South Carolina Law Review

Volume 52
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 10

Summer 2001

Simmons v. Tuomey Regional Medical Center: The New South Carolina Rule on Hospital Liability for Malpractice of Emergency Room Physicians

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SIMMONS V. TUOMEY REGIONAL MEDICAL CENTER: THE NEW SOUTH CAROLINA RULE ON HOSPITAL LIABILITY FOR MALPRACTICE OF EMERGENCY ROOM PHYSICIANS

I. INTRODUCTION

Many hospitals have attempted to avoid medical malpractice liability for certain high-liability services, such as emergency room operations, by engaging independent contractors to perform these services.[1] Through the use of independent contractors, hospitals have successfully prevented plaintiffs from obtaining judgments against them by using the doctrine of respondeat superior.[2] Although public policy once supported the idea that hospitals should be free from liability for the malpractice of its physicians, this policy has changed with the shift in the public perception and operation of hospitals.[3] Today, various theories have been used in an attempt to force hospitals to accept responsibility for the torts of their physicians. In *Simmons v. Tuomey Regional Medical Center*,[4] the South Carolina Supreme Court decided this issue for South Carolina.[5] The supreme court affirmed the court of appeals' decision that the hospital should be held liable for the physician's malpractice.[6] However, the supreme court declined to follow the court of appeals by imposing a nondelegable duty on hospitals for the operation of an emergency room.[7] A nondelegable duty imposes liability on the hospital in all circumstances regardless of fault.[8] The supreme court refused to take this jump and instead adopted a theory of ostensible agency[9] which renders the hospital liable when it holds itself out as providing emergency services and the patient reasonably looks to the hospital itself for emergency care.[10]

This Note considers the effect the application of the ostensible-agency rule in the hospital setting could have on hospitals, physicians, and patients. Part II

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1. *See* H. Ward Classen, *Hospital Liability for Independent Contractors: Where Do We Go from Here?*, 40 ARK. L. REV. 469, 469-70 (1987).
2. *See id.*
3. *See* Diane M. Janulis & Alan D. Hornstein, *Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 NEB. L. REV. 689, 690-92 (1985).
4. 341 S.C. 30, 533 S.E.2d 312 (2000).
5. *Id.* at 50-51, 533 S.E.2d at 322.
6. *Id.* at 50, 533 S.E.2d at 322.
7. *Id.* at 50-51, 533 S.E.2d at 322.
8. *See* Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 452 (1996).
9. *Simmons*, 341 S.C. at 50-51, 533 S.E.2d at 322.
10. *See* RESTATEMENT (SECOND) OF TORTS § 429 (1965).

provides background information regarding hospital liability and explores how the historical notions have evolved into the rule applied today. Part II further explains how public perception of hospitals has changed and describes how the general operation of hospitals has developed into a for-profit business. The court of appeals' decision imposing a nondelegable duty and the supreme court's step back from this decision in its application of the ostensible-agency theory is discussed in Part III. Finally, Part IV explains the effect that the ostensible-agency rule may have on patients seeking to obtain judgments against hospitals as well as the effect on hospitals themselves.

II. BACKGROUND

A. Independent Contractor Exception to Respondeat Superior

Typically, under the doctrine of respondeat superior, masters are liable for the torts of servants who are acting within the scope of their employment.[11] However, an important exception exists to this doctrine of liability with regard to independent contractors.[12] When an employer does not exercise the requisite degree of control over the employee, the employee is considered an independent contractor, and liability for an independent contractor's torts is not imputed to her employer.[13] Therefore, by establishing an independent

11. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *see also* Bing v. Thunig, 143 N.E.2d 3, 8 (N.Y. 1957) ("The doctrine of *respondeat superior* is grounded on firm principles of law and justice. Liability is the rule, immunity the exception. It is not too much to expect that those who serve and minister to members of the public should do so, as do all others, subject to that principle and within the obligation not to injure through carelessness."); Sams v. Arthur, 135 S.C. 123, 128, 133 S.E. 205, 207 (1926) ("An individual is charged with the consequences of an act done directly by himself or indirectly by another at his command.").

12. *See* RESTATEMENT (SECOND) OF AGENCY § 250 (1958); *see also* Albain v. Flower Hosp., 553 N.E.2d 1038, 1043 (Ohio 1990) ("'The fundamental rule generally recognized is that the doctrine of *respondeat superior* is applicable to the relation of master and servant or of principal and agent, but not to that of employer and independent contractor.'" (quoting Miller v. Metro. Life Ins. Co., 16 N.E.2d 447, 448 (1938))).

13. *See* Ft. Lowell-NSS Ltd. P'ship v. Kelly, 800 P.2d 962, 966 (Ariz. 1990) (en banc) ("[T]he employer's lack of control over the manner in which the independent contractor conducted the work rendered the undertaking essentially the contractor's enterprise rather than the employer's."); Arthur v. St. Peters Hosp., 405 A.2d 443, 445 (N.J. Super. Ct. Law Div. 1979) ("[I]t is the 'degree of control' which is critical. When applying that test several factors may be considered, including the type of occupation, the skill required, the method of payment, who supplies the tools, etc."); *Albain*, 553 N.E.2d at 1043 (reasoning that when an employer does not retain control and is primarily interested in the ultimate result, an employer and independent contractor relationship exists); Sampson v. Baptist Mem'l Hosp. Sys., 940 S.W.2d 128, 130 (Tex. App. 1996) (clarifying that "[i]t is the right to control, not actual control, which is determinative").

