



# Insight from Carlton Fields

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## Hospitals and the Non-Delegable Duty of Care

By Edward J. Carbone

To date, Florida common law has not recognized a broad duty on the part of hospitals to provide non-negligent medical care through physicians and other staff or contractors. The concept of a “non-delegable duty” on the part of hospitals continues to be advanced, however. In 2007 one Florida appellate court found authority for a non-delegable duty to provide anesthesia services in AHCA regulations setting certain standards for anesthesia departments. The following article summarizes the current state of Florida law in this evolving area.

For obvious reasons, Florida medical malpractice plaintiffs frequently claim that a hospital is legally responsible for all care that takes place within its walls, whether delivered by physicians, nurses, or ancillary personnel. The latest theory advanced in support of this concept is popularly known as “non-delegable duty.” It claims that every hospital owes a duty to every patient to guarantee non-negligent care and that, even if the performance of the care is delegated to independent contractor physicians, the legal responsibility for ensuring non-negligence remains with the hospital. This article will briefly summarize and examine the development and current state of Florida law concerning the “non-delegable duty” of hospitals.

### The General Rule and the Common Law

The general rule is very clear. Florida common law does not create a broad non-delegable duty on the part of hospitals to provide their patients with non-negligent medical care through physicians.

When a non-delegable duty arises out of common law, it is typically a duty that arises out of “inherently dangerous activity” or out of the creation of an “inherently dangerous condition.”<sup>1</sup> But Florida law is clear that physician and surgical care is not inherently dangerous, and that hospitals do not generally owe a non-delegable duty to their patients to provide physicians’ medical and surgical care. The general rule in Florida has long been, and still remains, that a hospital is not liable for the negligent acts of a physician who is not its employee, but instead an independent contractor.<sup>2</sup>

Indeed, Florida common law does not currently recognize an implied non-delegable duty imposing legal responsibility upon all Florida hospitals for all medical care provided in the hospital to patients. This precise issue arose five years ago in *Roessler v. Novak*,<sup>3</sup> in which a patient sued a radiologist and a hospital for medical malpractice. The plaintiff’s claim against the

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hospital was based upon vicarious liability, under the theory that the physician who acted negligently was an agent of the hospital. The trial court granted summary judgment in favor of the hospital on the basis that there was no genuine issue of material fact to preclude a finding that the doctor was not an agent of the hospital.<sup>4</sup> The Second District Court of Appeal reversed, reasoning that other facts might be developed during trial that could suggest that the hospital would be vicariously liable under an apparent agency theory.<sup>5</sup>

Although the Roessler opinion was issued by a unanimous panel, Chief Judge Altenbernd concurred with a separate opinion observing that, in his view, the use of apparent agency as the doctrine for determining hospital liability for the negligence of independent contractors was a failure and that, in the context of medical negligence, a theory of non-delegable duty is superior.<sup>6</sup> Judge Altenbernd suggested that hospitals should be liable as a general rule for certain activities within the hospital because a patient does not realistically have the ability to shop on the open market for other providers of medical services and is limited to the care of physicians selected by the hospital. He said he would adopt a theory of non-delegable duty if it were not for the prevailing precedent that employs the theory of apparent agency. Although Judge Altenbernd's personal opinion was clear, it was part of a concurring opinion in which he explicitly acknowledged that the non-delegable duty theory of liability had not yet been adopted in Florida.<sup>7</sup>

Three years after Roessler, the Fifth District Court of Appeal confirmed the non-existence of a non-delegable duty under common law for a hospital to provide non-negligent physician care to its patients. In *Pope v. Winter Park Healthcare Group, Ltd.*,<sup>8</sup> a husband and wife sued their doctors and a hospital for medical malpractice, basing their claims against

the hospital on a non-delegable duty theory of liability. The court rejected the claim, however, finding 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."<sup>9</sup> The court recognized the wisdom of Judge Altenbernd's concurring opinion in Roessler, and acknowledged the argument that a theory of non-delegable duty could be a replacement for liability founded on agency principles. The court noted, however, that even the concurring opinion in Roessler had observed that "Florida law does not recognize that the mere relationship between a hospital and its patient gives rise to a nondelegable duty to provide competent medical care."<sup>10</sup>

