HOSPITAL LIABILITY EXPOSURE FOR STAFF PHYSICIANS: THE CONCEPT OF NONDELEGABLE DUTY IN FLORIDA LAW

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INTRODUCTION

It is generally understood in Florida law that hospitals, ambulatory surgery centers, and other kinds of institutional health care providers are responsible for the care provided by its employed health care providers, whether they be nurses, therapists, perfusionists, and allied health professionals. Further, it is generally correct that such institutions are not vicariously liable for the actions of physicians who merely have staff privileges and are alleged to have committed malpractice within the institution. While there are exceptions, such as cases involving radiologists and emergency medicine physicians, most staff physicians are considered independent contractors. However, the concept of non-delegable duty for staff physicians has emerged within the law in Florida to create potential liability for hospitals as it relates to care provided by physicians practicing within the facility.

APPARENT AGENCY VERSUS NONDELEGABLE DUTY

Plaintiff’s attorneys often try, but are usually not successful, in alleging that hospitals are liable for the conduct of staff physicians based on the theory that the physician is an apparent agent of the hospital. It is fairly well settled that apparent agency is not created simply by a hospital granting staff privileges; the law requires that a patient demonstrate that the hospital has done something affirmatively to create the appearance of an agency with the physician, and that the patient acted in reliance on that representation.

The concept of nondelegable duty for hospitals with regard to nonemployed physicians is far less settled in Florida, however Plaintiff’s attorneys are finding more and more success in terms of being allowed to maintain causes of action based on this theory.
While the concept of non-delegable duty is somewhat convoluted, essentially it means in this context that if a hospital assumes a duty to provide a particular medical service in a contract with a patient, the hospital is not relieved of the responsibility to provide that service competently, even if the performance of the service is undertaken by an independent contractor, i.e., a staff physician.

An important case from the Fifth District Court of Appeal was decided in 2006, titled *Pope v. Winter Park Healthcare Group*, which addressed this legal theory directly. In that case, the Court was asked to consider whether the hospital had a non-delegable duty to provide neonatal care to a newborn that suffered permanent brain damage. The court ultimately decided that in fact the issue of whether the hospital had a non-delegable duty to provide competent neonatal services, through an independent neonatologist, should have been considered by the jury.

The *Pope* court stated, “…we agree that Florida law does not currently recognize an implied nondelegable duty on the part of a hospital to provide competent medical care to its patients. Florida law does recognize, however, that such a duty can be undertaken pursuant to an express contract.” The court reasoned that when the patient signed a Consent for Medical and Surgical Treatment, the patient and hospital entered into a contract for which both had duties and responsibilities. The court stated that although the contract was clear that physicians are independent contractors, it was unclear as to whether the hospital, in delegating medical and surgical care to physicians, relieved the hospital of liability, as the consent form specified that patient was consenting to a variety of medical and surgical services during the hospitalization. The court concluded that because the contract was ambiguous, this was an issue that the jury should have been allowed to decide.

In drawing a similar conclusion, the Fourth District Court of Appeal in *Wax v. Tenet Health System* ruled that the jury should have been allowed to decide whether the hospital had a nondelegable duty to provide anesthesia services competently, even though the anesthesiologist was an independent contractor. The *Wax* court was obviously persuaded by the reasoning of the *Pope* court in finding that “there is no express agreement by the patient that the delegation of the duty in question also operated to discharge hospital from liability to the patient for any negligence in its provision.” In a more forceful holding than the *Pope* case, this court stated, “we find no language at all in [the consent form] that might fairly and reasonably be construed to stand as an agreement to discharge the hospital from its primary statutory and contractual duty of providing non-negligent anesthesia services.”

Another case was decided in 2010 that takes exception with these prior cases. The Second District Court of Appeal in *Tarpon Springs Hospital Foundation v. Reth* concluded that the hospital did not have any nondelegable duty to provide non-negligent anesthesia services by an independent anesthesia practice, and that by signing a consent for anesthesia, the patient expressly consented to the delegation of the performance and responsibility of the anesthesia
services to the anesthesiologist and nurse anesthetist. In recognizing the conflict within Florida law based on this decision, the question was certified to the Florida Supreme Court to resolve the conflicting rulings on this issue.

THE PRACTICAL EFFECT OF NONDELEGABLE DUTY ON HOSPITALS IN FLORIDA

As it currently stands, hospitals, surgery centers, and other institutions that utilize the services of non-employed physicians need to be mindful of the potential liability exposure created by the theory of nondelegable duty. Although Plaintiff’s attorneys have essentially abandoned the theory of apparent agency for staff physicians, they have begun incorporating allegations of nondelegable duty against hospitals in almost every case that also includes a physician as a co-defendant.

While there is no ironclad way to avoid this allegation, it is recommended that hospital administrators work with risk management and legal counsel to identify any documents and other forms of communication with patients that can be improved upon to clarify that both performance and responsibility for services provided by independent physicians have been delegated to them, and that these documents, whether they be consent forms, financial responsibility forms, or marketing/advertising media are clear in this regard. It is further recommended that appropriate hospital staff who interact with patients and their families receive instruction and guidance from risk management and legal counsel that address any potential areas where these issues may arise.