that the plaintiff knew or should have known the physician was not an agent of the hospital." (*Id.*)

In short, *Mejia* held that the *only* relevant issue was "whether the patient had

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reason to know that the physician was not an agent of the hospital." (*Id.*) "Unless the patient had some reason to know of the true relationship between the hospital and the physician – for example, where the hospital gave the patient actual notice or where the patient was treated by his personal physician – ostensible agency is readily applied." (*Id*. at 1454-1455.)

Given this light burden, the *Mejia* court found that it "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." (*Id*.)

II. *Whitlow*: Boilerplate Hospital Admitting Forms are Insufficient

After *Mejia,* more hospitals started to use admitting forms – usually called "Conditions of Admission" or "Conditions for Services" forms – with clauses to notify patients about the employment status of medical staff physicians. In the emergency room, however, patients were often not in a condition to understand these boilerplate admission forms. This was an issue in the Third District's decision in *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641, which "reject[ed] 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."

In *Whitlow*, the patient went to the emergency room with a severe headache. (*Id.* at 633.) She was crying, in excruciating pain, and suffered from high blood pressure, nausea, vomiting, and dizziness. The patient signed an admission form which stated that "all physicians and surgeons furnishing services to the patient ... are independent contractors and not employees or agents of the hospital." There was also insignia on the doctor's clothing that identified him as an employee of a medical group and a sign on the wall in the registration area that stated that emergency physician services would be billed separately from the hospital's services.

Based on the negligence of the emergency medicine physician who diagnosed her with a tension headache, the patient was improperly discharged. At the time of discharge, the patient stated her pain had decreased to a 5 out of 10. The patient died two days later of a massive left temporal hemorrhage.

The trial court granted summary judgment, relying on the signature on the admissions form. The Court of Appeal reversed. "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." (*Id.* at 639.) The court examined the public policy concerns when a hospital attempts to absolve itself of liability for the actions of the physicians and others manning the emergency room. (*Id.* at 640.) "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." (*Id.*)

Relying on *Mejia*, the Court of Appeal in *Whitlow* held that ostensible authority is for a trier of fact to resolve and the issue should not be decided on summary judgment. "[T]he 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." The same was true for the vague insignia on the doctor's clothing and the billing signs. It was a question of fact for a jury to determine whether the patient knew or should have known that the doctors were not employees when she signed the boilerplate documents in severe pain and with a brain hemorrhage. (*Id.*)

III. *Markow v. Rosner*: Where the Patient Picked His Treating Doctor

In *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, the patient suffered from serious and chronic pain following an auto accident. The patient researched for a pain management physician and was impressed that the defendant physician was the medical director of the pain center at a prominent hospital. The physician worked at the pain center just down the street from the hospital and the hospital supplied equipment and staff to the center. With the hospital's authorization, the physician provided

patients with business cards that had the hospital's name without any reference to the physician's medical group and used the hospital's logo in his letterhead in correspondence. The hospital boasted about the physician on its website.

The physician treated the patient for over four years. Over that time, the patient signed 25 separate Conditions of Admissions forms from the hospital explicitly stating that physicians were not employees and instead independent contractors. The forms repeatedly emphasized in headings and bolded type that physicians were not employees. The patient also signed eight separate authorization for surgery documents, which again emphasized that the physician was not an employee. The forms were simple with no confusing legalese.

After years of treatment, the physician negligently performed a nerve root block procedure, which ended up rendering the patient a quadriplegic. At trial, the jury found the physician negligent and also found the hospital vicariously liable and awarded a substantial verdict.

In a split decision, the Court of Appeal reversed the verdict as to the hospital and found that the trial court should have granted the hospital a judgment notwithstanding the verdict. The majority reasoned that "[a]lthough the existence of an agency relationship is usually a question of fact, it "becomes a question of law when the facts can be viewed in only one way." (*Id*. at 372.)

The majority emphasized that the patient did not present to the hospital seeking care from its emergency room and rather chose the doctor to be his personal physician. (*Id.* at 373.) Given that the plaintiff signed dozens of consent forms over a period of years, the plaintiff knew or at least should have known that the physician was not an employee or agent of the hospital. (*Id.*) The majority distinguished *Mejia* and *Whitlow* on the basis that (1) this was not an emergency room setting and (2) that the patient chose his doctor.

IV. *Wicks v. Antelope Valley Healthcare District:* No Proof that the Patient was Unable to Understand the Admission Documents

Markow did not have a dramatic impact on existing law given the overwhelming evidence in that case that the patient knew, or should have known, that the physician was not an employee. Also, *Markow*, drew a distinction between the facts before it and emergency cases, such as *Mejia* and *Whitlow*.

