

**HOSPITALS NOW MAY BE VICARIOUSLY  
LIABLE EVEN FOR DOCTORS WHO ARE  
INDEPENDENT CONTRACTORS**

Initially, hospitals enjoyed immunity from malpractice claims because they were not vicariously liable “employers” of the independent contractor doctors, and because, traditionally, the hospitals themselves did not make the patient-care decisions, the doctors did. Traditionally, hospitals were run by charitable organizations and, in most cases, were providing free healthcare to those who could not afford it. Time and progress changed that notion when modern times found hospitals becoming large cash-generating businesses that competed aggressively with one another for healthcare dollars. Charitable immunity vanished, and increasingly, business interests drove hospitals further into the area of making health care decisions.

Hospitals also once enjoyed a degree of immunity from malpractice claims by having their doctors, radiologists and labs perform work as independent contractors and not employees. The theory was that since physicians possessed a considerable degree of skill and training, the traditional notion that vicarious liability depended on the degree to which an employer controlled the acts of its employee was not applicable since a lay hospital administration had little or nothing to do with examination, diagnosis and treatment of its patients.

Things are now changing due to the commercialization of healthcare. Traditionally, then, hospitals were not directly or vicariously liable for malpractice and often enjoyed charitable immunity as well. Citing the same progress and development which overran the charitable immunity doctrine, the case of *Maria Del Carmen Mejia v. Community Hospital of San Bernardino* has held that where a person seeks medical treatment at a given hospital, absent evidence to the contrary, that patient is entitled to presume that all persons or firms who render any form of treatment to that patient (whether the patient is aware or their existence or not) are hospital “employees,” which of course makes the hospital vicariously liable as an employer. This result is arrived at under the theory of “ostensible” agency. Under the

doctrine of ostensible agency, if someone (like a hospital) sets up a situation where the outside world is likely to think that its agents (doctors) are acting on behalf of the principal (hospital), the doctor is said to be an “ostensible” agent and the hospital is held vicariously liable for his or her acts.

In *Mejia*, plaintiff Maria Mejia suffered neck pain after lifting some boxes at home. The pain persisted throughout the day, but it was not until approximately midnight when her family convinced Ms. Mejia that she should be seen in an emergency room. Community Hospital of San Bernardino was chosen since it was the closest facility to the Mejia household. While at the hospital, she was seen by an emergency room physician who ordered x-rays of the neck. The doctor diagnosed neck strain and sent the plaintiff home with medication. It later was determined that she had actually fractured a vertebra earlier in the day and after she was sent home from the emergency room, she developed permanent paralysis due to this fracture. She brought suit against the hospital, the emergency room physician, the company that employed the emergency

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room physician, the radiologist and the company that employed the radiologist. After opening statements, Community Hospital of San Bernardino was granted its motion for a nonsuit on the issue of agency of both the doctor and the radiologist. The hospital successfully convinced the court that the doctor and radiologist were not employees of the Hospital and therefore there was no potential liability. Trial proceeded against the remaining defendants. At the conclusion of deliberations, the jurors found that the radiologist and his employer were both negligent. Plaintiff filed the appeal on the ruling granting the nonsuit to the Hospital.

Relying primarily on cases decided outside of the state of California, the Fourth District Court of Appeal held that in today's circumstances, it is not unreasonable for someone who seeks healthcare at a hospital emergency room to believe that all persons rendering care are employees of the hospitals. The court noted that in California ostensible agency is governed by Civil Code section 2300. This section provides that if a principal intentionally or by want of ordinary care causes a third person to believe another to be his agent, then there is ostensible agency. In the *Mejia* case, the plaintiff never met the radiologist who interpreted the x-ray, and had no idea that the radiologist was employed by anyone other than the hospital. The court held that it was reasonable for her to rely on the radiologist's presence at the hospital to infer that he was indeed an employee of the hospital.

When applying the ostensible agency standard to the facts of this case, the *Mejia* court stated ". . . it appears difficult, if not impossible for a hospital to ever obtain a nonsuit based on the lack of ostensible agency. Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what the plaintiff alleged in this case." The court held that emergency room patients cannot be expected to inquire as to whether treating physicians are independent contractors or employees. Likewise, patients cannot be expected to inquire into the employment status of physicians whom they never met. So long as the reliance is reasonable, and so long as there is no evidence that the hospital affirmatively was able to communicate to the patient that the caregivers were not employees of the hospital, then the caregivers will be held to be the "ostensible" agents of the hospital. The judgment was reversed in order for the plaintiff to present her case at trial as against the hospital since the radiologist was ultimately found to be liable to the plaintiff.

