

Minnesota Supreme Court Holds That a Hospital May Be Held Liable for Negligence of Its Independent Contractors

August 6, 2020

On July 29, 2020, in *Popovich v. Allina Health*, the Minnesota Supreme Court held that a hospital may be held vicariously liable for the negligence of independent contractors, thus reversing a rule that had been in place for more than 30 years that provided that a hospital could only be held liable for the conduct of its employees.

In *Popovich*, a patient alleged that he had suffered a stroke as a result of negligent care received in the emergency department of two hospitals owned by Allina. The allegedly negligent care had been provided by two independent contractors retained by Allina to provide radiology and emergency medical service. Concluding that the case should be dismissed, the court of appeals relied on a prior Minnesota Court of Appeals decision, *McElwain v. Van Beek*, 447 N.W.2d 442 (Minn. Ct. App. 1989), *rev. denied* (Minn. Dec. 20, 1989), which held that a hospital could only be vicariously liable for the negligent acts and omissions of its employees.

The Supreme Court reversed. In support of its conclusion, the Court distinguished between two strains of vicarious liability — respondeat superior, which holds an employer responsible for the acts of its employees based on the employer's right to control the conduct of its employees, and apparent authority. Under the doctrine of apparent authority, which is commonly applied in the context of commercial contract disputes, a party — the principal — may become liable for the conduct of another party — the agent — if the principal takes steps that cause third parties dealing with the agent to believe that the agent is authorized to act on the principal's behalf. By applying the doctrine of apparent authority to hospitals, the Court stated its intent to treat hospitals like other types of commercial enterprises.

Under *Popovich*, to establish apparent authority in the context of a hospital negligence case, the patient must show that: 1) the hospital held itself out as the provider of the services provided to the patient; and 2) the patient looked to the hospital to provide care and relied on the hospital to select personnel to provide the service. In remanding to the district court for consideration of whether Allina could be held liable based on apparent authority, the Court noted that the allegedly negligent physicians were working in the emergency rooms of two of Allina's hospitals and that Allina had acknowledged that some members of the public may



be unaware of the relationships that Allina has with physicians working in its hospitals.

So, what does this mean for hospitals and their physician group partners? Apparent authority is created when a principal takes actions that cause parties dealing with an agent to believe that the agent is authorized to act on behalf of the principal. Although the implications of this Supreme Court decision have yet to be tested, it stands to impact contractual arrangements and business collaborations in a variety of ways:

- Hospitals may revisit indemnification obligations and seek to confirm that contracts with independent contractors contain provisions requiring the contractor to defend and indemnify the hospital against claims arising from the contractor's negligence, with a focus on assuring that the hospital is sufficiently protected.
- Routine yet critical contract terms, such as insurance coverage, will take on heightened significance — providers will be well served by reviewing insurance coverage with their insurance brokers and/or insurance coverage counsel to be sure that coverage is adequate.
- Branding arrangements and marketing materials may be re-evaluated:
 - Hospitals may seek to install signage in areas of the hospital where an independent contractor provides service that informs patients that their care is being provided by an independent contractor and not the hospital — which may impact multi-party branding arrangements.
 - Patient-facing documents (e.g., patient consent forms) may need to be updated to more accurately describe the providers involved in their care.
 - Providers should consider whether marketing materials may have the effect of misleading the public about who is responsible for the service provided.
- Ultimately, the Supreme Court decision may add fuel to the continuing trend of hospital-physician group integration, as hospitals may seek to terminate existing independent contractor relationships and instead provide services through hospital-employed physicians.

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