

AGENCY TODAY AND TOMORROW



HSPRD

TERMINOLOGY



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AGENCY

A fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf.

ACTUAL AGENCY

APPARENT AGENCY





ACTUAL AGENCY CASE SITUATION AND CASELAW



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ACTUAL AGENCY

- (1) an employer-employee relationship between the hospital and physician;
- (2) the ability by the hospital to control the manner and method in which the physician treats patients; and
- (3) the treatment of the patient must occur within the scope of the physician's employment by the hospital.

Hospitals are generally not liable for the acts of physicians who are independent contractors. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill.2d 17, 31 (1999).



ACTUAL AGENCY

EXPRESS AUTHORITY

Principal explicitly grants the agent authority to perform a particular act

IMPLIED AUTHORITY

Actual authority proved circumstantially by evidence of the agent's position

EXAMPLES

Employed Staff to Patient Direct Care

Husband Instructs Wife Execute Consent

Rules and Regulations for Medical Decisions

Husband Agrees Signature of Wife is Own

CASE SITUATION

Patient arrives in ER with wife via ambulance, has tremendous difficulty breathing, cannot speak, severe swelling in neck. Wife signs consent form indicating ER physician is an independent contractor and choice of hospital is not relevant to care requested.

Patient passes away after failed emergency cricothyrotomy by ER physician. Hospital is sued for wrongful death by wife due to alleged negligence of independent contractor.



FESE V. PRESENCE, et. al.

Underlying Facts: Wrongful Death Case. Adult Male in ER. Negligent Diagnosis and Failure to Establish Airway by Dr. Irving.

Issue on Appeal: Consent Form; Express and Implied Authority Over Independent Contractor.

Significant Facts: Dr. Irving's employer was CEP America (CEP) and ER Medical Director for Presence. CEP had a PSA with Presence. PSA contained standard language for Presence to remove physicians at CEP for various failures and to approve medical director.

Pamela Fese (wife) signed consent indicating in clear terms all practitioners (not wearing a badge) were independent contractors and not relevant to selecting Presence with signature line indicating "patient's representative."



FESE V. PRESENCE, et. al.

Pamela signed consent form in ER, could not recall when, but was acting on her husband's behalf when she signed, but did not recall her husband asking her to sign any documents.

Presence moved for Summary Judgment arguing Dr. Irving was an independent contractor and to dismiss Presence. Plaintiff argued no authority existed for Pamela to sign consent, Dr. Irving was the ER Medical Director and other issues.

Trial Court granted Motion for Summary Judgment finding: 1) Dr. Irving was an independent contractor and Presence neither retained control or employed; 2) Consent form was clear and established Plaintiff had constructive or actual knowledge of Dr. Irving's independent contractor status.

Appellate Court found: 1) Pamela's husband did not give her authority to sign the consent on his behalf; 2) there was no evidence the husband knew about the independent contractor status of Dr. Irving; 3) there was no evidence the husband relied upon being treated by a specific provider under a theory of apparent agency.





IMPLIED AUTHORITY CASE SITUATION AND CASELAW

CASE SITUATION

Nine-month pregnant patient arrived at ER reporting false labor pains. Patient had a long-standing OB physician on call that day monitored her condition with plans to perform a Cesarean section after time passed from the patient's last meal. An emergency Cesarean section was performed after providers could not locate the fetus' heartbeat. The baby was delivered with severe brain injury due to lack of oxygen during the labor and delivery process. The Hospital had multiple ethical directives and rules and regulations regarding how OB/GYN physicians and patients provided care and were provided for.



CASE SITUATION NOTES

Appellate Court found the Hospital's policies, procedures, rules, regulation, ethical directives and other requirements to negate the independent contractor's status. The Court found the Hospital was providing detail directions about when to perform a C-section; the manner of how to administer tocolytic therapy, external fetal monitoring, the induction of labor and preventing the OB physician from performing certain conception and artificial fertilization procedures, sterilization procedures and abortions.

Appellate Court found the Hospital's rules pertained directly to the OB physician's practice of medicine and medical decision-making ability.

Appellate Court ruled the Hospital still maintained control over the OB physician independent contractor and held his status as an independent contractor "should be negated."

It is significant to note the Appellate Court upheld the lower court's decision that the OB physician was not the Hospital's apparent agent, as the patient had a long-standing prior relationship with the OB physician.





APPARENT AGENCY CASE SITUATION AND CASELAW

APPARENT AGENCY

For a hospital to be vicariously liable for negligent medical treatment rendered in the hospital by an independent contractor physician under the doctrine of apparent authority, the plaintiff must establish that:

- (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital;
- (2) where the acts of the agent create the appearance of authority, the hospital had knowledge of and acquiesced in them; and
- (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511 (1993).

CASE SITUATION

Patient receives referral from primary care physician to see an orthopedic physician affiliated with a major medical center for pain and swelling in her right knee. The medical center actively advertised this orthopedic physician with vast experience and being part of a team. The patient only seeks out the orthopedic physician because she was recommended to go and does not rely upon or consider the advertisement. The patient was later diagnosed with a cancerous tumor in her right leg resulting in an amputation.



