



Medical Malpractice Update

JULY 2015

*If you have any questions
about this Advisory,
please contact:*

PENNY Q. SEAMAN
203.498.4333
pseaman@wiggin.com

ERIKA L. AMARANTE
203.498.4493
eamarante@wiggin.com

KEVIN S. BUDGE
203.498.4378
kbudge@wiggin.com

BENJAMIN W. CHENEY
203.498.4375
bcheney@wiggin.com

Appellate Court Restricts Vicarious Liability of Hospitals

In a decision issued this week, the Connecticut Appellate Court rejected an argument that a hospital has a nondelegable duty to provide emergency care and thus is vicariously liable for the professional negligence of an independent emergency room physician with whom it contracted to provide that care. *Tiplady v. Maryles*, No. AC 35832. In combination with the recent decision in *Cefaratti v. Aranow*, 154 Conn. App. 1 (2014), *cert. granted*, 315 Conn. 919 (2015), where the Court held that the doctrine of apparent agency cannot be used to hold a hospital liable for the tortious actions of an independent physician, the Appellate Court has narrowed the bases upon which a plaintiff can recover from a hospital for the negligence of an independent physician.

In *Tiplady*, a forty-two year old woman died of encephalitis shortly after being discharged from a hospital emergency room. The Estate sued the hospital, arguing that the ED physician had misdiagnosed the woman's condition and prematurely discharged her, causing her death. In an attempt to hold the hospital liable for the actions of the ED physician, an independent contractor, the plaintiff argued that hospitals have a *per se*, nondelegable duty to treat patients in the emergency room. Under this theory, a hospital would be vicariously liable for *any* negligence occurring in the emergency room, even if the negligent

actor were an independent contractor. The trial court struck down the claim before trial, and the Appellate Court unanimously affirmed. In its decision, the Court noted that "Connecticut has not previously recognized a nondelegable duty in the context of a hospital and an independent contractor physician," and it refused to do so now.

The Court rejected the plaintiff's assertion that state and federal regulations create a nondelegable duty for hospitals to provide non-negligent care in emergency rooms. First, the plaintiff relied on Department of Public Health Regulation § 19-13-D3(j)(2), which states that "[e]ach general hospital shall be organized in such a way as to provide adequate care for persons with acute emergencies at all hours." The Court disagreed with the plaintiff's interpretation of this regulation noting that subsection (3) of the regulation expressly *permits* hospitals to contract—i.e., delegate—their duty to provide emergency room care. The Court did issue a caveat to its decision, because that Regulation allows for delegation in a city or town with more than one hospital, and so the Court stated that it did not need to reach the issue of a nondelegable duty for a hospital in a municipality with only one hospital.

Second, the plaintiff argued that a nondelegable duty was created by 42 C.F.R. § 482.12(e), which provides that a hospital

CONTINUED ON NEXT PAGE

Appellate Court Restricts Vicarious Liability of Hospitals

is responsible for all services furnished in the hospital and that contractual services must be provided in a safe and effective manner. Again, the Court was not persuaded. Noting that the purpose of the regulation is to provide a baseline for determining whether a hospital qualifies for a provider agreement under Medicare or Medicaid (see 42 C.F.R. 482.1(b)), the Court opined that, “[g]iven this stated purpose, it is unclear how the federal regulation supports the plaintiff’s proposition.” The regulation does not confer upon hospitals a nondelegable duty to ensure that ED physicians, even if independent contractors, do not commit malpractice.

The case was not at an end, however. The jury had found that the ED physician was not negligent, but the Appellate Court reversed and remanded for a new trial on evidentiary grounds. Apart from the stricken theory of nondelegable duty, the plaintiff had also claimed that the ED physician was the apparent agent of the hospital, but the Appellate Court declined to opine on that theory of liability before a new trial, noting in a footnote that the issue of apparent agency is currently pending before the Connecticut Supreme Court in *Cefaratti*.

The parties have until mid-August to file a petition for certification for review of these issues by the Connecticut Supreme Court. We will be watching to see if the Supreme Court will review this decision and will keep you posted with the latest developments.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.