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Court of Appeals, Division III No. 378047
Grant Co. Superior Court No. 18-2-00746-13

SUPREME COURT OF WASHINGTON STATE

THE ESTATE OF CINDY ESSEX, by and through JUDY ESSEX, as Personal Representative of the ESTATE OF CINDY ESSEX,

Petitioners,

vs.

GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a SAMARITAN HEALTHCARE, a Public Hospital; et al.

Respondents.

GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1 d/b/a SAMARITAN HEALTHCARE'S ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS CURIAE MEMORANDUM

JEROME R. AIKEN, WSBA #14647
Meyer, Fluegge & Tenney, P.S.
230 S. 2nd Street
Yakima, WA 98901
(509) 575-8500
aiken@mftlaw.com

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I. IDENTITY OF ANSWERING RESPONDENT

The answering Respondent in this case is Grant County Public Hospital District No. 1 dba Samaritan Healthcare, a Public Hospital. It is not believed that any other defendant or party in this action will be filing an answer.

II. ARGUMENT WHY AMICUS MEMORANDUM SHOULD BE DENIED

A. INTRODUCTION

The Memorandum filed by the amicus party in support of Plaintiff's Petition for Review is duplicative of the Plaintiff's Petition. Similarly to the Plaintiff's Petition, it does not provide any persuasive argument as to why approximately 45 years of long-standing Washington law should be reversed.

Consequently, we will not burden this Court by submitting a lengthy answer to the amicus party's memorandum. The decision in Estate of Essex v. Grant County Public Hospital Dist. No. 1 et al., 25 Wn. App. 2d 272, 523 P.3d 242 (2023) is consistent with Washington's three previously reported appellate

decisions that directly address this issue. It is consistent with the overwhelming majority of other jurisdictions that have addressed the issue. Finally, the position advocated by the amicus party's Memorandum would be detrimental to the public interest and not promote it.

B. ESSEX IS CONSISTENT WITH ADAMSKI AND THE OTHER WASHINGTON REPORTED APPELLATE CASES ON THE ISSUE

The seminal decision in Washington on this issue Adamski v. Tacoma General Hospital, 20 Wn. App. 98, 579 P.2d 970 (1978) is consistently and universally considered to be a case adopting the ostensible/apparent agency theory of liability for the acts of an independent contractor physician. See 6 Washington Practice, Washington Pattern Jury Instruction, Civil WPI 105.0201 comment (7th Ed.). No reported Washington appellate decision has concluded it adopted the inherent function theory or nondelegable duty theory.

This Court has already specifically identified the Adamski decision as a decision adopting the ostensible/apparent agency

theory. "As in Adamski, we find that a hospital may be, depending on the facts found by a jury, liable for the negligence of its contractor doctors, who are held out to be the agents of the hospital." Mohr v. Grantham, 172 Wn.2d 844, 862, 262 P.3d 490 (2011).

In addition to the Adamski and Mohr cases, there is another reported Washington appellate case that has specifically adopted the ostensible/apparent agency theory to determine whether an independent emergency room physician can be held to be the agent of a hospital. In Wilson v. Grant, 162 Wn. App. 731, 258 P.3d 689 (2011), Division III of the Court of Appeals extensively discussed the holding in Adamski. The Wilson court correctly concluded Adamski adopted the ostensible/apparent agency theory. Id. at 744-45.

A reported Washington appellate decision not dealing with medical malpractice issues also concluded that Adamski is an ostensible/apparent agency case. The Maybin court included the Adamski decision in a list of Washington cases adopting the

ostensible agency theory. D.L.S. v. Maybin, 130 Wn. App. 94, 99, 121 P.3d 1210 (2005). Several other reported Washington appellate cases have concluded Adamski adopted an ostensible agency theory; e.g., Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wn.2d 15, 864 P.2d 921 (1993); S.H.C. v. Lu, 113 Wn. App. 511, 84 P.3d 174 (2002).

Washington reported appellate decisions consistently apply the ostensible/apparent agency theory in determining whether an independent emergency physician can be held to be the agent of the hospital as evidenced by the Adamski, Mohr, and Wilson decisions. The Adamski decision did not adopt an inherent function or nondelegable duty test to determine the issue of whether such a physician potentially is an agent of a hospital. To contend that it does misrepresents the holding in that case and the holding of the other Washington appellate cases specifically addressing this issue.

It should be noted that the Adamski decision has been cited by numerous other jurisdictions. Uniformly, it has been

cited for adopting the ostensible/apparent agency theory. It has never been cited for adopting an inherent function, or a nondelegable duty rule. See, e.g., Moser v. Heistand, 649 A.2d 177 (Pa. Cmwlth. 1994); Torrence v. Kusminsky, 408 S.E.2d 684 (W. Va. 1991); Richmond County Hosp. Auth. v. Brown, 361 S.E.2d 164 (Ga. 1987).

C. THE CASES CITED BY THE AMICUS PARTY DO NOT SUPPORT THEIR POSITION

A careful review of the cases cited by the Plaintiff from other jurisdictions that they claim support their position in reality do not. All these cases adopt essentially the same holding as the Adamski and Essex courts did – an ostensible/apparent agency theory.

At page 10 of the amicus memorandum, they state that Simmons v. Tuomey Regional Medical Center, 533 S.E.2d 312 (S.C. 2000) "adopted a nondelegable duty for a hospital. . . ." That is not correct. When the whole decision is examined, it

adopts the same theory as Adamski, an ostensible/apparent agency theory.

> However, we conclude it is not necessary, as the Court of Appeals did in the cases at hand, to impose an absolute nondelegable duty on hospitals. Instead, we adopt the approach expressed in Restatements (Second) of Torts: Employers of Contractors Section 429 (1965). That section, sometimes described as ostensible agency, provides: . . . ."

