NOVEMBER 2007

Expansion of ostensible agency liability under *Ermoian*: Proof requirements

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This month's column discusses the implications of the recent Fourth District Court of Appeal decision on ostensible agency and the elements of proof at trial.

In 2002 the Court of Appeals handed down the *Mejia* decision (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448), which adopted the national trend in determining how a patient can prove ostensible agency. In California, the definition and elements for ostensible agency are codified in Sections 2317, and 2334 of the Civil Code. These statutes require proof of three elements:

> (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) such belief must be generated by some act or neglect of the principle sought to be charged, and (3) the third person in relying on the agent's apparent authority must not be guilty of negligence. *(Mejia* at 1457)

Mejia essentially held that, following the national trend in the medical context, a patient can meet these elements by showing (1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship, and (2) reliance on that apparent agency relationship by the patient. In most cases, this is a very low burden for the patient to meet, because the patient need only plead facts showing that the patient sought treatment from the hospital without being informed that the doctors were independent contractors. (*Id.* at 1458)

Expanding the scope of ostensible agency even further, the Court of Appeals dealt with the issue again this past June in *Ermoian v. Desert Hospital et al.* (2007) 152 Cal.App.4th 475. *Ermoian* was a wrongful life and birth case in which the plaintiffs, a mother and daughter, sued the doctors at an outpatient clinic, and the hospital affiliated with the clinic on an ostensible agency theory.

In analyzing the requirements that patients must meet in arguing ostensible agency, the Court went back to *Mejia*, affirming that California would follow the national trend for ostensible agency in a hospital/ contractor situation. But while *Mejia* focused on the reliance aspect of ostensible agency theory, (meaning the patient sought treatment at the hospital without knowing the relationship of the doctors/staff to the hospital), *Ermoian* focused heavily on the hospital's actions.

According to the *Ermoian* court, in meeting the Civil Code elements for ostensible agency, the patient must show facts indicating that: (1) the hospital held itself out as a provider of medical services, and (2) the patient did not have actual knowledge of the physician's actual status, and that it is "objectively reasonable" for the patient to believe "that physician is an employee of the hospital." (*Ermoian* at 506) While the issue of whether a physician is an actual agent of a hospital is a question of fact, "ostensible agency on the other hand may be implied from the facts of a particular case…" (*Id.* at 502). If the patient can show that it was "objectively reasonable" to believe the physician was a hospital employee, the Court may infer ostensible agency as a matter of law. (*Id.* at 507, 509-510)

Ermoian also clarifies what a patient does *not* have to show in order to prove ostensible agency:

> ..a patient seeking to prove that a physician is an ostensible agent of the hospital is not required to show that the patient (1) actually believed that the

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doctors were employed by the hospital, or (2) changed her position or otherwise relied to her detriment based upon her belief that the doctors were agents of the hospital (*Ermoian* at 505).

Mejia addressed the second of these two statements by noting that the "reliance" prong is satisfied just by showing that the patient sought treatment at the hospital. *Ermoian* makes the point that since ostensible agency can be *inferred* from the "facts of a particular case," that proving the *actual belief* of the patient is not necessary. This is why the court focuses so heavily on the actions of the hospital in "holding itself out," as the doctors' employer in *Ermoian*.

Facts of *Ermoian*

In 1994, Jackie Shahan went to the Desert Hospital emergency room because of abdominal pain, cramping, headaches, and vomiting. The ER doctor told her that she was pregnant and referred her to the Desert Hospital Outpatient Maternity Services Clinic across the street from the main hospital. Apparently, at this time no representations were made to Shahan regarding the relationship of the clinic to the hospital.

During her pregnancy, Shahan visited the clinic for prenatal care, and was seen by several hospital-employed nurses, and also by Drs. Gubin and Ogata. Dr. Gubin was the director of the clinic but was an "independent contractor." Dr. Ogata was an "independent contractor" as well.

During the course of treatment, but after the fetus was viable, it was found that there was some abnormality in the developing fetus; Shahan, however, was not told of the abnormality. Several weeks afterward, Shahan gave birth to a baby girl, who she named Amanda. Amanda was born with severe brain abnormalities, meaning that she is mentally retarded, microcephalic and will "always be a child under the age of one year."

The clinic was operated by the hospital as a comprehensive perinatal services program (CPSP). The hospital applied to become a member of CPSP so that physicians who were seeing patients in labor and delivery could receive compensation. "Under the CPSP guidelines, the hospital provided psychosocial, nutrition, and health education services, and related case coordination to Medi-Cal patients during and after pregnancy." (*Ermoian* at 481.) To this end, the hospital provided dietitians, nurses and a social worker. The hospital also billed for all clinic services and then paid Drs. Gubin and Ogata.

Even though this outpatient clinic was located across the street from the hospital, and was run by doctors who were independent contractors, the court found numerous facts indicating that the hospital "held itself out" as the provider of care to the clinic patients Shahan and Amanda, and inferred ostensible liability as a matter of law.

The court particularly focused on the fact that the CPSP was run by the hospital, and that the hospital was billing for all services provided through the CPSP and then compensated the independent doctors. Also, the name, "Desert Hospital Outpatient Maternity Services Clinic," gives the appearance to patients that this is an extension of the hospital. On days that Shahan would see either Dr. Gubin or Ogata, she would also see a nurse. In particular, nurse Sterling represented to Shahan that she was a hospital employee. Taking all these facts, and adding the fact that the hospital did provide numerous services to patients through the clinic, and employed several staff members there, the court found that "the entire appearance created by the hospital and those associated with it, was that the hospital was the provider of the obstetrical care to Shahan" (*Ermoian* at 509.). (Shahan may have signed a form indicating that the doctors were not affiliated with the hospital, however this was not in the appellate record and was not admitted into evidence at trial so the court did not consider it. However, even considering this, the court might still have found that ostensible agency existed (*Id.* at pg. 482).

Conclusion

Mejia affirmed the majority law in the U.S. on ostensible agency. Unlike *Mejia* which focused on the issue of reliance, *Ermoian* focuses more on the hospital's conduct, e.g., what it did to cause a patient to believe that there was an agency relationship. Discovery of what representations were made in writing and verbally, who billed for services, policies and procedures governing the conduct of the doctor, who employed the staff will play an important role in proving agency.

Like any situation where agency is in dispute, plaintiff's counsel must understand the elements of proof at the outset of the case and prepare for discovery which will support those elements; expect those elements to be tested not only at trial but at an earlier summary judgment hearing.

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