# Spreading the Liability for Ostensible Agents: PA Supreme Court Paves the Way for Hospitals to Seek Contribution from Employers of Independent Physicians in Professional Liability Actions

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On July 28, 2023, the Pennsylvania Supreme Court issued an opinion recognizing the right of hospitals to pursue contribution claims against employers when held liable for the professional negligence of a healthcare provider who is not a hospital employee. The decision provides hospitals the opportunity to recoup losses caused by the conduct of ostensible agents.

Under Pennsylvania law, an employer can be held legally responsible for the actions of an employee through the legal doctrine of respondeat superior, which deems the employee an agent of the employer. Pennsylvania law also permits plaintiffs to recover from hospitals for the acts of independent healthcare providers when there is evidence that a reasonable person would believe the healthcare provider is an agent of the hospital, even if that individual is not actually employed by the hospital. These are so-called "ostensible agents," and hospitals can be liable for their conduct whether or not the individual healthcare provider or his or her employer is also named as a defendant.

Although hospitals have indemnification rights against the individual healthcare provider, it was an open question whether a hospital has any recourse against the employer of these ostensible agents until the Supreme Court issued the *McLaughlin v. Nahata* decision at the end of July.

The plaintiff in *Nahata* was admitted to a hospital and treated by numerous doctors, including two independent physicians who were not employed by the hospital. The patient alleged she received negligent treatment that caused her permanent neurological damage and sued the two physicians and the hospital. Following a bench trial, the court held that the two doctors were negligent and ostensible agents of the hospital, which was vicariously liable for their conduct. The hospital then sought to recover through contribution and indemnification claims from the doctors' employer, which was not initially named as a defendant. The trial court allowed these claims to proceed, and the employer sought an immediate appellate review.

The Superior Court held that the hospital was able to proceed with both indemnification and contribution claims against the employer, a decision that was further appealed to the Supreme Court.

The Supreme Court was unanimous in holding that the hospital could seek contribution from the employer, concluding that two different entities that could be held jointly responsible for the conduct of a "shared agent" by operation of law should be permitted to potentially share that liability through a contribution claim. Although this view was not adopted by the full court, in a decision concurring in part, three justices opined that determining who exerted

more control over the shared agent would govern the allocation of fault between the hospital and employer in a contribution action.

The Supreme Court was evenly split on the question of whether the hospital also had an indemnification claim against the employer, the practical consequence of which is that the Superior Court's decision allowing the indemnification claim stands.

For questions involving this recent Supreme Court opinion and how it may be used to reduce liability stemming from a recent verdict, please contact Partner Peter Faben, Attorney Tasha Stoltzfus Nankerville or any member of the Barley Snyder Health Care Industry Group.

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