contractor relationship, the traditional doctrine permits an employer to avoid liability for an employee's torts.[14]

Courts have held, however, that some duties are nondelegable, and therefore the liability cannot be shifted to an independent contractor.[15] Usually these duties are such that "the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[16] In these situations a nondelegable duty is imposed to insure that there will be a party financially able to compensate the injured party for harm incurred through negligence in the undertaking.[17] Since the nondelegable duty doctrine is a type of strict liability, which is liability without fault, there must be a very strong public policy to support its application.[18]

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14. *See* Hale v. Sheikholeslam, 724 F.2d 1205, 1208 (5th Cir. 1984) (holding that the hospital was not liable because the physician "was no more than an independent contractor" and had no other "legal relationship" with the hospital); *Ft. Lowell-NSS*, 800 P.2d at 966 ("[I]t would be unjust to hold an employer liable for the negligence of an independent contractor over whom he had no control."); *Arthur*, 405 A.2d at 445 (stating that this general rule regarding independent contractors has been applied in the hospital setting to absolve hospitals of liability); *Sampson*, 940 S.W.2d at 130 (observing that a "hospital is not liable for the negligent acts of independent physicians").

15. *See* Jackson v. Power, 743 P.2d 1376, 1383 (Alaska 1987) ("A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor."); *Ft. Lowell-NSS*, 800 P.2d at 967 (stating that a nondelegable duty may "exist where the employer is under a higher duty to some class of persons"); Marek v. Prof'l Health Servs., Inc., 432 A.2d 538, 542 (N.J. Super. Ct. App. Div. 1981) (recognizing the nondelegable duty as an exception to the rule of no liability "dependent on public policy considerations"). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 511 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS] ("[T]he cases of 'nondelegable duty' go further, and hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. They are thus cases of vicarious liability.").

16. PROSSER AND KEETON ON TORTS, *supra* note 15, § 71, at 512; *see Jackson*, 743 P.2d at 1384 (stating that emergency room patients are "as deserving of protection as the airline passengers" who are afforded a nondelegable duty by the airline); Beeck v. Tuscon Gen. Hosp., 500 P.2d 1153, 1157 (Ariz. Ct. App. 1972) (referring to the importance of the hospital's duty to the community); McWilliams & Russell, *supra* note 8, at 454. In *Beeck v. Tuscon Gen. Hosp.* the Arizona Court of Appeals states:

> Having undertaken one of mankind's most critically important and delicate fields of endeavor, . . . the hospital must assume the grave responsibility of pursuing this calling with appropriate care. The care and service dispensed through this high trust, however technical, complex, and esoteric its character may be, must meet standards of responsibility commensurate with the undertaking to preserve and protect the health, and indeed, the very lives of those placed in the hospital's keeping.

Beeck, 500 P.2d at 1157; *see also Marek*, 432 A.2d at 542 (holding that the health care entity had a nondelegable duty of care in reading its patients' x-rays). *See generally* PROSSER AND KEETON ON TORTS, *supra* note 15, § 71, at 511-12 (defining the character of nondelegable duty in terms of the importance of the duty to the community and listing numerous examples of nondelegable duties).

17. *See* Maloney v. Rath, 445 P.2d 513, 515 (Cal. 1968).

18. *See* McWilliams & Russell, *supra* note 8, at 453-54.

B. *Change in Public Perception of Hospitals*

Originally hospitals were run by religious orders or governmental agencies[19] and therefore were shielded from liability through the doctrines of charitable and sovereign immunity.[20] Charitable immunity was based on the public policy that by protecting charitable institutions from liability, the public as a whole would gain the continued availability of their services.[21] However, the perception of hospitals as institutions in need of protection has changed as hospitals have grown from charitable organizations to business enterprises, and, as a result, the rule of charitable immunity has been abrogated.[22] The role that hospitals play in society today spawns a new public policy which supports the imposition of liability upon the hospital.[23]

Since the days of charitable immunity, the relationships among hospitals, physicians, and patients have changed significantly.[24] The objectives of modern hospitals are far more extensive than simply providing a facility for treatment.[25] Today, "hospitals are run increasingly for profit by large national health corporations."[26] Health care is now considered an industry that is less personal and more specialized than in the past.[27] Many patients do not have family

19. *See* Janulis & Hornstein, *supra* note 3, at 690.

20. *See* Lindler v. Columbia Hosp., 98 S.C. 25, 27-28, 81 S.E. 512, 512-13 (1914).

21. *See* McWilliams & Russell, *supra* note 8, at 434-35.

22. *See* Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 487, 234 S.E.2d 873, 876-77 (1977). The first step toward abrogation in South Carolina occurred in *Brown* when the court held that the hospital was not immune from liability for the tortious acts of the hospital or its agents if "the injuries occurred because of the hospital's heedlessness and reckless disregard of the plaintiff's rights." *Id.* The doctrine was then fully abrogated when the South Carolina Supreme Court held that "a charitable institution is subject to liability for its tortious conduct the same as any other person or corporation." Fitzer v. Greater Greenville S.C. YMCA, 277 S.C. 1, 4, 282 S.E.2d 230, 231-32 (1981). The Court of Appeals of New York expressly abrogated charitable immunity in the hospital setting, stating that "[t]he test should be, for these institutions, whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act one of its employees and, if he was, was he acting within the scope of his employment." Bing v. Thunig, 143 N.E.2d 3, 8 (N.Y. 1957). However, the *Simmons* court noted that "[t]oday, the malpractice liability of hospitals classified as charitable organizations or as governmental entities under the state Tort Claims Act is limited by statute." Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 41 n.3, 533 S.E.2d 312, 317 n.3 (2000) (citing S.C. CODE ANN. § 33-56-180 (Law. Co-op. & Supp. 1999) and S.C. CODE ANN. § 15-78-120 (Law. Co-op. & Supp. 1999)).

