


MEMORANDUM

TO: General Distribution

FROM: Glenn Jones, Esq. 
Deputy General Counsel

DATE: November 19, 2008

RE: **Apparent Authority**

Annexed hereto is a recent article in the N.J. Law Journal. This article discusses a recent Appellate Division decision holding that a hospital can be held liable for the negligence of an independent contractor if based on the "totality of the circumstances" the patient was led to believe that the independent contractor (physician) was an employee of the hospital. This holding is contrary to the current interpretation of the N.J. Tort Claims Act which provides a public entity is not responsible for the negligence of an independent contractor. If this ruling is applied to UMDNJ, and there is little reason to think that it will not be, then the failure to distinguish UMDNJ doctors at UMDNJ facilities, from non-UMDNJ doctors could lead to increased liability. In addition, doctors performing non-UMDNJ work, whether officially authorized or not, will likely be a potential source of additional liability for the University. Please be guided accordingly.

Anesthesiologist's Apparent Authority Renders Hospital Liable for Negligence

APPELLATE DIVISION

TORTS — Hospitals — Apparent Authority — Vicarious Liability — Fraudulent Concealment

Estate of Cordero v. Christ Hospital et al., A-1289-07T1; Appellate Division; opinion by **Grall, J.A.D.**; decided and approved for publication October 29, 2008. Before Judges Skillman, Graves and Grall. On appeal from the Law Division, Hudson County, L-1568-05. [Sat below: Judge Gallipoli.] DDS No. 29-2-2033 [19 pp.]

The totality of the circumstances here is sufficient to permit a jury to find the hospital liable for any negligence by the anesthesiologist under a theory of apparent authority.

Plaintiffs, the estate and husband of Ramona Cordero, appeal from an order granting summary judgment in favor of defendant Christ Hospital on a claim of, inter alia, vicarious liability for the negligence of defendant Dr. Selvia G. Zaklama.

Zaklama, an anesthesiologist and a member of defendant Hudson Anesthesia Group, is on the staff of Christ Hospital's anesthesiology department through Hudson's contract with the hospital. She was assigned to provide services during Cordero's surgery, during which Cordero suffered brain damage. She remained in a vegetative state until her death. Zaklama wore no identification to disclose her affiliation with Hudson and did not tell Cordero that the hospital assumed no responsibility for the care she would provide. The hospital's Web site identifies Zaklama as a member of its anesthesia department without reference to Hudson.

Plaintiffs claimed that the hospital was liable for Zaklama's negligence under a theory of apparent authority. Based on the absence of evidence that the hospital actively held out Zaklama as its agent or misled Cordero into believing Zaklama was its agent, or that Cordero was misled, the trial court dismissed plaintiffs' claim.

Held: When 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 on behalf of the hospital, the hospital has held out that doctor as its agent. 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 on behalf of the hospital may be presumed unless rebutted.


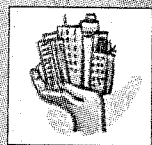
Generally, a principal is immune from liability for the negligence of an independent contractor, or that of its employees, in the performance of the contracted services. There are exceptions, however. The exception at issue here is based on "apparent authority."

Under *Basil v. Wolf*, 193 N.J. 38, 67 (2007) (quoting and approving *Arthur v. St. Peter's Hosp.*, 169 N.J. Super. 575 (Law Div. 1979)), apparent authority is demonstrated when the "hospital, by its actions, has held out" a doctor as its agent and "a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital."

The appellate panel says that the trial court read the conditions for liability in *Arthur* too strictly. *Arthur* considered the hospital's

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ALSO INSIDE . . . IN PRACTICE ARTICLES

<p>BUSINESS LAW 42 Amorphous standard that has proved to be fertile ground. BY MICHAEL L. RICH</p>		<p>REAL ESTATE LAW 43 The <i>Matera</i> holding marks a dramatic expansion of the CFA. BY MICHAEL O'DONNELL</p>	
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PLANTIFFS, DEADBEAT PARENTS, ANYONE

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entire course of conduct and the impression it would convey to a reasonable patient. The facts there show that a hospital can act to "hold out" a doctor as its agent without actively misrepresenting the doctor's agency or affirmatively misleading the patient.

The panel notes that that approach is consistent with § 2.03 of the *Restatement (Third) of Agency* and § 429 of the *Restatement (Second) of Torts*. The standards for apparent authority employed in *Arthur* and stated in §§ 2.03 and 429 have two essential elements: (1) conduct by the principal that would lead a person to reasonably believe that another person acts on the principal's behalf, i.e., conduct by the principal "holding out" that person as its agent; and (2) acceptance of the agent's service by one who reasonably believes it is rendered on behalf of the principal.

Active or explicit misrepresentations of agency by the principal are not required. A principal can manifest assent to a person's action on its behalf by placing a person in a position from which third parties will infer that the principal assents to acts necessary to fulfill the responsibilities of that position.

Based on these principles, the panel holds that 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 its behalf, the hospital has held out the doctor as its agent. When a patient accepts a doctor's care under such circumstances, the patient's acceptance in the reasonable belief that the doctor is rendering treatment on behalf of the hospital may be presumed.

The panel also sets forth the circumstances that should be considered when determining whether the hospital's conduct would lead a patient to reasonably believe that the doctor acts on its behalf. These include whether the hospital supplied the doctor and any notice of the doctor's independence from the hospital or disclaimers of responsibility.