The reason hospitals do not owe a general non-delegable duty to patients to provide non-negligent medical care is twofold. First, patients are generally "fully protected by the causes of action they have availed themselves of under actual agency and apparent agency theories,"<sup>11</sup> meaning there is no need for a plaintiff to seek relief under non-delegable duty theory. The second reason was expressed succinctly by the Supreme Court of Ohio in rejecting a theory of non-delegable duty for hospitals:

employers are held liable under the traditional non-delegable duty exception because the nature of the work contracted involves the need for some specific precaution, such as a railing around an excavation in a sidewalk, or the work involved is inherently dangerous, such as blasting....[But] [t]he practice of medicine in a hospital by an independent physician with staff privileges does not involve the type of risks and precautions required as contemplated by the 'non-delegable duty' exception. Where the hospital has exercised its independent duty to grant and continue staff



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privileges only to competent and careful physicians, any remaining precautions attendant to the non-negligent practice of medicine are the sole responsibility of such independent private physician.<sup>12</sup>

In short, “[hospitals have a duty to hire and retain competent physicians. Hospitals do not have a duty to ensure those competent physicians are not negligent. Indeed, that would seemingly be an impossibility.”<sup>13</sup>

Florida’s refusal to acknowledge a common law non-delegable duty running from a hospital to its patients is far from unique. Many other jurisdictions take a similar approach toward hospital liability for physician care.<sup>14</sup>

### Judicially-Crafted Exceptions to the General Rule

However, recent appellate developments have provided Florida plaintiffs a beachhead from which they are now attempting to expand the concept of non-delegable duty. These developments include decisions construing a provision of the Florida Administrative Code to create a non-delegable duty to provide non-negligent anesthesia services. Other decisions have construed hospital admission forms and surgical consent forms to constitute express contractual undertakings to provide not only traditional hospital services such as nursing care and therapies, but also medical care and treatment through physicians.

### Chapter 395 and AHCA Regulations

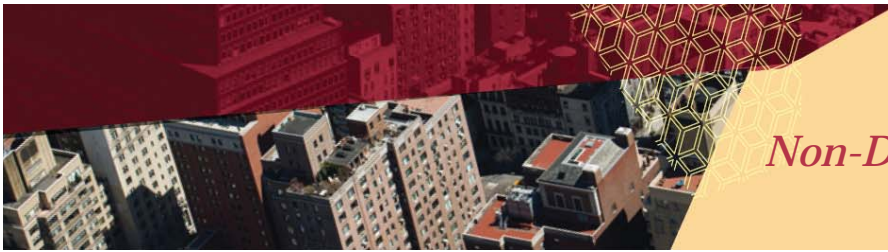
Chapter 395 of Florida Statutes generally governs Florida hospitals. Section 395.002(13)(b) defines a “hospital” as an institution that, among other things, regularly makes available treatment facilities for surgery. Chapter 395 also authorizes the Agency for Health Care Administration (AHCA) to adopt rules

and regulations to ensure that hospitals are operated consistent with established standards and rules.<sup>15</sup>

In *Wax v. Tenet Health System Hospitals*,<sup>TM</sup> the Fourth District Court of Appeal examined one of the regulations adopted by AHCA to ensure the proper operation of Florida hospitals and ruled that it imposed on Florida hospitals a legal duty to provide non-negligent anesthesia services to all of its surgical patients.<sup>17</sup> The broader ramifications of this decision remain to be seen, but it raises a concern that other provisions of the Florida Administrative Code may be used to argue for similar expansions of a hospital’s legal duty in other areas.

Rule 59A-3.2085(4) of the Florida Administrative Code, an AHCA regulation enacted pursuant to Chapter 395, requires each Class I and Class II hospital, and each Class III hospital providing surgical or obstetrical services, to have “an anesthesia department, service, or similarly titled unit directed by a physician member of the organized professional staff.” The regulation requires nothing more; hospitals at which surgical or obstetrical services are available are simply required to have an anesthesia department or service, and to make sure that it is directed by a physician who enjoys staff privileges at that hospital.