23. *See* Jackson v. Power, 743 P.2d 1376, 1384-85 (Alaska 1987); Beeck v. Tuscon Gen. Hosp., 500 P.2d 1153, 1157 (Ariz. Ct. App. 1972); Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 794 (Ill. 1993); *Bing*, 143 N.E.2d at 8-9; Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 51-52 (Ohio 1994); Kashishian v. Port, 481 N.W.2d 277, 282 (Wis. 1992); McWilliams & Russell, *supra* note 8, at 436.

24. *See* Janulis & Hornstein, *supra* note 3, at 691-92.

25. *See Beeck*, 500 P.2d at 1157; Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980).

26. Janulis & Hornstein, *supra* note 3, at 691.

27. *See id.* at 691-92.

physicians and instead rely solely on the hospital for care.[28] "[H]ospitals increasingly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health care services."[29] Therefore, "[a]s the role of the modern hospital has evolved, and as the image of the modern hospital has evolved (much of it self induced), so too has the law with respect to the hospital's responsibility and liability towards those it successfully beckons."[30]

Another change is that today hospitals are heavily regulated by the states.[31] These regulations not only show how the perception of hospitals has changed, but also support imposing a duty on hospitals to render non-negligent care.[32] The stated purpose of South Carolina Code sections 44-7-110 through 44-7-370, known as the State Hospital Construction and Franchising Act, is that hospitals "will ensure safe and adequate treatment of persons in such institutions."[33] The South Carolina Code further provides that "[e]ach hospital must have a single organized medical staff that has the overall responsibility for the quality of medical care provided to patients," and that doctors who are members of the staff must be licensed by the State Board of Medical Examiners.[34] Perhaps of most importance when considering the hospital's liability for the operation of its emergency room is South Carolina's regulation expressly requiring hospitals to provide emergency services.[35]

These South Carolina statutes and regulations evidence a public policy which encourages hospital liability for torts occurring in the hospital emergency room. Not only do these statutes purport to provide "safe and adequate treatment" for patients, but they also require the hospital to maintain an emergency room.[36] Therefore, if the regulations are considered together, they provide support for the public policy that hospitals have a duty to afford competent care to patients in their emergency room facilities. Accordingly, in *Simmons*, the South Carolina Supreme Court expressly rejected the hospital's

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28. *See id.* at 692.

29. *Kashishian*, 481 N.W.2d at 282 (stating hospitals spend billions of dollars in efforts to market themselves as "full-care modern health facilities").

30. *Id.*

31. *See, e.g.*, State Hospital Construction and Franchising Act, S.C. CODE ANN. §§ 44-7-110 to -370 (Law. Co-op. 1976 & Supp. 1999).

32. *See* Jackson v. Power, 743 P.2d 1376, 1382-83 (Alaska 1987) (holding that hospitals have a duty to provide physician care in their emergency rooms based in part on the relevant state hospital regulations); Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 122, 498 S.E.2d 408, 411 (Ct. App. 1998) ("The change in public reliance and public perceptions, as well as the regulations imposed on hospitals, has created an absolute duty for hospitals to provide competent medical care in their emergency rooms.").

33. S.C. CODE ANN. § 44-7-120 (Law. Co-op. 1976).

34. S.C. CODE ANN. § 44-7-310 (Law. Co-op. 1976).

35. *See* 24A S.C. CODE ANN. REGS. 61-16 § 613 (1992).

36. *See* S.C. CODE ANN. § 44-7-120 (Law. Co-op. 1976); 24A S.C.CODE ANN. REGS. 61-16 § 613 (1992).

contention that "regulations promulgated by the state Department of Health and Environmental Control do not impose such a duty."[37]

III. THE *SIMMONS* CASE

A. Background

The facts of *Simmons* are typical for an emergency room negligence case.[38] McBride was treated at the Tuomey Regional Medical Center emergency room for contusions received in a moped accident.[39] Upon arrival at the emergency room, his daughter, Simmons, signed a form consenting to treatment which stated, "The physicians practicing in this emergency room are not employees of Tuomey Regional Medical Center. They are independent physicians, as are all physicians practicing in this hospital."[40] However, Simmons claimed that she believed the physicians were employees of Tuomey and that she did not read the form because she was upset about her father's injuries.[41] McBride was treated and released by two attending emergency room physicians who failed to treat a serious head injury that was visible on the back of his head.[42] Both physicians were employees of Coastal Physicians Services and were independent contractors.[43] The next day, McBride's condition worsened, and he returned to Tuomey.[44] Another physician diagnosed the injury as a subdural hematoma, and McBride died six weeks later from complications caused by the condition.[45] Simmons, as personal representative for McBride's estate, brought an action for medical malpractice against the physicians, Coastal Physicians Services, and Tuomey Regional Medical Center.[46]

A very similar situation arose in *Cooper v. Tuomey Regional Medical Center*.[47] Because *Cooper* and *Simmons* both raised the same issue, the supreme court consolidated them on appeal.[48] John H. Cooper had chest pains while driving.[49] Since he had suffered a heart attack before, he asked a friend

37. *Simmons*, 341 S.C. at 43, 533 S.E.2d at 318.