## COMMENTS

Without a doubt, hospitals will engage counsel to draft some sort of notification that it hires outside contractors, not employees, for emergency room services, radiology services and laboratory work. Yet even this scenario abounds with unanswered questions about the unconscious patient: What level of sedation will be such that a patient cannot comprehend this notice, what (if any) family member can be notified of the independent contractor's status and still have that notice bind the patient? If notices, releases or waivers are ultimately found to be ineffectual, and the hospital is required to deal with this situation, then what degree of actual control would a hospital be permitted to exercise over the day-to-day diagnosis and treatment of patients by physicians who are now deemed ostensible employees of the hospital?

- Thomas E. Martin

## WESIERSKI & ZUREK LLP IN TRIAL

Paul Lipman recently defended what was likely the oldest case in California, a 1995 moderate impact rear-ender. The defendant was taken to the hospital from the scene with broken ribs. Nevertheless, the defense kept that information from the jury and successfully argued that the plaintiff was not hurt based on going immediately for treatment, but soon thereafter dropping the M.D. and waiting three weeks to institute treatment with a new M.D. The arbitration award was only \$2,000, and plaintiff would have become entitled to expert costs had he even recovered his property damage, but the defendant was adamant that the plaintiff stopped without cause, and the decision was made to go forward. There were no witnesses or police report.

When the case was finally called for trial in Van Nuys and a jury panel sworn, it was learned that the defendant's father was a judge in the same courthouse, and the County per its rules had to transfer it to Ventura County, where it was tried. The swearing of the first jury panel tolled the five-year mandatory dismissal rule, and the case was not tried until its sixth year. The case was finally put to rest when the jury returned a 10-2 defense verdict in about 15 minutes.

## **SUPREME COURT GRANTS RELIEF FROM ERROR IN STATUTORY OFFER TO COMPROMISE**

In the recent case of *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, the California Supreme Court affirmed the ruling from the trial court and appellate court which set aside relief from a settlement because there was a typographical error in the offer to compromise. Here, the Court relieved the party who erroneously made the offer from the other party's acceptance. However, in making its ruling, the Court noted that courts should exercise such relief both carefully and sparingly.

This case arose out of a breach of contract action filed by plaintiff Pablo Zamora (Zamora) against defendant Clayborn Contracting Group, Inc. (Clayborn). Clayborn responded by filing an answer and a cross-complaint, seeking affirmative relief against Zamora. Less than two months before trial, Zamora's counsel served a Code of Civil Procedure section 998 offer to compromise in the amount of \$149,000. In typing the offer to compromise, the attorney's legal assistant typed the words "against himself" when it was intended to state "in favor of." Defendant Clayborn filed a notice of acceptance within three days of receiving the offer. Plaintiff Zamora then moved to set aside the judgment based on "mistake, inadvertence and excusable neglect" pursuant to Code of Civil Procedure section 473. The trial court granted the motion, and the appellate court affirmed. Thereafter, the Supreme Court granted review of the case.

In upholding the trial court's and appellate court's rulings, the Supreme Court went through the legislative history and use of Code of Civil Procedure section 473, subdivision (b). That subdivision was first enacted in 1872, and the language has not changed appreciably since that time. The Supreme Court noted that courts of this state have consistently applied this code section to set aside voluntary judgments or dismissals. In fact, the code section has even been used to vacate a voluntary dismissal with prejudice. Its provisions are to be liberally construed, and sound policy favors determination of actions on their merits. Applying the code section to this action was noted simply to remain faithful to these venerable principles.

In applying section 473, the Court noted that a party seeking relief on the basis of mistake or inadvertence of counsel must show that the mistake, inadvertence or neglect was excusable. To make that determination, the

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### **NEW AT WESIERSKI & ZUREK LLP**

Wesierski & Zurek LLP proudly presents three new attorneys who have recently joined our firm:

**Mary Xinh Nguyen:** Mary joins our L.A. office in her third year of practicing law. She is a graduate of the Whittier School of Law, and has experience in legal and medical malpractice, criminal defense, construction defect and automobile and trucking accidents.

**Valorie Ferrouillet:** Valorie is a second-year attorney who recently joined our Los Angeles office. Valorie graduated from Southwestern University School of Law.