The plaintiff in *Wax* argued that, because the applicable statutes require AHCA to adopt rules comporting with “reasonable and fair minimum standards” and, elsewhere, with “established standards and rules,” and because the hospital did furnish anesthesia services pursuant to those rules, the hospital was obligated to furnish the services in accordance with established standards — which, in turn, meant the hospital was obligated to furnish non-negligent services.<sup>18</sup>



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The court adopted the plaintiff's argument without further analysis, concluding that:

because the statute and regulation impose this duty for non-negligent anesthesia services on all surgical hospitals, it is important enough that as between the hospital and its patient it should be deemed non-delegable without the patient's express consent.<sup>19</sup>

In particular, the opinion does not explain how a regulation requiring hospitals to have an anesthesia department directed by a physician member of the organized professional staff imposes a duty to provide anesthesia services to patients.

Plaintiffs are already attempting to use the *Wax* opinion to argue that other provisions of the Florida Administrative Code create similarly non-delegable duties in other aspects of hospital operations. As of yet, however, there are no reported Florida appellate opinions adopting this reasoning and applying it to other regulatory provisions or other hospital departments. So far, *Wax's* construction of rule 59A-3.2085(4) stands alone.

### Contract

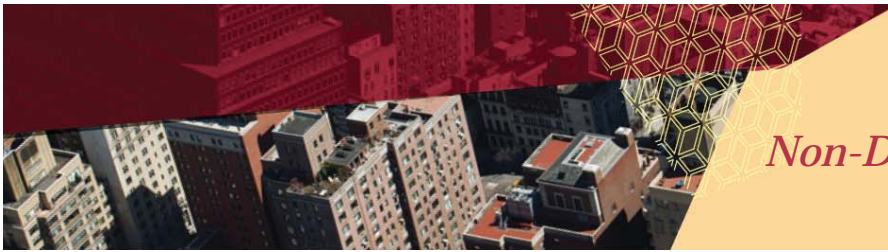
There is ample support in Florida law for the proposition that hospitals may undertake by contract to provide certain types of care to their patients and that, if they do so, the contractual duty to provide such care may not be delegated to independent contractors, even though the actual performance of the duty may be so delegated. As far back as 1982, Florida courts recognized that a hospital that undertakes by contract to do something is not allowed to escape contractual liability by delegating performance to an independent contractor.<sup>20</sup> But it was not until very recently that Florida courts have examined the specific question of whether that rule applies to physicians' and other ancillary providers' medical care and treatment of hospital patients. In three cases released

by three different appellate courts over the last five years, Florida courts have expressed three dramatically different views of a hospital's contractual duty to its patients.

In 2003, the First District Court of Appeal upheld a summary judgment imposing liability on a hospital for the negligence of a perfusionist based on a theory of contractual non-delegable duty.<sup>21</sup> The court found that there had been a broad undertaking by the hospital, through its admission "Certification and Authorization" form, to provide "hospital care, [and] medical treatment" and that perfusion services plainly fell within the definition of "hospital care, [and] medical treatment."<sup>22</sup>

The *Juliana* court's analysis of the non-delegable duty question drew a clear distinction between physicians' services on the one hand, and care rendered by nurses or technologists (such as perfusionists) on the other hand. Noting that the hospital had clearly discharged liability for the negligence of the physicians, residents, and students in the employ of the University of Florida, the court pointed out that the hospital had not done so with regard to the perfusionist.<sup>23</sup> This, the court observed, was consistent with longstanding custom and usage, in which "[p]atients normally contract separately for physicians' services, but do not normally contract separately for the services of hospital-based nurses and technologists."<sup>24</sup> It thus appears that, although the *Juliana* court imposed a non-delegable duty to provide non-negligent perfusion services based upon the admission form constituting an express contract between the hospital and the patient, the result would likely have been different if the allegations had focused on the surgeon or one of the other treating physicians rather than the perfusionist.<sup>25</sup>

Three years later, in *Pope v. Winter Park Healthcare Group, Ltd.*,<sup>26</sup> the Fifth District Court of Appeal re-



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solved an identical question less favorably to the hospital, reversing a directed verdict in favor of a hospital and remanding for further interpretation of the scope of the hospital's contractual duty to provide physicians' medical care. Significantly, however, the court stopped short of ruling that the contract imposed a non-delegable duty as a matter of law.