38. *See* Edwin L. Barnes, Jr., Note, *Victims of Their Own Success? South Carolina Hospitals Now Have an Absolute, Nondelegable Duty to Provide Competent Emergency Room Care*, 50 S.C. L. REV. 1063, 1064 (1999).

39. *Simmons*, 341 S.C. at 36, 533 S.E.2d at 314.

40. *Id.*

41. *Id.*

42. *Id.*

43. Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 117, 498 S.E.2d 408-09 (Ct. App. 1998).

44. *Simmons*, 341 S.C. at 36, 533 S.E.2d at 314.

45. *Id.* at 36-37, 533 S.E.2d at 314-15.

46. *Simmons*, 330 S.C. at 116-17, 498 S.E.2d at 408-09.

47. Cooper v. Tuomey Reg'l Med. Ctr., Op. No. 98-UP-077 (S.C. Ct. App. filed Feb. 17, 1998).

48. *Simmons*, 341 S.C. at 36, 533 S.E.2d at 314.

49. *Id.* at 37, 533 S.E.2d at 315.

to drive him to the Tuomey Regional Hospital emergency room.[50] Upon entering the emergency room, Cooper told the receptionist that he was having a heart attack and asked for "immediate help."[51] However, Cooper then had to wait for one and a half hours before he saw a doctor, a delay which caused him serious harm.[52] Unlike Simmons, Cooper never signed a form acknowledging the independent contractor relationship.[53] However, Cooper, just like Simmons, saw no signs or indications that the physicians were not employees of Tuomey.[54]

B. South Carolina Court of Appeals' Decision

In *Simmons v. Tuomey Regional Medical Center*, the South Carolina Court of Appeals put an end to efforts by hospitals to insulate themselves from liability by having their emergency rooms run by independent contractors.[55] The court of appeals applied a nondelegable duty to the operation of an emergency room[56]—quite a jump from the previous rule under which many hospitals had found protection through the use of independent contractors.[57] The holding was based almost completely on public policy. The court specified three factors that have changed the policy regarding a hospital's liability for the torts of emergency room physicians:[58] (1) emergency rooms are now, for many, the health care provider of last resort;[59] (2) regulations require hospitals to provide emergency room services;[60] and (3) the public today views the hospital as a "single-entity providing all of its medical services."[61] The court of appeals held that these factors give rise to policy concerns strong enough to

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Simmons*, 341 S.C. at 37, 533 S.E.2d at 315.
55. *See* Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 124, 498 S.E.2d 408, 412 (Ct. App. 1998) ("Given the cumulative public policies surrounding the operation of emergency rooms and the legal requirement that hospitals provide emergency services. We firmly believe that hospitals must be accountable in tort for the actions of care givers working in their emergency rooms.").
56. *See id.* at 124, 498 S.E.2d at 413.
57. *See id.* at 118, 498 S.E.2d at 409.
58. *See* Barnes, *supra* note 38, at 1069.
59. *See Simmons*, 330 S.C. at 120-21, 498 S.E.2d at 410-11 ("Few things are more comforting in today's society than knowing that immediate medical care is available around-the-clock at any hospital."). Further, in an emergency situation the patient is not in a position to bargain for medical services. *Id.* at 121, 498 S.E.2d at 411.
60. *See id.* at 121, 498 S.E.2d at 411; Barnes, *supra* note 38, at 1069; *see also supra* text accompanying note 34 (regarding the requirements that hospitals provide emergency room services twenty-four hours a day).
61. *Simmons*, 330 S.C. at 121, 498 S.E.2d at 411; Barnes, *supra* note 38, at1069-70 ("The *Simmons* court acknowledged the commercialization of the industry and specifically cited advertising, active solicitation of business, and other commercial efforts by hospitals as contributing to the public's perception.").

support the imposition of a nondelegable duty on the hospital's operation of an emergency room.[62] To impose a nondelegable duty, the public policy supporting it must be exceptionally strong.[63] In the situation of *Tuomey*, the court of appeals held that public policy supported the imposition of a nondelegable duty.[64]

A nondelegable duty is similar in effect to strict liability in that the delagator will be held liable for the torts of the delagatee although the injury occurred through no fault of the delagator and regardless of their relationship.[65] However, the nondelegable duty exception does not truly impose absolute liability on the hospital.[66] "Although no fault of the possessor need be shown, the negligence of the independent contractor must be proven before liability may attach to the employer."[67]

The imposition of a nondelegable duty on hospitals would have far-reaching implications on the quality of patient care, the patient's ability to recover for malpractice, and the relationship between doctors and hospitals.[68] Under nondelegation hospitals may be forced to take control of their emergency rooms, resulting in not only increased control over their operation, but also increased profits for the hospital that were previously captured by independent contractors.[69] However, among smaller hospitals, the result could be quite the opposite, as the necessity of assuming control over the emergency room may force them into merging or being bought out by larger organizations.[70] However, since the *Simmons* court of appeals' decision is based on "specific" public policy, the short-term effect of this decision will be limited to the emergency room setting.[71] Alternatively, "[t]he idea that hospital liability should be determined by how hospitals, either individually or collectively, are perceived by their users and the public could be given such elasticity by the courts that hospital liability may quickly expand."[72] As hospitals and physicians will be forced to re-evaluate the terms of their relationships, the public-policy shift asserted by the court of appeals could result in an expansion of hospital liability for malpractice occurring in other areas of the hospital as well as the emergency room.[73]

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62. *Simmons*, 330 S.C. at 120-24, 498 S.E.2d at 410-12 ("[W]e believe that the operation of emergency rooms is such an important activity to the community that hospitals should be liable for the negligence of emergency room care givers.").

