

## Contracted doctors at Peoria hospital keep liability in play

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A state appeals panel reversed a trial court judge's dismissal of a medical-malpractice suit against Children's Hospital of Illinois, determining they could be liable for actions by contracted doctors because the hospital presented them as employees.

Heather and Justin Terry filed a lawsuit in 2011 in Peoria County Circuit Court against Children's Hospital of Illinois, located in Peoria and run by OSF Healthcare Systems, as well as several doctors who treated their daughter, alleging their negligence caused the child to lose her vision.

In August 2005, Heather Terry delivered a baby prematurely at OSF. The hospital was touted as a facility specializing in premature deliveries and neonatal issues, and they advertised as such. When Heather arrived in the neonatal intensive care unit, the staff gave her a consent form for the baby's treatment and asked her to sign it, which she did.

During the next several weeks, Dr. James Hocker and Dr. Kamlesh Macwan cared for the child and monitored her development while she was a patient. Hocker and Macwan are University of Illinois doctors who specialize in neonatology and are employed by Neonatology Associates, a medical group that consists of specialists who have privileges to teach and practice medicine at the hospital.

At the time of the child's treatment, Hocker was the director of the NICU department and Macwan was the associate director. Dr. Chittaranjah Reddy, a pediatric ophthalmologist, was also assigned to the child's care.

Reddy is employed by Retina Consultants and provides specialized services to patients at OSF.

OSF provides identification badges to physicians with privileges to practice in the NICU department. In their depositions, Hocker and Macwan said they also wore OSF lab coats that had their names embroidered on them.

Shortly after her birth, the child developed retinopathy of prematurity, a condition which causes abnormal blood vessel growth in the retina. The child was eventually discharged from the NICU after four months of care. Two weeks later, another doctor examined the child and let her parents know that she had retinal detachment in both eyes and needed immediate surgery. She lost her vision in her left eye and the vision in her right eye was severely reduced.

The Terrys sued OSF, Reddy, Hocker, Macwan and others, claiming that as a consequence of their negligent conduct, their daughter's retinal condition was not treated in a timely manner and she lost her eyesight.

In their complaint, the parents claimed OSF was negligent in treating their daughter and vicariously liable for the physicians' negligence based on theories of actual and apparent agency.

OSF argued it was not liable for the doctor's actions because they were contractors providing services at OSF through an agreement between the hospital and their employer, Neonatology Associates. The hospital did not control how the doctors treated patients, they said.

OSF filed a motion for partial summary judgment on the issue of vicarious liability based on both theories of actual agency and apparent authority.

Peoria County Circuit Judge [Stephen A. Kouri](#) granted summary judgment, finding there was no actual agency relationship between the physicians and OSF and that by signing the consent form, the plaintiffs could not establish a genuine issue of material fact as to the elements of apparent agency.

Kouri interpreted the phrase, "[OSF] does not employ all of the physicians who treat me," as clearly putting the plaintiffs on notice that the doctors providing medical care to their daughter were independent contractors, not OSF employees.

On appeal, the Terrys argued that even if they were contracted out, the doctors who treated their daughter had leadership roles and developed the protocol used to treat children with such medical problems.

Third District Appellate Justice [Tom M. Lytton](#) disagreed, finding that although OSF presumably appointed the doctors' to those positions, those titles do not show that OSF exercised control over their duties. Lytton also wrote that OSF pays Neonatology Associates for "administrative and teaching services," but the medical group bills patients.

"Here, the facts alleged by plaintiffs do not show that OSF retained control over the manner in which Dr. Hocker and Dr. Macwan performed their services. Thus, the trial court properly granted summary judgment on the issue of actual agency," Lytton wrote in the unpublished Rule 23 order.

On the issue of apparent authority, plaintiffs argued that Kouri failed to consider the ambiguous language used on OSF's consent form. While the plaintiffs maintained that Heather Terry signed a consent form, they argued that Kouri was still required to consider other facts and circumstances in evaluating whether a question of fact exists.

Under the doctrine of apparent authority, a hospital can be held vicariously liable for a physician's negligence in providing care at the hospital, regardless of whether the physician is an independent contractor.

To establish apparent authority against a hospital for a physician's negligence, a plaintiff must show that the hospital held itself out as the provider of medical care without informing the patient that the care was given by independent contractors and the patient justifiably relied on the hospital's conduct by looking to the hospital to provide medical services, rather than on a specific physician.

Lytton found that questions of fact exist as to the holding out and reliance elements of the Terrys' claim.

"Heather signed a form that stated "certain physicians" on the medical staff at the hospital "are independent contractors and not employees of the hospital." It further provided that OSF "does not employ all of the physicians who treat [a patient]. Such a disclaimer is ambiguous in that the patient may assume some, all or none of the treating physicians are independent contractors," Lytton wrote.

Heather Terry also testified that she chose to deliver her child at OSF because she believed the hospital could provide the neonatal care the baby would need. At the time her daughter was admitted to the NICU, she did not ask the treating physicians whether they were employed by OSF nor did she choose the doctors who cared for her daughter.

The case will be remanded back to the trial court for further proceedings.

Justices [Robert L. Carter](#) and Vicki Wright concurred in the judgment.

The Terrys were represented by [Todd A. Smith](#) and [Brian LaCien](#) of [Power, Rogers & Smith LLP](#).

Smith said he was pleased that the appellate court identified the issues they saw in the case.

"In so many cases, and in this one, patients families go to hospitals and they are going to there because of the care they believe they are going to be receiving from that hospital," Smith said.

He added that he found it "disturbing" that someone in Heather Terry's condition would be handed a long consent form with language "buried within it" that could be used against them down the road.

OSF Healthcare Systems was represented by [Rhonda J. Ferrero-Patten](#) of [Hinshaw & Culbertson LLP](#) in Peoria. She could not be reached for comment.

The case is Heather and Justin Terry, individually and as Mother, Father and Next Friend of Fallon Terry, a minor, v. OSF Healthcare Systems d/b/a St. Francis Medical Center d/b/a Children's Hospital of Illinois, et al. 2018 IL App (3d) 160143-U.

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