The hospital in *Pope* agreed that its admission form constituted an express contract between the hospital and the patient, but argued that its terms precluded liability. The form at issue reads:

I authorize Winter Park Memorial Hospital (WPMH) to furnish the necessary medical or surgical treatments, or procedures, including diagnostic, x-ray, and laboratory procedures, anesthesia, hospital services, drugs and supplies as may be ordered by the attending physician(s), his assistants or his designees. ... I recognize that the physicians who practices [sic] at WPMH are not employees or agents of the hospital but are independent physicians; the hospital may delegate to these independent physicians those services physicians normally provide; and any questions relating to care my physician has given or ordered should be directed to him/her.<sup>27</sup>

The court disagreed, however, ruling that although the admission form notified the patient that the physicians were independent contractors and not agents or employees of the hospital and also delegated the performance of "services physicians normally provide," that was not necessarily legally sufficient to discharge a duty to provide medical care.<sup>28</sup> In fact, the *Pope* form's express delegation of "those services physicians normally provide" to physicians was adjudged an implicit admission that WPMH was undertaking to provide all care, as one cannot delegate that which one does not have an obligation to do. However, the court ultimately concluded that the language used to define the scope of the hospital's contractual

undertaking was unclear and susceptible of multiple interpretations.<sup>29</sup>

The court also remarked that there was nothing in the contract indicating the patient's agreement that the delegation of the duty to perform the medical care discharged the hospital from liability.<sup>30</sup> This is significant because under section 318 of the Restatement (Second) of Contracts, the court noted, delegation of performance does not discharge liability unless specifically agreed by the obligee.<sup>31</sup> In the final analysis the *Pope* court avoided a definitive ruling, remanding the case for further development of that issue because the parties had "barely addressed the interpretation of the contract."<sup>32</sup>

Months later, however, the Fourth District Court of Appeal examined this issue in *Wax v. Tenet Health Systems Hospitals, Inc.*,<sup>33</sup> with a chilling result for Florida hospitals. In *Wax*, as discussed above, the primary holding focused on the hospital's statutory/regulatory duty.<sup>34</sup> After ruling that a statutory/regulatory non-delegable duty existed, the court then turned its attention to the contractual issue.

The *Wax* court took the step that the *Pope* court had refrained from taking, and ruled that the hospital had undertaken by contract a non-delegable duty to provide non-negligent anesthesia services.<sup>35</sup> Nowhere in the opinion, however, does the court refer to an express or implied contract between the patient and the hospital. The contract relied on was the surgical consent form, in which the patient authorized a surgeon to perform a hernia repair and consented to the administration of anesthesia by a professional association of anesthesiologists.<sup>36</sup>

After discussing the *Pope* opinion and its analysis of the contractual duties undertaken by the hospital in that case pursuant to its admission consent form, the *Wax* court observed that "[i]n substance the form was



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different from the one employed by [the hospital] in this case.”<sup>37</sup> This is unquestionably true, yet dramatically understated. The only connection to the hospital in the surgical consent form was the fact that the form was “headed with the name of the hospital.”<sup>38</sup>

Despite the dissimilarity between the admission form in *Pope* and the surgical consent form in *Wax*, the *Wax* court concluded that it would follow the reasoning in *Pope*:

In this case we find both a statutory and a contractual basis for the hospital’s duty of providing non-negligent, competent surgical anesthesia services to its patient. Under the admission consent form, we find that the patient con-sented to [the professional association’s] administration of anesthesia services. Unlike the contract in *Pope*, however, we find no language at all in this 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.<sup>39</sup>

This explanation suggests that the *Wax* court read *Pope* to stand for the proposition that every hospital contractually agrees to provide its patients with non-negligent medical care and treatment unless the patients clearly agree in writing to the contrary. And yet, as discussed above, that was not the holding of *Pope*. In fact, *Pope* concluded with a remand to the trial court to determine that which the decision in *Wax* court assumes: the scope of the hospital’s contractual undertaking to its patient. And, while *Pope* dealt with a document that discussed the scope of the hospital’s contractual undertaking to the patient, *Wax* drew a broader conclusion based on a document that did not involve a contractual undertaking by the hospital to provide any care at all.