63. *See supra* note 16 and accompanying text.

64. *Simmons*, 330 S.C. at 124, 498 S.E.2d at 412-13.

65. *See* McWilliams & Russell, *supra* note 8, at 453; *see also* Barnes, *supra* note 38, at 1063.

66. *See* Ft. Lowell-NSS Ltd. P'ship v. Kelly, 800 P.2d 962, 970 (Ariz. 1990) (en banc).

67. *Id.*

68. *See* Barnes, *supra* note 38, at 1078.

69. *See id.*

70. *See id.*

71. *See id.* at 1079.

72. *Id.*

73. *See id.* at 1065.

C. *South Carolina Supreme Court Decision*

On appeal, the South Carolina Supreme Court affirmed the result but took a step back from imposing an absolute nondelegable duty on the hospital.[74] The supreme court instead based its holding on the theory of "ostensible agency"[75] from the *Restatement (Second) of Torts*. The *Restatement (Second) of Torts* § 429 states:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.[76]

According to the court, for a plaintiff to hold the hospital liable under section 429:

> the plaintiff must show that (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee.[77]

1. *The Hospital Must Hold Itself Out to the Public by Offering to Provide Services*

The first element of the test, which requires that the hospital hold itself out as providing emergency services, is relatively easy for a plaintiff to prove.[78] Courts have held that sufficient "holding out occurs 'when the hospital acts or omits to act in some way which leads the patient to a *reasonable* belief he is being treated by the hospital or one of its employees.'"[79] In *Adamski v. Tacoma General Hospital* the court found that the hospital held itself out as providing

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74. *See* Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 50-51, 533 S.E.2d 312, 322 (2000).

75. *Id.* at 51, 533 S.E.2d at 322.

76. RESTATEMENT (SECOND) OF TORTS § 429 (1965).

77. *Simmons*, 341 S.C. at 51, 533 S.E.2d at 322.

78. *See* Arthur v. St. Peters Hosp., 405 A.2d 443, 447 (N.J. Super. Ct. Law Div. 1979); Mduba v. Benedictine Hosp., 52 A.D.2d 450, 453-54 (N.Y. App. Div. 1976); Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 979 (Wash. Ct. App. 1978).

79. *Capan*, 430 A.2d at 649 (quoting *Adamski*, 579 P.2d at 979).

emergency services simply by providing emergency room care and neglecting to inform the patient that the physician was not an agent of the hospital.[80]

However, several courts have stated that the hospital could avoid liability simply by effectively putting patients on notice of the independent contractor relationship.[81] This causes problems as well because courts disagree as to what action, sufficient to avoid liability, a hospital could take under section 429 to make patients aware that its employees are not agents. Some courts have neglected to mention notice at all and have simply stated that when a hospital holds itself out as having emergency facilities, the meaningful notice requirement is met and the hospital can be held liable.[82] However, in *Clark v. Southview Hospital & Family Health Center*[83] as well as *Simmons*, it was held that "notice, to be effective, must come at a meaningful time."[84] Both the Ohio Supreme Court and the South Carolina Supreme Court explained that signs in the emergency room informing patients of the physicians' independent contractor status were not effective to give the patients the ability to choose within a reasonable time.[85] "Even if the patient understood the difference between an employee relationship and an independent-contractor relationship, informing her of the nature of the relationship after she arrives is too late."[86] The notice should allow the patient to make an educated choice as to whether to choose that hospital for care despite the independent contractor status of the physicians.[87] One commentator suggests that to limit potential liability, hospitals should post notices in the waiting rooms stating the existence of the independent contractor relationship and should take other measures, such as indicating non-employee status on physicians' uniforms and requiring patients

80. *Adamski*, 579 P.2d at 979; *see also Capan*, 430 A.2d at 649.

81. *See Arthur*, 405 A.2d at 447 ("[U]nless the patient is in some manner put on notice of the independent status of the professionals with whom it might be expected to come into contact, it would be natural for him to assume that these people are employees of the hospital."); *Capan*, 430 A.2d at 650 (holding that the hospital's failure to alert the patient that the physicians were not agents of the hospital was one factor in the court's determination that the hospital held out the physicians as its employees); *Adamski*, 579 P.2d at 979 (holding that because "the plaintiff was not advised to the contrary . . . a jury could find that the emergency room personnel were 'held out' as employees of the Hospital").

82. *See Mduba*, 52 A.D.2d at 453-54; Smith v. St. Francis Hosp., Inc., 676 P.2d 279, 282-83 (Okla. Ct. App. 1983).

83. 628 N.E.2d 46 (Ohio 1994).

84. *Id.* at 54; *see also* Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 47, 533 S.E.2d 312, 320 (2000) (illustrating the trend against allowing hospitals to avoid liability through last-minute admission forms or emergency room signs); Sampson v. Baptist Mem'l Hosp. Sys., 940 S.W.2d 128, 135 (Tex. App. 1996) (observing that "posting signs in an emergency room will rarely provide the patient with the ability to choose at a meaningful time").