Id. at 322 (emphasis supplied).

At page 9 of the amicus memorandum, there is a suggestion that Beeck v. Tucson General Hospital, 500 P.2d 1153 (Ariz. App. 1972) adopted an inherent function analysis in determining potential vicarious liability for the acts of independent contractor emergency department physicians. Again, this is not correct. Subsequent Arizona appellate cases have correctly determined that the Beeck decision adopted the same theory as Adamski, ostensible/apparent agency. See, e.g., Barrett v. Samaritan Health Services, Inc., 153 Ariz. 138, 735 P.2d 460 (1987).

The amicus memorandum at pages 11-13 cite a number of other cases from other jurisdictions. It is confusing as to why those cases are cited. A review of all of those cases demonstrate they support Division III's opinion in this case, and the previous Washington appellate court cases of Adamski, Mohr, and Wilson. All of the cases cited in the amicus memorandum on those pages discuss the ostensible/apparent agency theory of vicarious liability.[1]

D. IT WOULD BE A DISSERVICE TO PUBLIC INTEREST TO REVERSE 45 YEARS OF A JUST RULE

Notably absent from the amicus memorandum, similar to Plaintiff's Petition, is any evidence or any real argument that the ostensible/apparent agency rule of law creates an injustice. This rule that was adopted almost 45 years ago in Adamski and that has been confirmed both by this Court in Mohr, and also

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1 Clark v. Southwest Hospital, 628 N.E.2d 46 (Ohio 1994) uses the term "agency by estoppel." However, the discussion in that case concluded agency by estoppel is the same as ostensible agency.

previously by the Washington Court of Appeals in Wilson, has not previously resulted in any reported appellate decision where a plaintiff alleged that the rule of law created any type of unfairness.

Furthermore, there is no evidence that any plaintiff has ever not been fully compensated because of the rule, that a jury was confused by the rule and instructions related to it, or that in any way that rule resulted in unfairness to the parties involved in the litigation. The Plaintiff and the amicus memorandum's contention that public interest would be served by changing this well-reasoned rule is nothing but speculation and conjecture. This Court should not modify a well-established workable rule of law based solely upon speculation and conjecture.

III. CONCLUSION

Almost 45 years ago, the seminal Adamski decision set forth the rule of law that has been adopted in Washington to determine whether an independent contractor emergency room physician can be an agent of the hospital. That rule is the

ostensible/apparent agency theory. That rule of law was similarly discussed and confirmed in this Court's decision in Mohr and also in the appellate court decision in Wilson. That rule of law has worked seamlessly since its adoption.

The Plaintiff and the amicus party now request this Court to modify that rule of law. What they are suggesting will only add complexity and confusion to this area of law. This Court should decline such a deleterious invitation.

Certificate of Compliance: I hereby certify there are **1306** words contained in this Answer, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 17th day of May, 2023.

/s/ Jerome R. Aiken .
JEROME R. AIKEN, WSBA #14647
Meyer, Fluegge & Tenney, P.S.
Attorneys for Respondent
Samaritan Healthcare

CERTIFICATE OF TRANSMITTAL

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I caused the foregoing to be electronically filed with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of this document to all counsel of record:

For Plaintiff: William A. Gilbert Gilbert Law Firm, P.S. 421 W. Riverside Ave., Ste. 353 Spokane, WA 99201 Email: bill@wagilbert.com	X Via E-Service
Kristine A. Grelish Grelish Law, PLLC 1606 148th Ave. SE, Suite 200 Bellevue, WA 98007 Email: kristine@grelishlaw.com	X Via E-Service
George M. Ahrend Ahrend Law Firm, PLLC 421 W. Riverside Ave., Ste. 1060 Spokane, WA 99201 Email: george@luveralawfirm.com	X Via E-Service

For Defendants Christopher Davis, M.D. and Wenatchee Emergency Physicians: Eric A. Norman / Joseph V. Gardner Amanda K. Thorsvig FAVROS Law 701 Fifth Ave., Suite 4750 Seattle, WA 98104 Email: eric@favros.com / joe@favros.com / amanda@favros.com	__X__ Via E-Service
For Defendant Irene Cruite, M.D.: Mr. Stephen M. Lamberson Ms. Megan C. Clark Etter, McMahon, Lamberson, Van Wert & Oreskovich, PC 618 W. Riverside Avenue, Suite 210 Spokane, WA 99201 Email: lambo74@ettermcmahon.com mclark@ettermcmahon.com	__X__ Via E-Service
For WA State Association for Justice Foundation: Ms. Valerie D. McOmie 4549 NW Aspen Street Camas, WA 98607 Email: valeriemcomie@gmail.com Mr. Daniel E. Huntington Richter-Wimberly 422 W. Riverside, #1300 Spokane, WA 99201 Email: danhuntington@richter-wimberly.com	__X__ Via E-Service __X__ Via E-Service

Dated this 17th day of May, 2023 at Yakima,

Washington.

/s/ Sheryl A. Jones .
SHERYL A. JONES, Legal Assistant to
Jerome R. Aiken

MEYER, FLUEGGE & TENNEY

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- scanet@ahrendlaw.com
- switzer@mftlaw.com
- valeriemcomie@gmail.com
- vanguse@mftlaw.com

Comments:

Answer to Amicus Curiae Memorandum

Sender Name: Sheri Jones - Email: jones@mftlaw.com
Filing on Behalf of: Jerome R. Aiken - Email: aiken@mftlaw.com (Alternate Email: jones@mftlaw.com)

Address:

230 S. 2nd Street
Yakima, WA, 98901
Phone: (509) 575-8500

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