*Wax*’s holding is also in sharp conflict with *Juliana*, a hospital contractual non-delegable duty case that was not cited in the *Wax* opinion. In *Juliana*, the admission

form was read to exclude physician services from the scope of the hospital’s undertaking. In *Pope*, the scope of the contractual undertaking was left undecided pending further development of the evidentiary record. In *Wax*, the court decided that the scope of the hospital’s contractual undertaking included physician services as a matter of law. Because of the divergence of the three opinions, it appears that trial courts in the Second and Third Districts need not consider themselves bound by any of them. Defense counsel arguing these issues would be well advised to emphasize the reasoning of the opinions in *Juliana* and *Pope* and distinguish the conclusion of *Wax*.

### Medicare Conditions of Participation

Section 482.12 of Title 42 of the Code of Federal Regulations is a regulation promulgated by the U.S. Department of Health & Human Services’ Centers for Medicare and Medicaid Services (“CMS”). It is part of the Conditions of Participation that govern hospitals’ eligibility to receive payments from the Medicare program. It requires hospitals to have a “governing body” legally responsible for the conduct of the hospital as an institution. The regulation requires that the governing body: (a) oversee the appointment of physicians to the hospital’s medical staff; (b) appoint a chief executive officer who is responsible for managing the hospital, (c) ensure that patients are admitted to the hospital only on the recommendation of a licensed practitioner permitted by the State to admit patients to a hospital; (d) adopt an overall institutional plan that meets various conditions, including having an annual budget; (e) be responsible for services furnished in the hospital, regardless of whether they are furnished under contracts, and ensure that the services performed under a contract are provided in a safe and effective manner; and (f) comply with various conditions relating to the provision of emergency services, including ensuring that the medical



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staff has written policies and procedures for appraisal of emergencies, initial treatment, and referral when appropriate.

Many Florida plaintiffs have attempted to argue that the language in 42 C.F.R. § 482.12(e) imposes a general non-delegable duty on hospitals to be legally responsible for ensuring that all services furnished in the hospital and provided in a non-negligent manner. The relevant portion of the regulation states, in relevant part:

**§ 482.12 Condition of participation:  
Governing body.**

(e) Standard: Contracted services. The governing body must be responsible for services furnished in the hospital whether or not they are furnished under contracts. The governing body must ensure that a contractor of services (including one for shared services and joint ventures) furnishes services that permit the hospital to comply with all applicable conditions of participation and standards for the contracted services.

(1) The governing body must ensure that the services performed under a contract are provided in a safe and effective manner.

The argument that this provision of the Medicare Conditions of Participation creates a non-delegable duty upon Florida hospitals that is enforceable in tort by medical malpractice plaintiffs does not withstand scrutiny.

42 C.F.R. §482.12 exists to govern a hospital's eligibility to receive payments from the Medicare program, not to create a private right of action for patient-plaintiffs who claim negligent care at the hands of their physicians. The key to determining whether to imply a private right of action when one has not been made explicitly is the intent underlying the regulation.<sup>40</sup> Unless an intention to create a private right of action can be inferred from the language of the regulation,

the regulatory structure, or some other source, "the essential predicate for implication of a private remedy simply does not exist."<sup>41</sup> After all, the fact that a federal regulation has been violated and some person harmed "does not automatically give rise to a private cause of action in favor of that person."<sup>42</sup>

An analysis of the intent underlying 42 C.F.R. § 482.12 requires a review of the regulation's language itself, followed by an examination of the regulatory history and overall scheme.<sup>43</sup> As an initial matter, nowhere in the language of 42 C.F.R. § 482.1 *et seq.*, the statute authorizing the promulgation of these regulations, is a private right of action expressly created. Further, this series of regulations is entitled "Conditions of Participation for Hospitals," with the implied consequence of failure to meet any condition being the possible removal from participation from the Medicaid and Medicare Programs. The regulations also provide that "Hospitals participating in Medicare must meet certain specified requirements," and in defining the scope of the provision, 42 C.F.R. § 482.1(b) prescribes that "the provisions of this part serve as the basis of survey activities *for the purpose of determining whether a hospital qualifies* for a provided agreement under Medicare and Medicaid" (emphasis added).