**Mary Bevins:** Mary graduated from the Western State University of Law and has served as a judge pro tem with the O.C. Superior Court. She has extensive jury trial experience taking cases to verdict in such areas as employment, sexual harassment, premises liability, medical negligence, auto liability, breach of contract and fraud.

Court inquires whether a reasonably prudent person under the same or similar circumstances might have made the same error, i.e. mistakes anyone could have made. Second, the party seeking relief must be diligent in making the application for relief within a reasonable period of time, not to exceed six months.

Applying the ruling to the facts of the case, the Court noted that while counsel's failure to review the document was not prudent, the imprudent act did not render the mistake inexcusable. Moreover, where an attorney makes a clerical mistake that results in a settlement on terms not authorized by the client, the public policy favoring settlements has no force. However, the Court also noted that trial courts are to exercise this discretionary power to vacate settlements and judgments carefully and sparingly, and see through claims of buyer's remorse or breach of contract.

- Ronald F. Templer

**TRIAL COURT'S ORDER PROHIBITING TREATING PHYSICIAN  
UNPREPARED AT EXPERT DEPOSITION FROM TESTIFYING AS  
TO HIS OPINION WAS WRONG; ACCORDINGLY, DEFENDANT  
HAS TO MOVE FOR RELIEF, HE CANNOT FILE A MOTION IN  
LIMINE TO PRECLUDE THE TESTIMONY**

On June 10, 2002, a trial for personal injuries resulting from an automobile accident began in front of the Honorable Derek W. Hunt in the Superior Court of Orange County. Two days later, plaintiffs filed a petition with the Fourth Appellate District, arguing that the Superior Court had erred in prohibiting a treating physician from testifying as to his opinions expressed at deposition. The Superior Court apparently made this ruling after hearing defendant's motion in limine and testimony from the treating doctor, which revealed that the doctor had not reviewed plaintiffs' medical records prior to his deposition.

Dr. Richard Mulvania, plaintiffs' orthopedic surgeon, was timely designated by the plaintiffs as an expert witness several months before trial. At the time his deposition was taken, Dr. Mulvania conceded that he had not yet had a chance to review any of the plaintiffs' medical records, though he intended to review them for trial. Upon hearing this, counsel for the defendant did not request that the deposition be continued. Further, defense counsel did not request or schedule a second deposition of Dr. Mulvania. A second deposition would have allowed defense counsel to further depose Dr. Mulvania about his diagnosis, treatment, and opinions as to causation, after having reviewed plaintiffs' medical records.

Instead, defendant brought a motion in limine to preclude the doctor's opinion testimony on the day of trial. Specifically, defense counsel argued that he was "unable to obtain complete and meaningful expert witness testimony" from Mulvania "due to his failure to review plaintiffs' medical records."

The court deferred a ruling on the motion on the first day of trial, but made its ruling at a 402 hearing the next day after hearing Dr. Mulvania's testimony on the matter. Dr. Mulvania testified that he had reviewed the medical records submitted and none of the opinions expressed at his deposition had changed. Even in light of this testimony, the Superior Court ruled that Dr. Mulvania could only testify as a percipient witness; he could not testify as to any opinions expressed at his deposition. This ruling was made despite plaintiff counsel's offer to allow further deposition testimony on the matter from Dr. Mulvania.

This, plaintiff's counsel argued, would avoid any perceived prejudice. Instead, the Superior Court ruled that Dr. Mulvania could not testify as to his opinions. His testimony was limited to what he heard, saw, and did.

The Appellate Court disagreed with the Superior Court's ruling, stating that the trial court's "apparent rush to preclude petitioners from presenting critical expert opinion testimony is alarming." It was undisputed that Dr. Mulvania was the plaintiffs' treating physician. As such, Dr. Mulvania should have been allowed to testify as to any opinions formed on the basis of facts, including any opinions acquired from his training, skill, and experience as a doctor.

The Court further held that motions in limine cannot be misused to prevent due process. Here, there were reasonable alternatives. Defense counsel could have continued the first deposition or requested a second one. Likewise, the Court could have ordered Dr. Mulvania to submit to a further deposition on limited terms. This would have allowed the plaintiffs a fair and reasonable opportunity to present their side of the case.

In this case, it did not pay to wait until the day of trial to move to preclude the doctor's testimony. A prudent defense attorney should object to procedural errors early on in the case to avoid these types of situations on the day of trial.

- Sacha Caldemeyer

**Editor**

**Paul J. Lipman**