85. *See Clark*, 628 N.E.2d at 54 n.1; *Simmons*, 341 S.C. at 47, 533 S.E.2d at 320.

86. *Sampson*, 940 S.W.2d at 136.

87. *Id.*

to sign a release indicating their knowledge of the independent contractor relationship, to ensure that physicians are not held out as hospital employees.[88]

The South Carolina Supreme Court in *Simmons* did not have to decide the issue of adequate notice in relation to the test adopted under section 429 because this issue was to be determined by the trial court.[89] However, the *Simmons* court did recognize the current trend of courts that have adopted some form of apparent agency, stating that "hospitals will not be allowed to escape liability by giving last-minute notice of independent-contractor practitioners through admission forms or emergency room signs."[90] Therefore, although it has been suggested that hospitals seeking to avoid liability should employ these methods, it is probable that even these efforts will not be considered effective as meaningful notice. Because the issue of whether a person has notice is a question of fact for the jury,[91] there may be no bright-line test to determine what would constitute effective notice. While it is clear that simply posting signs and having consent forms signed will not be sufficient, the courts have provided little help as to what hospitals can realistically do to put patients on notice that will be considered sufficient to avoid liability.

2. *Plaintiffs Must Look to the Hospital Instead of the Individual Physician for Care*

In order to hold a hospital liable, a plaintiff must also prove that she looked to the hospital, not the individual physician, for care.[92] Some courts view this as the "critical question" in determining whether a hospital may be held liable.[93] The requirement recognizes the changed status of the hospital in today's society and the modern perceptions of the functions and duties of such a business.[94] Previously, hospitals were considered places for physicians to treat

88. *See* Classen, *supra* note 1, at 502 (suggesting methods for hospitals to attempt to effectively notify patients, but not indicating whether these methods are adequate).

89. *See Simmons*, 341 S.C. at 47-48, 533 S.E.2d at 320 (discussing the sufficiency of notice in general without discussion of whether the notice given in that particular case, such as the consent form, should be considered adequate).

90. *Id.*

91. *See* Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 795 (Ill. 1993) ("Whether a person . . . is put on notice by circumstances, is . . . a question of fact.").

92. *See Simmons*, 341 S.C. at 51, 533 S.E.2d at 322.

93. *See, e.g.*, Smith v. St. Francis Hosp., Inc., 676 P.2d 279, 282 (Okla. Ct. App. 1983) ("[T]he critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems." (quoting Grewe v. Mt. Clements Gen. Hosp., 273 N.W.2d 429 (Mich. 1978))).

94. *See* Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 53 (Ohio 1994) (addressing the element of representation and recognizing that "[i]n applying the traditional elements in this way, . . . courts invariably recognize the status of the modern-day hospital and its role in contemporary society"); Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980) (relying on the change in perception and operation of modern hospitals to determine that the patient looked to the hospital instead of the physician for care).

their own patients.[95] However, times have changed; today hospitals hold themselves out as providing physicians for needs such as emergency services, and the public looks to the actual hospital instead of the specific physician for such needs.[96] "[G]enerally people who seek medical help through the emergency room facilities of modern-day hospitals are unaware of the status of the various professionals working there."[97] Therefore, unless the patient is directed by her personal physician to go to the hospital or she goes to the hospital and then requests a specific physician, the patient has looked to the hospital itself for help.[98] In the absence of a pre-existing, patient-physician relationship, the court will assume that the plaintiff was looking to the hospital for help rather than to an individual physician, and the second element of the test will be satisfied.[99]

The *Clark* court has pointed out, though, that this element of the test is purely subjective, and "[o]nce a plaintiff testifies that he or she 'looked to the hospital' as opposed to the individual practitioner, a hospital defendant will have almost no effective means to disprove the plaintiff's subjective state of mind."[100] However, as previously stated, the changed public policy respecting hospitals supports the notion that, especially in emergency situations, patients *are* looking to the hospital as an entity to provide care, rather than the physician alone.[101]

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95. *See* Richmond County Hosp. Auth. v. Brown, 361 S.E.2d 164, 166 (Ga. 1987); *Capan*, 430 A.2d at 649.

96. *See Richmond County Hosp. Auth.*, 361 S.E.2d at 164; *Capan*, 430 A.2d at 649.

97. Arthur v. St. Peters Hosp., 405 A.2d 443, 447 (N.J. Super. Ct. Law Div. 1979).

98. *See id.*

99. *See id.*; *see also Richmond County Hosp.*, 361 S.E.2d at 166 ("A patient is likely to look to the hospital, not just to a particular doctor he comes into contact with through the hospital.")

100. Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 55 (Ohio 1994) (Moyer, C.J., dissenting).

101. *See id.* at 53. The court summarizes the public's perception of modern-day hospitals as follows:

> As an industry, hospitals spend enormous amounts of money advertising in an effort to compete with each other for the health care dollar, thereby inducing the public to rely on them in their time of medical need. The public, in looking to the hospital to provide such care, is unaware of and unconcerned with the technical complexities and nuances surrounding the contractual and employment arrangements between the hospital and the various medical personnel operating therein.... Public policy dictates that the public has every right to assume and expect that the hospital is the medical provider it purports to be.

Id.