Although no one factor is determinative of CMS's intent underlying the Conditions of Participation for Hospitals found at 42 C.F.R. § 482.1 *et seq.*, where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the regulatory history that 42 C.F.R. § 482.12 may give rise to suits for damages reinforces the conclusion that there is no such a right of action implicit within the section.<sup>44</sup> In short, the only evidence of CMS's intent underlying 42 C.F.R. § 482.12 is that it is intended to set forth requirements for a hospital to participate in the



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Medicare and Medicaid Programs, not to give rise to a private right of action by patients who allege injuries at the hands of physicians that merely occur in a hospital setting.

Although no Florida appellate opinion has addressed the application of the *Touche Ross & Co.* test to 42 C.F.R. § 482.1 *et seq.*, including 42 C.F.R. § 482.12, other courts have considered and uniformly rejected attempts by plaintiffs to transform the requirements for Medicare participation set forth in 42 C.F.R. § 482.12 into a non-delegable duty — or any other tort duty, for that matter. In *Sepulveda v. Stiff*,<sup>45</sup> for example, one of the theories of liability advanced by a plaintiff in a medical malpractice case was that 42 C.F.R. § 482.12(e)(1) imposed a non-delegable duty on hospitals to provide competent care. In ruling on the defendant's motion for judgment on the pleadings, a federal district court applied the *Touche Ross & Co.* test to determine the intent behind the regulations. After reviewing the plain language of the regulations and the legislative history, the court concluded that the plaintiff's argument was simply an effort to circumvent long-established legal principles limiting vicarious liability for independent contractors.<sup>46</sup> The court granted a judgment on the pleadings in favor of the hospital, holding:

It is clear to this Court that the provision upon which Plaintiff relies does not create a private right of action, whether express or implied. Sections 482.1 *et seq.* are merely intended to set out the guidelines for determining whether a hospital may participate in Medicaid or Medicare; indeed, that is its stated purpose. *See id.* The Court, therefore, finds no support for Plaintiff's claim Congress intended to create a new private right of action, exposing hospitals to liability for medical malpractice, in §§ 1302 and 1395 of the Social Security Act, or the

implementing regulations contained in 42 C.F.R. §§482.1, *et seq.*<sup>47</sup>

*Sepulveda* is just one in a line of cases concluding that 42 C.F.R. § 482.12 does not create a private right of action for plaintiffs in tort suits. In fact, the first reported case to reach this conclusion was decided right here in Florida. In *Acevedo v. Lifemark Hospital of Florida*,<sup>48</sup> Judge Gill Freeman of Florida's Eleventh Circuit Court closely examined what he described as a case of first impression in Florida: a plaintiff's claim that a non-delegable duty for hospitals arises from federal Medicare regulations and Florida Statutes. It is not clear from the opinion which federal Medicare regulations were relied upon by the *Acevedo* plaintiff. However, after a searching analysis, including examination of similar inquiries by the Alaska Supreme Court and Ohio Supreme Court, Judge Freeman ruled that the plaintiff's theory failed.<sup>49</sup> He observed:

The Medicare regulations and state law cited by the Plaintiffs do no more than require a hospital to staff its hospital competently.... This court declines to extend non-delegable duty doctrine under the contract or legal theories proposed by the Plaintiffs.<sup>50</sup>

Building on *Sepulveda* and *Acevedo*, two cases last year similarly rejected attempts by plaintiffs to circumvent long-established legal principles limiting vicarious liability for independent contractors on the basis of 42 C.F.R. § 482.12(e). In *Blackmon v. Tenet Healthsystem Spalding*,<sup>51</sup> the Georgia Court of Appeals declared:

