

Nevada Supreme Court Rules Hospital May Be Liable For Physician's Medical Negligence Under Theory Of Ostensible Agency

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The Supreme Court of the State of Nevada ("Nevada Supreme Court") held in its opinion filed on December 28, 2017 that while the general rule of vicarious liability is that an employer is liable for the negligence of its employee but not the negligence of an independent contractor, an exception exists if the hospital selects the doctor and it is reasonable for the patient to assume that the doctor is an agent of the hospital. In such a scenario, the doctor has apparent authority to bind the hospital, making the hospital vicariously liable for the doctor's actions under the doctrine of ostensible agency.

In the Nevada medical malpractice case the Nevada Supreme Court was reviewing, the plaintiff sued a hospital and an on-call obstetrician ("OB") who had delivered her child, alleging that the child suffered severe and

permanent birth injuries allegedly as a result of medical negligence. The plaintiff settled with the defendant OB before trial and the signed release explicitly reserved all rights against the defendant hospital predicated upon the actions or omissions of the OB.

The Nevada medical malpractice jury found in favor of the defendant hospital on the plaintiff's direct negligence claim against the hospital following an eleven-day trial, but the plaintiff sought to hold the defendant hospital vicariously liable for the OB's alleged medical negligence. The plaintiff conceded that the OB is an independent contractor rather than an employee of the defendant hospital and that the OB is paid by an outside medical group to provide on-call obstetrical service at the defendant hospital. Nonetheless, the plaintiff argued that a reasonable patient in her position would have understood the OB to be an employee of the defendant hospital, making the OB an ostensible agent of the defendant hospital and exposing the hospital to vicarious liability for the OB's conduct.

Ostensible Agency/Vicarious Liability

NRS 41A.045(1) provides: "In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff. . . severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant."

The purpose of NRS 41A.045(1) is "to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence." NRS 41A.045 substitutes a joint and several liability scheme, wherein each defendant is liable for all of the damages that joint defendants caused, for a several liability scheme, wherein a plaintiff can recover only the defendant's share of the injured plaintiff's damages.

The Nevada Supreme Court stated that vicarious liability is related to but distinct from the concepts of several liability and joint and several liability: vicarious liability is liability that a supervisory party bears for the actionable conduct of a subordinate based on the relationship between the two parties. The supervisory party need not be directly at fault to be liable, because the

subordinate's negligence is imputed to the supervisor. Vicarious liability applies regardless of whether joint and several liability or several liability is the governing rule.

The Nevada Supreme Court stated that because NRS 41A.045 is silent regarding vicarious liability, it leaves vicarious liability intact.

The Nevada Supreme Court further stated that NRS 17.245, which establishes that one tortfeasor's settlement does not release others liable for the same tort unless the settlement so provides, applies to situations involving vicarious liability. Under NRS 17.245, the plaintiff's settlement with the defendant OB does not extinguish the defendant hospital's vicarious liability nor will this determination result in a double recovery for the plaintiff (should the plaintiff recover damages from the defendant hospital on a vicarious liability theory, those damages will be reduced by the amount the plaintiff already received from the OB).

Whether an ostensible agency relationship exists is generally a question of fact for the jury if the facts showing the existence of agency are disputed, or if conflicting inferences can be drawn from the facts. Typical questions of fact for the jury include (1) whether a patient entrusted herself to the hospital, (2) whether the hospital selected the doctor to serve the patient, (3) whether a patient reasonably believed the doctor was an employee or agent of the hospital, and (4) whether the patient was put on notice that a doctor was an independent contractor.

The Nevada Supreme Court held because material issues of fact exist as to whether ostensible agency existed in this case, the district court erred in granting summary judgment on this issue.

McCrosky v. Carson Tahoe Regional Medical Center, 133 Nev., Advance Opinion 115.

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