3. *A Person in Similar Circumstances Must Have Reasonably Believed That the Physician was a Hospital Employee*

Even after the plaintiff shows that she sought care from the hospital and not from the individual physician, the plaintiff must still establish that she should not have reasonably believed that the doctor was an employee of the hospital. Several courts have held that "[p]atients entering the hospital through the emergency room, [can] properly assume that the treating doctors and staff of the hospital [are] acting on behalf of the hospital."[102] Patients should not be bound by a contract between the physician and the hospital that they were not aware of when they entered the hospital.[103] Whether the hospital adequately notified the patient of the independent contractor relationship becomes critical again in the analysis of this aspect of the test.[104] "[U]nless the patient is in some manner put on notice of the independent status of the professionals with whom [the patient] might be expected to come into contact, it would be natural for him to assume that these people are employees of the hospital."[105] Therefore, absent some form of notice which the court deems sufficient, the reasonableness of the patient's belief that the physician is a hospital employee will be established through the support of the modern-day perception of the hospital—holding itself out as a provider of medical services (including emergency care).

IV. EFFECT OF OSTENSIBLE-AGENCY THEORY

Supporters of imposing a nondelegable duty on hospitals have pointed out that if hospitals are not able to avoid liability by informing patients of the independent contractor relationship when they enter the emergency room, they will probably attempt to avoid liability by "more far-reaching general notices . . . contained in advertisements and other literature."[106] Because imposing the ostensible-agency doctrine could result in broader attempts by

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102. Mduba v. Benedictine Hosp., 52 A.D.2d 450, 453 (N.Y. App. Div. 1976); *see also* Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 794 (Ill. 1993) (explaining that the reasonable expectations of the public are that the hospital's staff are actual employees of the hospital).

103. *Mduba*, 52 A.D.2d at 453; Smith v. St. Francis Hosp., Inc., 676 P.2d 279, 283 (Okla. Ct. App. 1983); *see also* Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980) ("It would be absurd to require such a patient to be familiar with the law of respondeat superior and so to inquire of each person who treated him whether he is an employee of the hospital or an independent contractor.").

104. *See* Arthur v. St. Peter's Hosp., 405 A.2d 443, 447 (N.J. Super. Ct. Law Div. 1979).

105. *Id.*; *see also Gilbert*, 622 N.E.2d at 794; Sampson v. Baptist Mem'l Hosp. Sys., 940 S.W.2d 128, 135-36 (Tex. App. 1996) ("The plaintiff's reliance upon the hospital's competence has been demonstrated by her walking . . . into the emergency room. Simply informing her that some doctors and staff have a different technical relationship with the hospital than the one she expected does not lessen the reasonableness of her reliance upon the hospital." (quoting *Clark*, 628 N.E.2d at 54 n.1)).

106. *Sampson*, 940 S.W.2d at 136.

hospitals to inform their patients and thus avoid liability, some courts have decided to take the full leap and impose an absolute nondelegable duty on the hospital.[107] The imposition of a nondelegable duty avoids the various notification schemes that hospitals doubtlessly will attempt, and instead places the duty where many believe that it belongs—with the hospital.[108]

One problem with the ostensible-agency theory of the South Carolina Supreme Court is that the notice issue is still basically unresolved.[109] Certainly, under the ostensible-agency rule, hospitals will continue to make attempts to inform patients by various notification methods which will lead to continued litigation on this issue and the possibility that hospitals could still escape liability. Some believe these attempts will be against public policy: Despite the patient's knowledge of the relationship, they still are forced to rely on the hospital because "[t]here exists no other place to find immediate medical care."[110]

Aside from the fact that the ostensible-agency doctrine is unclear on the issue of notice, this doctrine will, in effect, impose liability in the same circumstances as the nondelegable duty theory.[111] Disregarding the possibility of adequate notice under the ostensible-agency theory, both theories will hold the hospital liable unless the independent contractor physician is personally selected by the patient.[112] Under the ostensible-agency doctrine, "courts virtually never dismiss a claim because the hospital dispelled the appearance of agency. . . . The non-delegable duty doctrine simply makes it explicit that 'the hospital bears vicarious liability. . . .'"[113] Certainly a valid argument exists that both of these doctrines impose liability in practically the same situations, the non-delegable duty approach may be more appropriate and efficient in order to avoid further questions over the issue of notice.

When a patient seeks out a specific physician at the hospital, the hospital is relieved of liability, but when a patient looks solely to the hospital for care, the hospital will be forced to assume liability. However, one situation not covered by this scheme occurs when a patient enters the emergency room for treatment (relying on the hospital) and thereafter establishes a physician-patient relationship with a specific physician (looking toward one physician).[114] Two cases have illustrated the possible results from a malpractice suit in this

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107. *See id.*

108. *See id.*

109. *See supra* note 89 and accompanying text.

110. *Sampson*, 940 S.W.2d at 136.

111. *See* Ward v. Lutheran Hosp. & Homes Soc'y of America, Inc., 963 P.2d 1031, 1034 (Alaska 1998).

112. *See id.* at 1034-35.

113. *Id.* at 1035 n.5 (quoting Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 389 (1994)).

