

Hospitals That Vest Contract Doctors With 'Apparent Authority' May Be Held Liable

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A state appeals court on Wednesday opened the door wide to malpractice liability for hospitals that use contract doctors in circumstances that lead patients to believe they are staff physicians.

By keeping mum about a doctor's status as a contractor, a hospital vests the doctor with "apparent authority" and the patient may be presumed to have accepted care in the reasonable belief that the doctor is acting in the hospital's behalf, the court held in *Estate of Cordero v. Christ Hospital et al.*, A-1289-07.

The judges reinstated a malpractice claim against Jersey City's Christ Hospital, finding that although it did not explicitly represent an anesthesiologist to be a member of its staff, neither did it dispel the notion that he was an outsider for which the hospital was not responsible.

Ramona Cordero, a 51-year-old diabetic, entered the hospital on Sept. 22, 2003, for surgery to install a catheter. Dr. Selvia Zaklama, an employee of the Hudson Anesthesia Group under contract with the hospital, was assigned to provide services during the procedure. Cordero had never met him before. He wore no identification and introduced himself to her simply as the anesthesiologist, not disclosing his relationship with the medical group or the hospital.

Though the catheter was inserted without incident, Cordero's blood pressure and heart rate dropped precipitously and Zaklama was unable to stabilize her. She was resuscitated but suffered brain damage and never regained consciousness and she remained in a vegetative state until her death 3 1/2 years later.

In the wrongful death suit, Cordero's estate settled with Zaklama and Hudson Anesthesia for \$975,000 but the claims against the hospital and Dr. Patrick McGovern, who performed the surgery, were dismissed. Hudson County Superior Court Judge Maurice Gallipoli found little evidence to suggest that the hospital held out Zaklama as its own employee.

In Wednesday's reversal, Appellate Division Judge Jane Grall said that while a hospital is generally immune from liability for the negligence of a contract doctor that it does not hold out as its own employee, there is an exception if the doctor's or the hospital's actions or inactions lead a person to believe the doctor is acting with the "apparent authority" of the hospital.

Grall cited Restatement (Third) of Agency § 2.03 comment c (2006), which

states, "Imputation of liability based on apparent authority prevents a principal from 'choos[ing] to act through agents whom it has clothed with the trappings of authority and then determin[ing] at a later time whether the consequences of their acts offers an advantage.'"

Grall said judges should look at five factors in deciding whether a doctor has been cloaked in "apparent authority":

- Whether the hospital supplied the doctor;
- The nature of the treatment, such as whether it was in an emergency room;
- Whether there were any notices or disclaimers regarding the doctor's employment situation;
- Whether there had been any prior contact between the doctor and the patient; and;
- Whether the patient had any special knowledge about the relationship between the hospital and the doctor.

Judged by those criteria, Cordero had "every reason to believe and little reason to doubt" that Zaklama was on staff at Christ Hospital, Grall said.

Active or explicit misrepresentation on the part of the doctor or hospital is not required for an actionable claims. "When a hospital provides ... a medical specialist for a patient without taking action to dispel the appearance of authority implied by the specialist's position and action, courts generally treat the hospital's inaction as additional conduct manifesting the hospital's assent to having the specialist care for the patient it its behalf," wrote Grall, joined by Judges Stephen Skillman and Ronald Graves.

Michael Zerres, one of the estate's lawyers, says the appeals court properly placed the burden on the hospital to make sure the doctor's status as a contractor is disclosed. "It is reasonable to assume that [Cordero] was without any knowledge or reason to assume that the doctor was not an employee of the hospital," says Zerres, of Chatham's Blume, Goldfaden, Berkowitz, Donnelly, Fried & Forte. "The onus is on the hospital to let the patient know that the doctor is not on staff. It's a simple obligation to meet and the hospital failed to do so."

The hospital's attorney, Nan Gallagher, of Springfield's Hardin, Kundla, McKeon & Poletto, did not return a telephone call seeking comment.