The panel concludes that the evidence was adequate to withstand Christ Hospital's motion for summary judgment on apparent authority. The hospital put in place a system under which Zaklama arrived, without explanation, to provide specialized care in the hospital's operating room. A reasonable patient in the same situation would assume that the hospital furnished her service. Having created a misimpression of agency, the hospital failed to take any action to correct it. There is no evidence of any disclaimer of responsibility and no evidence that Cordero was given an opportunity to select a different doctor.

Thus, the evidence is sufficient to permit a jury to find that the hospital held out Zaklama as its agent and plaintiffs are entitled to a rebuttable presumption that Cordero accepted Zaklama's service in the reasonable belief that care was rendered on behalf of the hospital.

defendant's guilty plea to reckless driving. Relying on the Supreme Court's strict enforcement of drunk-driving laws, the Law Division held it should abide by the plea-bargaining ban embodied in the "Guidelines for Operation of Plea Agreements in the Municipal Courts," although the guidelines expressly govern only municipal courts. [Decided May 5, 2008.] [Digested at page 47.]

FAMILY LAW — PALIMONY

20-2-2018 *Bayne v. Johnson*, App. Div. (Colleston, J.A.D.) (29 pp.) We denied palimony to the claimant who lived with her paramour and his wife for a substantial period of time based on absence of proof of a promise of lifetime support and also because claimant left the relationship voluntarily. [Decided Oct. 27, 2008.] [Digested at page 44.]

PHYSICIAN/PATIENT — HOSPITALS — APPARENT AUTHORITY

29-2-2033 *Estate of Cordero, et al. v. Christ Hospital, et al.*, App. Div. (Grall, J.A.D.) (19 pp.) On appeal from a grant of summary judgment in favor of the defendant-hospital, plaintiffs contend the evidence was adequate to permit a jury to find the hospital liable for an anesthesiologist's negligence under a theory of "apparent authority." There is apparent authority when "a hospital by its actions, has held out" a doctor as its agent and "a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital." *Basil v. Wolf*, 193 N.J. 38, 67 (2007) (quoting and approving *Arthur v. St. Peter's Hosp.*, 169 N.J. Super. 575, 581 (Law Div. 1979)). Based on the absence of evidence that the hospital "actively held out" or "misled" the patient "into believing" that the anesthesiologist was its agent, or that patient was misled, the trial court dismissed plaintiffs' claim. We hold that when 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 on 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 on behalf of the hospital may be presumed unless rebutted. [Decided Oct. 29, 2008.] [Digested at page 41.]

REAL ESTATE — EQUITABLE SUBROGATION VS. CONSTRUCTIVE NOTICE — FORECLOSURES — LIENS — MORTGAGES — RECORDING ACT

34-4-2021 *U.S. Bank National Assoc. v. Hylton, et al.*, Chancery Div. — Mercer Cy. (Syppek, P.J.Ch.) (13 pp.) This is a decision that contrasts the equitable doctrine of "equitable subrogation," with the "constructive notice" provision of the "Recording Act" (N.J.S.A. 46:21-1). The matter arises in a contested foreclosure action brought on a \$400,000 mortgage loan made to defendant Hylton by Mortgage Lenders and thereafter assigned to U.S. Bank. The mortgage was made at a time when Hylton's property was already encumbered by a prior mortgage held by Countrywide. In anticipation of obtaining a new *first* lien, Mortgage Lenders paid more than \$300,000 to Countrywide, discharging that mortgage. Prior to its payment, Mortgage Lenders obtained assurances from both Hylton and from New Jersey Title Insurance Company that its "new" mortgage would succeed to an intended *first* lien position. However, contrary to assurances from both Hylton and the title company, it was discovered that Hylton had, a short time before Mortgage Lenders made its loan, obtained a \$35,000 "home equity" mortgage loan from American General, who had recorded its mortgage *first*. The evidence presented to the court by the title company (by way of a summary judgment motion), was that the title search did *not* find the American General mortgage, and, therefore, the title commitment did *not* report the existence of that mortgage, and, therefore, at the time it made its loan, Mortgage Lenders had *no* "actual knowledge" of American General's technically prior lien. What the title company also established was that American General (due to the relatively modest amount of its loan) could *not* have had a "reasonable expectation" that its "home equity" mortgage would obtain a *first* lien superior to that of Countrywide, unless someone else paid off Countrywide. Indeed, at the time of its loan, American General was content to remain a subordinate lienor, *behind* Countrywide. Because American General always intended to hold a subordinate lien position *behind Countrywide*, the court found no prejudice in adjudicating that American General *remain* in that subordinate lien position. By employing the doctrine of "equitable subrogation," the court allowed the Mortgage Lenders mortgage to "step into the shoes" of Countrywide, and, thereby, retain a subrogated lien priority ahead of American General. The importance of the court's decision to the title industry lies in the court's rejection of the Recording Act's rigid imputation of constructive notice as to an undiscovered prior lien in favor of a more equitable "actual notice" test. The court also rejected American General's argument that the title company's negligence tainted the granting of "equitable subrogation" relief to an otherwise innocent lender. [Decided June 13, 2008.] [Digested at page 47.]