*Blackmon*, however, misreads this regulation. It does not purport to impose state tort liability on hospitals for the negligence of their independent contractors; rather, it simply outlines that with which the hospitals must comply to receive Medicare. This state tort case is not about whether Tenet's hospital is complying with all necessary regulations so as to be eligible for Medicare reimbursement; rather, it





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is about whether under the detailed strictures of Georgia law concerning agency and the particular facts of this case, the hospital is liable for the actions of Dr. Webb. And in *Dunn v. Atlantic Surgical Associates, LLC*,<sup>52</sup> the Delaware Superior Court also rejected a plaintiff's attempt to use section 482.12 as a basis for tort liability, reasoning: The Plaintiffs additionally claim that by admitting that they participate in the Medicare Program, Bayhealth Medical Center acknowledges their responsibility and control over the defendant doctors pursuant to 42 C.F.R. § 482.12(e), which states that "the governing body must be responsible for services furnished in the hospital, whether or not they are furnished under contract." Mere participation by a Hospital in the federally mandated Medicare Program is insufficient to show the control necessary to establish an actual agency relationship. To accept the inverse proposition, that participation by a Hospital in the Medicare Program establishes the control necessary to create an actual agency relationship, would require a finding that every independent contractor practicing in that Hospital is a servant/agent of that Hospital. The Court is unwilling to so find.<sup>53</sup>

In summary, in every reported case where a plaintiff has sought to impose tort liability on the basis of 42 C.F.R. § 482.12, the court has soundly rejected the claim. Nothing in section 482.12 remotely suggests an intention to create any duty under tort law. Rather, the regulation merely sets out some conditions for participation in the Medicare program. A non-delegable duty claim under 42 C.F.R. § 482.12 is simply not supported by existing law.

### Conclusion

Only time will tell whether *Wax* will be known as the seminal case ushering in an era of vastly expanded liability for Florida hospitals, or whether it will end up consigned to the dust bin of discredited legal theories. Will the Florida Supreme Court eventually open the door to the broad, common law duty on the part of

hospitals envisioned in the concurring opinion in *Roessler*? Will the Florida Legislature intervene and remove this issue from the courts' purview, defining the scope of hospital liability statutorily as a matter of public policy? The answers remain unclear.

What is clear, however, is that the plaintiffs' bar is not content with the decades-long use of vicarious liability theories to attempt to reach the deep pockets of hospitals to answer for physician errors in the hospital setting. To that end, they are pushing back on multiple fronts against the long-settled idea that a hospital is just a place where doctors practice medicine and treat patients. Heedless to the reality of hospital-physician relations in Florida and the very limited degree of control that can legally be exercised by hospitals over non-employee members of their medical staffs, the plaintiffs' bar is aggressively pushing a new paradigm: the hospital no longer as a place, but instead as a patient's principal health care provider, directly furnishing both nursing and medical care and controlling and directing the various individuals involved in the patient's health care while in the hospital.

Hospitals and their defense counsel will increasingly be called upon not just to defend patient care, but also to battle against acceptance of this new and dangerous paradigm. And if recent events are any guide, the ground upon which that battle will now most frequently be pitched is the law of non-delegable duty.

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For more information, please contact:

**Edward J. Carbone**  
[ecarbone@carltonfields.com](mailto:ecarbone@carltonfields.com)  
[www.carltonfields.com/ecarbone](http://www.carltonfields.com/ecarbone)  
813.229.4307



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52 C.A. No. 05C-02-041 WLW, 2007 WL 1784093 (Del. Super Ct. Apr. 27, 2007).  
53 *Id.* at \*2.