The Second District in *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal. App.5th 866, 869, altered the framework of ostensible agency claims against hospitals. *Wicks* is lengthy and addressed several legal issues. On the point of ostensible agency, in *Wicks* the patient drove himself to the emergency department complaining of pain in his neck, upper chest, throat, and stomach as well as a tight chest. The patient stated that he felt like he was "getting strangled below my neck." His pain level was a 7 out of 10 and he "appeared to be in distress due to pain." Hospital records described him as alert, oriented, and able to describe his symptoms.

The patient signed and initialed an admission form that stated that the ER

Physicians were not employees or agents of the hospital. The appellate court characterized the form as containing no obtuse legalese. The emergency medicine physicians discharged the patient with a diagnosis of "chest pain of unclear etiology" and provided a referral to a cardiologist. Less than eight hours later, the patient died at home of an acute aortic dissection. The heirs filed a wrongful death action, contending that the hospital was vicariously liable based on the negligence of the emergency medicine physicians.

A hospital can also be directly liable ... for negligent selection, supervision, oversight, or evaluation of physicians who practice as independent contractors at that hospital.

The heirs argued that unlike in *Markow*, the patient was an emergency patient and had no role in picking his physicians. He signed and initialed one consent form, not dozens as in *Markow*. The heirs argued that whether the patient knowingly understood the consent form given the severity of his condition, one that would kill him mere hours later, was an issue of fact inappropriate for summary judgment. The trial court granted summary judgment, finding no ostensible agency as a matter of law.

The Court of Appeal affirmed, taking great pains to distinguish *Whitlow*. (*Id.* at 883.) *Whitlow* explained that the patient was in no condition to understand the admission form given her condition. (*Id.*) In contrast, in *Wicks* the decedent was capable of understanding the admission form, as shown by evidence that he drove himself to the hospital and he was alert and oriented. (*Id.*)

Wicks held that "a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." The patient was given actual notice and that there was no evidence to show that the patient was unable to understand the admissions form so, *Wicks* reasoned, summary judgment was appropriate.

V. Lessons Derived from *Wicks*

There is a tension between *Wicks* and *Mejia* and *Whitlow*, and even *Markow*. *Wicks* deviated from those cases. Whether notice is actual and effective are quintessential jury questions. Advocate *Mejia* and *Whitlow* as the better-reasoned decisions. When intermediate appellate court decisions conflict, the trial court must choose what it believes to be the better-reasoned decisions. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 456.

First, it is critical that the plaintiff be prepared in deposition to explain exactly the severity of the patient's condition. Even under *Wicks*, summary judgment is not appropriate if the patient presented to the hospital with a severe condition that rendered that patient unable to fully understand or comprehend the admission documents. *Wicks* distinguished *Whitlow* on the grounds that the *Whitlow* "patient was in no condition to understand the admission form she signed in the emergency room." If the patient was in no condition to understand the paperwork, ensure that you secure testimony or declarations from the patient, friends, or family that will attest to those facts. Particularly in cases involving a failure to diagnose, it is prudent to bolster the evidence with a declaration from an expert explaining that the patient's actual condition would render it extremely difficult for that patient to comprehend the forms that they are signing.

Examine the admission forms themselves. In emergency cases, it is not unusual for the compromised patient to have a signature on the documents that appear far different than their customary signature, showing impairment. If the patient's signature does not appear to be that patient's regular signature, establish that the patient was not capable of understanding the form or writing her normal and customary signature. Show the trial court that signature compared to the patient's customary signature.

Some hospitals keep administrative documents separate from the electronic medical file. Prior to the plaintiff's deposition, it is important to obtain all documents pertaining to the hospitalization, including all admission forms. It is critical that the plaintiff is shown all of the admission documents and is prepared for questions about those documents.

If no one at the hospital separately explained the contents of the form despite the patient's condition, address that in the opposition papers. Consider taking a "person most qualified" deposition to establish that signing the admission paperwork is a condition before seeing any doctor. Also focus on the fact that no one at the hospital verbally explained to the patient or the family that doctors were independent contractors and not employees.

In some cases, the facts just will not be there to support an ostensible agency claim. If the patient was treated by one of their own primary doctors in the hospital, such as in *Markow*, it is unlikely that there would be a valid ostensible agency claim. If the error was made by a pathologist, radiologist, or anesthesiologist, for example, the plaintiff might be able to show ostensible agency. These physicians are typically chosen by the hospital. The attending physician often has no choice in selecting those physicians.

Examine closely the language of the admission forms. *Markow* and *Wicks* specifically relied on the fact that the documents were free from "obtuse legalese." If the documents are confusing or contain legalese that would be confusing for any patient, much less a patient with a severe medical problem requiring emergency care, it would help advance a cause of action for ostensible agency.

Evaluate whether there are any direct liability claims against the hospital outside of ostensible agency. A hospital is liable for the malpractice of its nurses or staff if those nurses failed to follow a physician's order, failed to adequately convey information concerning vital signs to physicians, or otherwise acted wrongfully. A hospital can also be directly liable under the holding of *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, for negligent selection, supervision, oversight, or evaluation of physicians who practice as independent contractors at that hospital. ■