Pennsylvania Hospitals Provided a Path to Offset Ostensible Agent Liability

Kevin C. Cottone, Michael W. Horner and Allison M. Goldberg
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A recent Pennsylvania Supreme Court decision provided hospitals a path to offset liability for their ostensible agents' negligence. In *McLaughlin v. Nahata,* the Court recognized that a defendant hospital could seek contribution from a physician's actual employer if the hospital and employer are both vicariously liable for the physician's negligence.

At trial, the hospital was found vicariously liable under ostensible agency principles for an approximately $17 million verdict due to the negligence of two physicians with staff privileges at the hospital. After receiving the physicians' insurance coverage limits, the hospital sought contribution and indemnity from the physicians' actual employer for the difference between the amount of the physicians' insurance limits and the verdict. The hospital argued that the physicians' actual employer should be vicariously liable for the negligence, as the physicians were acting within the scope of employment when the care at issue occurred. The employer moved for summary judgment arguing that a secondarily liable party (hospital) could not shift its blame to another secondarily liable party (employer). The trial court denied the employer's motion for summary judgment and the Superior Court affirmed.

The Supreme Court addressed whether the Uniform Contribution Among Tortfeasors Act (UCATA) permits a party that is vicariously liable in tort (under ostensible agency) to seek contribution from a party that may also be vicariously liable (under *respondeat superior*) in tort for a common agent's negligence. First, the Supreme Court explained that UCATA doesn't limit contribution to only those parties primarily liable; parties secondarily or vicariously liable are "liable in tort" and could share liability. Furthermore, the theory under which a party is secondarily or vicariously liable is not relevant to whether contribution amongst them is available under UCATA. Thus, the Supreme Court concluded that the hospital could seek contribution from the employer under UCATA because (1) the hospital and employer could both be vicariously liable for the negligent physicians as their common agents and share the full extent of the agents' liability and (2) the parties could also be severally liable because either or both could be named as an initial defendant with regard to the actions of the common agents. Of note, the court expressly refused to state what factors the trial court may consider in an apportionment analysis relative to the hospital's claim for contribution.

The Supreme Court was split on whether the hospital could also seek indemnity from the actual employer. Ultimately, the court concluded indemnity principles do not apply to a circumstance involving two vicariously liable parties responsible in tort for a common agent where there is a statutorily "imposed" vicarious liability under the Medical Care Availability and Reduction of Error Act (MCARE). That is, if an ostensible employer is vicariously liable for the negligence of its ostensible agent under the MCARE statute, it is not permitted to obtain indemnity from another party that is also vicariously liable for the common agent. The Supreme Court, however, did not rule out the possibility of indemnity should either party show the other was actively, not just passively or vicariously, liable for the damages.

Accordingly, expect more hospitals with potential ostensible agency exposure to assert contribution claims against parties who may also be vicariously liable for the common agent's negligence to defray the cost of any judgment.

For additional information, please contact Kevin C. Cottone (cottonek@whiteandwilliams.com; 215.864.7108) Michael W. Horner (hornerm@whiteandwilliams.com; 856.317.3658), or Allison M. Goldberg (goldberga@whiteandwilliams.com; 215.864.6399).