Solorzano v. West Suburban, et al.

Underlying Facts: Failure to diagnose cancerous tumor by Dr. Romano resulting in right leg amputation.

Issue on Appeal: Apparent agency for advertisement by West Suburban Medical Center for Dr. Romano who rents on hospital campus, chair of orthopedic department and received a WSMC badge.

Significant Facts: WSMC advertises orthopedic specialists with vast experience, rents an office to Dr. Romano on campus near its main entrance and, provided a WSMC badge to Dr. Romano.

Dr. Romano has held positions at WSMC including president, vice president and president emeritus of the WSMC medical staff. He does not wear a lab coat with WSMC logos. He does not wear his WSMC badge.



Solorzano v. West Suburban, et al.

Significant Facts (con't): Plaintiff/patient Solorzano referral order listed Dr. Romano's name and "West Suburban Hospital." Solorzano admitted she would have gone to whatever hospital and doctor her primary care physician recommended, even back to her original orthopedic surgeon, Dr. Magnani at Mount Sinai Hospital.

Solorzano signed a consent at Dr. Romano's office acknowledging payments. The consent did not reference Dr. Romano's relationship with WSMC.

Trial court granted motion to dismiss for WSMC finding Plaintiff failed to show any evidence WSMC held itself out or Plaintiff justifiably relied on WSMC's conduct for her care.

Appellate Court analyzed advertisements that created a question of fact to deny a hospital's dismissal, including phrases like staff had "hundreds of qualified physicians" referring them as "our" physicians; displaying a physician's name and photo without a disclaimer of independent status and how it is irrelevant to the inquiry if a patient actually observes hospital advertisements.



Solorzano v. West Suburban, et al.

Appellate Court found WSMC's advertisements to establish a genuine issue whether the hospital held itself out as Dr. Romano's principal by advertising "our team" and "our...compassionate physicians" without a disclaimer of independent contractor status.

Appellate Court also found WSMC should have informed patients that its providers, especially those renting offices on campus, were independent contractors by putting up signs in the professional building.

Finally, the Appellate Court was influenced by the services provided to Solorzano were all located on WSMC campus (snow globe analogy) and medical records were sent directly to Dr. Romano "without any action on Solorzano's part."



ANATOMY OF A CONSENT

Use strong universal language like “all” or “none” in describing provider relationships. Words like “most” or “almost all” will always be interpreted as ambiguous and unclear. Use language that limits supervision or control over the healthcare provider as in “not subject to the supervision or control” or “these physicians use their own medical judgment for your care” or “exercise their own medical judgment” or “make their own medical decisions about your care.”

Use common sense meanings and phrases. Words or phrases like “authority” or “apparent agent” or “actual agent” cannot be understood by the average lay person or by a person who is in need of immediate care. Words that have meaning to the patient are better understood like “I” or “your doctor” or “your nurse” or “your care” or “your surgery” and are less likely to be challenged by their attorney.

Recommend language: “I acknowledge that the employment or agency status of physicians and other providers who treat me is not relevant to my selection of HOSPITAL for my care. I acknowledge that any questions about the Independent Contractor Disclosure form and the information contained in it have been answered to my satisfaction.”



ANATOMY OF A CONSENT

Title Paragraphs with “NOTICE OF INDEPENDENT CONTRACTOR” or “NOTICE OF INDEPENDENT PRACTITIONERS” or use individual’s names with the names of their legal employer. Use bold to emphasis, avoid using italic fonts as this may be difficult to read.

The layout and font should be easy to follow. Font should be used that will print out neatly, if necessary. Areas to place initials should be close to clauses, paragraphs or in paragraphs, NOT near the edges.

If the Hospital has many independent providers, consider providing a list with names. It should also contain their specialty and names of their legal employers and a separate phone number. Do NOT use addresses if the provider is on your campus.

If electronic signature pads are used, then use language in the consent patient/representative that a paper copy as been offered and/or available. Questions provided and completely answered. If a document is provided, then have them initial receipt of the document.



ANATOMY OF A CONSENT

Risk management should be reviewing all consent forms created by the Hospital/System when patient authorization is obtained to ensure language for independent providers is consistent. Plaintiff attorneys will seek out conflicting or ambiguous language when comparing consents or documents signed by their client or their client's representatives. This creates an issue of fact before the judge or the jury.



OTHER AGENCY CRITERIA TO CONSIDER

Keep everyone on the same page. Have a good working relationship with your human resource department or individual to keep track of employment status or independent contractor status. Are there new providers in your Hospital? Do you have clear communication between IT, social networking, marketing, human resources, etc. about agency relationships and Hospital liability. Have a “we are all in this together” mentality. Are there appropriate disclaimers being used for advertisements and websites?

Place signs on Hospital campus indicating which providers are independent practitioners if they rent from the Hospital with easy-to-understand language. Everyone understands “landlord” and “tenant.” Placing signs at or near provider offices on campus clearly shows the Hospital is not “holding out.”



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