- 1 *McCall v. Alabama Bruno's, Inc.*, 647 So. 2d 175, 178 (Fla. 1st DCA 1994).
- 2 *See, e.g., Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987); *Shands Teaching Hosp. and Clinic v. Juliana*, 863 So. 2d 343, 349 (Fla. 1st DCA 2003).
- 3 858 So. 2d 1158, 1160 (Fla. 2d DCA 2003).
- 4 *See id.*
- 5 *Wat* 1163.
- 6 *Id.* at 1164.
- 7 *See id.*
- 8 939 So. 2d 185 (Fla. 5th DCA 2006).
- 9 *Id.* at 186-87.
- 10 *Pope*, 939 So. 2d at 187 (citing Roessler, 858 So. 2d at 1163), *Wax v. Tenet Health System Hospitals*, 955 So. 2d 1, 11 n.3 (Fla. 4th DCA 2007) (finding that a non-delegable duty for certain hospital services "does indeed make sense as an aspiration for the evolution of Florida law") (emphasis added).
- 11 *Acevedo v. Lifemark Hosp. of Florida, Inc.*, 2005 WL 1125306, \*6 (Fla. 11th Cir. Ct. 2005).
- 12 *Albain v. Flower Hospital*, 553 N.E.2d 1038 (Ohio 1990).
- 13 *Acevedo*, 2005 WL 1125306, at \*5 -6.
- 14 *See, e.g., Albain v. Flower Hospital*, 553 N.E.2d 1038 (Ohio 1990) (finding that using a non-delegable duty theory in the hospital liability context "represents] misdirected attempts to circumvent the necessity of proving agency by estoppel, and confuses] the proper scope of a hospital's duty in selecting competent physicians"); *Menzie v. Windham Community Memorial Hospital*, 774 F. Supp. 91, 93 (D. Conn 1991) (finding that [t]he hospital's duty is to provide competence, [whereas] the physician's duty is to be nonnegligent; thus, "a hospital may be directly liable for its own negligence, if it grants non-qualified physicians staff privileges, and the physicians then commit malpractice"), *Fletcher v. S. Peninsula Hosp.*, 71 P. 3d 833 (Alaska 2003) (finding that it would be futile to extend the doctrine of non-delegable duty to the independent contractor physician and hospital context, since "the theories of non-delegable duty and apparent agency create liability" sufficient to protect plaintiffs).
- 15 §395.1055(1)(d), Fla. Stat.
- 16 955 So. 2d 1 (Fla. 4th DCA 2007)." *Id.* at 8-9.
- 18 *Id.* (referring to § 395.1055(1)(d), Fla Stat. (2005)).
- 19 *Wax*, 955 So. 2d at 9.
- 20 *Irving v. Doctors Hosp. of Lake Worth, Inc.*, 415 So. 2d 55, 57 n.2, 59, 60 (Fla. 4th DCA 1982).
- 21 *Shands Teaching Hosp. and Clinic, Inc. v. Juliana*, 863 So. 2d 343 (Fla. 1st DCA 2003).
- 22 *Id.* at 350.
- 23 *See id.* at 349-350.
- 24 *Id.* at 349.
- 25 *See id.* at 349 ("The present case differs importantly from cases in which physicians, as opposed to nurses or technologists, have established independent contractor relationships with hospitals").
- 26 *Pope v. Winter Park Healthcare Group, Ltd.*, 939 So. 2d 185 (Fla 5th DCA 2006).
- 27 *Id.* at 190.
- 28 *See to.* at 190-91.
- 29 *See to.* at 191.
- 30 *See to.*
- 31 *Id.*
- 32 *See to.* at 191-92.
- 33 955 So. 2d 1 (Fla. 4th DCA 2007).
- 34 *See id.* at 6-9.
- 35 *Id.* at 11.
- 36 *Id.* at 9-10.
- 37 *See to.* at 9.
- 38 *See id.* at 6-7.
- 39 *See to.* at 11 (citation omitted)
- 40 *Touche Ross & Co. v. Redington*, 442 U. S. 568, 568 (1979).
- 41 *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).
- 42 *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979).
- 43 *Touche Ross & Co.*, 442 U.S. at 568-73.
- 44 *Touche Ross & Co.*, 442 U.S. at 571 (citing *Cort v. Ash*, 422 U.S. 66, 82-84 (1975)).
- 45 2006 WL 3314530, \* 7 (E.D. Va. 2006).
- 46 *Id.*
- 47 *Id.*
- 48 2005 WL 1125306 (Fla. 11 th Cir Ct May 5, 2005).
- 49 *Id.* at\*3.
- 50 *to.*
- 51 653 S.E.2d 333, 340 (Ga. Ct App. 2007)