114. *See* Classen, *supra* note 1, at 489.

particular situation. In *Simmons v. St. Clair Memorial Hospital*,[115] the patient was admitted to the hospital and was treated by the psychiatric physician on call.[116] After his release from the hospital, the patient became a personal patient of the physician until the patient committed suicide five months later.[117] The decedent's parents sought to hold the hospital liable on the theory that the physician was an ostensible agent of the hospital.[118] The court remanded the case but found that the decedent could reasonably have looked to the hospital for treatment, and therefore the hospital may have been liable.[119]

Alternatively, in *Porter v. Sisters of St. Mary*,[120] the court held that no agency relationship existed between the hospital and the specialist who was initially called in to treat the patient.[121] In *Porter* the patient entered the emergency room, was treated by the specialist, and then consented to an operation recommended by the specialist; the operation resulted in medical problems.[122] Although the surgery took place only a few days after the patient was initially admitted to the emergency room, as opposed to the five months that elapsed in the *Simmons* case, the *Porter* court held that no agency relationship existed, and the hospital therefore could not be held liable.[123] These cases illustrate the potential problems with the ostensible-agency rule when the patient initially looks to the hospital for emergency treatment, but then develops a patient-physician relationship with the physician and is injured by negligent acts not occurring in the emergency room.[124]

Another potential problem with the ostensible-agency rule arises when the patient admitted to the emergency room is unconscious and therefore is not aware of who is providing the treatment.[125] The court in *Walker v. Winchester Memorial Hospital*[126] addressed exactly this situation.[127] After Walker regained consciousness, it became known that he had a broken jaw that the emergency room physicians failed to discover.[128] In denying the hospital's motion for summary judgment, the court stressed the idea that the question of liability should center around whether "the Hospital 'held out' the plaintiff's treating physicians as its agents or permitted the doctors to represent to the plaintiff that they were agents of the Hospital."[129] The court further stated that the fact that

115. Simmons v. St. Clair Mem'l Hosp., 481 A.2d 870 (Pa. Super. Ct. 1984).
116. *Id.* at 872.
117. *Id.*
118. *Id.*
119. *Id.* at 875.
120. 756 F.2d 669 (8th Cir. 1985).
121. *Id.* at 674-75; Classen, *supra* note 1, at 491.
122. *Porter*, 756 F.2d at 670.
123. *Id.* at 674-75.
124. Classen, *supra* note 1, at 492.
125. *See id.*
126. 585 F. Supp. 1328 (W.D. Va. 1984).
127. *Id.* at 1329.
128. *Id.*
129. *Id.* at 1331.

the patient was not conscious when he was admitted to the emergency room or during his treatment weighed heavily against finding the hospital liable.[130] *Walker* presented one of the few situations in which the hospital may not be held liable under the ostensible-agency theory because there is no way for an unconscious patient to reasonably rely on the idea that the physician is a hospital employee.[131] The South Carolina Supreme Court addressed the issue, explaining that "when a third person accepts such services on [an] injured person's behalf and reasonably believes the services are being rendered to the injured person by the independent contractor's employer," section 429 of the *Restatement (Second) of Torts* still applies.[132] However, although section 429 of the *Restatement* apparently may still apply when someone accepts medical services on behalf of the injured person, the courts have not ruled on the applicability of this section in a situation when no one actually accepts the services on the injured person's behalf.[133]

The reasoning applied in *Walker* could logically be extended to prevent recovery against the hospital by a patient who simply did not have "full control of his senses or have full comprehension of the circumstances."[134] This extension would relieve hospitals of liability through application of ostensible agency in a broad area of emergency room practice. Because many of the emergency room malpractice cases involve unconscious patients and the trend is toward hospital liability, ostensible agency may be a disfavored result because it will allow hospitals a large window of non-liability simply because the patient was unconscious. These patients are also the ones who may be most in need of protection and most deserving of recovery for their injuries because, as they were unconscious, they were allowed no choice about where they received their treatment. The imposition of a nondelegable duty avoids these problems with the application of the ostensible-agency theory because with a nondelegable duty, hospitals would be held liable in all situations instead of having a general rule of hospital liability with exceptions and uncertainties that must be resolved by the courts.

V. CONCLUSION

Public policy supports the trend towards increased hospital liability. The adoption of ostensible agency is a significant step towards absolute hospital liability. Under this theory, as long as the hospital holds itself out by providing an emergency room and the plaintiff reasonably looks to the hospital for care,

130. *Id.*

131. *See* Classen, *supra* note 1, at 493-94.

132. Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 51, 533 S.E.2d 312, 322 (2000).

133. This situation may occur if a patient is brought into the emergency room alone and unconscious, and the physicians render emergency medical treatment negligently. In that scenario, the physician's treatment is performed under informed consent.

134. Classen, *supra* note 1, at 494 (stating that this possible application of the rule could even prevent recovery by patients who did not speak the language of the emergency room staff).

liability will be imposed. However, several aspects of this doctrine remain unresolved. Hospitals will continue, and could possibly succeed, in developing methods to adequately inform patients of the independent contractor relationship of the physicians. There will also be issues regarding patients who are brought to the emergency room unconscious who are conceivably not actually looking to the hospital for care. Another concern with the future application of this doctrine occurs when a patient is admitted to the emergency room and is treated by an attending physician, but thereafter develops a physician-patient relationship with that physician. When considering these problems, the better approach would be to impose an absolute, nondelegable duty as the South Carolina Court of Appeals did. Imposing a nondelegable duty would prevent future litigation over these unresolved issues, conform to the trend of increased hospital liability, and protect those patients who are victims of emergency room malpractice and may not be able to fully recover from the individual physician.

Mary Dameron Stuart

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