Apparent Agency Claims Not Permitted In Medical Malpractice Actions

The Appellate Court recently released an important decision in Cefaratti v. Aranow, 2014 Conn. App. LEXIS 503 (Dec. 1, 2014), which will significantly impact the scope of potential liability and the available theories of recovery against Connecticut hospitals and other institutional defendants in medical malpractice actions. The Appellate Court definitively addressed an issue that has received inconsistent treatment at the trial court level for years: whether a plaintiff is entitled to recover against a hospital under the doctrine of apparent agency, which is a theory of vicarious liability holding a hospital responsible for the negligence of independent contractor physicians under circumstances where the hospital has created the appearance of an affiliation. For example, plaintiffs frequently assert that ED physicians, radiologists and anesthesiologists are "apparent agents" of the hospital, despite the fact that these physicians are employed by outside entities. According to the Cefaratti court, while a hospital remains vicariously liable for the negligence of those who are directly employed by the hospital, the theory of apparent agency or ostensible agency is no longer a viable theory of recovery under Connecticut law.

The plaintiff in Cefaratti had undergone gastric bypass surgery and, following the discovery of a retained surgical sponge, she pursued a claim against the defendant surgeon and the defendant Hospital for injuries sustained as a result of the retained material. The plaintiff claimed that the surgeon was an actual and/or apparent agent of the defendant Hospital. In support of her claim, she submitted the Hospital's website pages, which featured the defendant physician and described him as part of "our team." She also submitted her own deposition testimony, in which she testified that she always understood the surgeon to be employed by the Hospital. The Hospital submitted affidavits averring that the surgeon was a private attending physician with medical staff privileges at the Hospital. Moreover, the Hospital submitted evidence that it had no employment contract with the defendant surgeon and that he was not compensated by the Hospital.

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The lower court granted the Hospital's motion for summary judgment, holding that, under Connecticut law, the doctrine of apparent agency cannot be used to impose tort liability on an alleged principal relying on L&V Contractors, LLC v. Heritage Warranty Ins. Risk Retention Group, Inc., a 2012 Appellate Court case which issued a broad holding that Connecticut law did not recognize apparent agency claims in tort actions. L&V Contractors has not gained much traction since its release; many superior court judges have refused to apply its holding to medical malpractice cases. In affirming the lower court's holding, the Cefaratti Court acknowledged that the applicability of the doctrine of apparent agency in tort actions was "not entirely clear," but noted that it was bound to follow the precedent of L&V Contractors. The Appellate Court also addressed Fireman's Fund Indemnity Co. v. Longshore Beach & Country Club, Inc., 127 Conn. 493 (1941), a Supreme Court case often cited by plaintiffs to support their position that apparent agency claims in the tort actions are permitted despite the holding in L&V Contractors. The Appellate Court concluded that Fireman's Fund only held that the facts of that case were insufficient to support an action of apparent agency; the broader question of whether of the theory of apparent agency was available in tort actions was not addressed. While the outcome of Cefaratti is great for targets of apparent agency claims, including hospitals, the Court in its decision appears to be inviting Supreme Court review on this issue, and the concern among the defense bar is that Cefaratti may ultimately be reversed.

One other positive outcome of Cefaratti is that the court embraced a Superior Court holding that the fact that an agency relationship is not created merely because a physician holds staff privileges at a hospital. The Court also reiterated that, in order to prove a claim of direct agency, the plaintiff must prove that there is an agreement between the agent and the principal that the agent will act on behalf of the principal and that the principal will be in control of the "undertaking". In the context of a medical malpractice case, the undertaking is the provision of medical services which a hospital does not (and should not) control. The court dismissed the plaintiff's reliance on the Hospital's website, which contained a reference to Dr. Aranow as the founder of its weight loss center, as irrelevant to proving the elements of agency. The Court's decision will help hospitals defend direct agency claims that are based on the alleged negligence of private attending physicians.

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