No. 101745-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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On behalf of
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I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system.

II. INTRODUCTION

This case gives the Court an opportunity to confirm the holding from *Adamski v. Tacoma General Hospital*, 20 Wn. App. 98, 579 P.2d 970 (1978), and clarify the applicable law in Washington concerning when a hospital may be liable for the negligence of a non-employee physician. The appellate decision below limits the bases of hospital liability for a non-employee physician by excluding liability based on theories of 1) performing an "inherent function" of a hospital, and 2) a nondelegable duty to operate an emergency department.

The Court should grant review to address whether the limitation of liability in *Essex* is consistent with Washington law and relevant public policy.

III. BACKGROUND

Cindy Essex died following treatment she received in the emergency department at Good Samaritan Hospital. The facts are drawn from the Court of Appeals opinion and the parties' briefing. *See Estate of Essex v. Grant County Public Hosp. Dist., et al.*, __ Wn. App. 2d __, 523 P.3d 242, 246-47 (2023); Petition at 3-8; Answer at 3-6.

Essex appeared at the hospital emergency department reporting 10 out of 10 shoulder pain and abdominal cramping. She was reported to be yelling and writhing in pain. Dr. Davis arrived 1½ hours after Essex's admission and ordered hydromorphone for pain.

Dr. Davis suspected a gastric obstruction and ordered a pelvic-abdominal CT and more hydromorphone. Radiologist Dr. Cruite interpreted the CT as suspicious for gastric obstruction, although no cause was identified. Dr. Davis consulted with a gastroenterologist and ordered nonemergency transfer to Central Washington Hospital.

1½-2 hours later, still awaiting an ambulance, Essex reported 10 out of 10 back pain and was given additional hydromorphone. Approximately eight hours after emergency department admission, Essex arrived at the transfer hospital where she was lethargic and had redness in her left arm, breast, and chest. The examining physician suspected necrotizing fasciitis ("flesh-eating disease") and recommended surgical debridement. Surgery revealed extensive areas of nonviable muscle. Essex died later that morning from necrotizing fasciitis.

Essex's estate sued multiple entities for negligence, including Good Samaritan and Drs. Davis and Cruite. The trial court entered summary judgment orders, including: 1) issues of material fact exist regarding whether the hospital was liable for the alleged negligence of non-employee physicians Davis and Cruite under the theory of ostensible authority; 2) vicarious liability can be established only under ostensible authority, as Washington has not recognized the theories of nondelegable duty or inherent authority in this context.

On appeal, the appellate court agreed with the trial court's ruling that hospitals are not liable for the acts of non-employed

physicians under either a nondelegable duty or "inherent function" of the hospital theory, *Essex,* 523 P.3d at 248-49, and held that ostensible agency is the sole basis for imposing vicarious liability on hospitals under these circumstances. *See id.* at 245-46.

Essex petitioned for review.

IV. ISSUE ADDRESSED

> Is review warranted to address whether the appellate decision, which limits hospital liability for the acts of non-employee physicians to "ostensible agency" and excludes liability based on theories of 1) performing an "inherent function" of the hospital, and 2) a nondelegable duty to operate an emergency department, is consistent with Washington law and relevant public policy?

V. ARGUMENT IN SUPPORT OF REVIEW

The Court of Appeals sweeps too broadly in declaring that ostensible agency is the sole basis for a hospital's vicarious liability for the negligence of non-employee physicians and excluding liability based on a nondelegable duty to provide emergency care or non-employee physicians performing an inherent hospital function. Washington law has not so limited or narrowly defined theories of hospital-physician agency. Nor should it.

A. Review Is Warranted Because *Essex* Conflicts With *Adamski*.

RAP 13.4(b)(2) requires review if the appellate decision "is in conflict with a published decision of the Court of Appeals." The decision in *Essex* conflicts with *Adamski v. Tacoma General Hospital*, *supra*.

In *Essex*, the court held: 1) "ostensible agency is the sole basis for holding a hospital vicariously liable for the negligence of nonemployee physicians," 523 P.3d at 245-46; 2) a hospital does not have a "nondelegable duty" to provide emergency care that subjects it to liability for non-employee physicians, *id.* at 248; and 3) it was not error to deny summary judgment on the basis that Drs. Davis and Cruite were performing an "inherent function" of the hospital, *id.* at 249. But in *Adamski*, the Court found two *separate* bases for hospital liability for the acts of non-employee physicians:

> 1) principal-agent liability based on a "nondelegable duty" to the public which the hospital assumes when it staffs and maintains an emergency department, or based upon a non-employee physician performing an "inherent function" of the hospital, 20 Wn. App. at 108-12;

2) ostensible agency, *see id.* at 112-16.

In *Adamski*, the court reviewed cases from other jurisdictions where hospital liability has been expanded for negligent medical acts committed by non-employees. Only *after* analyzing the "nondelegable duty" and "inherent function" bases for hospital liability and holding the trial court erred in granting summary judgment, did the court proceed to discuss the separate "ostensible agency" theory and hold that the trial court also erred in failing to submit that issue to the jury. *Id.* at 112-116.

This Court recognized these distinct bases for hospital liability in *Pedroza v. Bryant*, 101 Wn.2d 226, 230-31, 677 P.2d 166 (1984), where it noted that Washington has avoided the independent contractor defense by finding hospital vicarious liability when a non-employee physician "is performing an 'inherent function' of the hospital, ***or*** acting as an 'ostensible agent.'" (Citing *Adamski*; emphasis added).

In *Adamski,* the court held a principal-agent relationship may arise where a hospital assumes a "nondelegable duty" to the public by maintaining an emergency department or a non-employee physician performs an "inherent function" of the

hospital. This Court should accept review to determine whether the holding in *Essex* that ostensible agency is the sole basis for imposing vicarious liability on a hospital for the negligence of non-employee physicians conflicts with *Adamski.*

B. Whether Ostensible Agency Alone Captures The Relevant Public Policies Bearing On Hospital Liability For Independent Contractor Physicians Involves An Issue Of Substantial Public Interest That Should Be Resolved By This Court.

RAP 13.4(b)(4) requires review if the petition involves "an issue of substantial public interest that should be determined by the Supreme Court."

Historically, hospitals were protected from negligence liability by charitable immunity. *See* Ryan Montefusco, *Hospital Liability for the Right Reasons: A Nondelegable Duty to Provide Support Services*, 42 Seton Hall L. Rev. 1337, 1339-40 (2012). With advances in medical technology, hospitals evolved into large businesses dependent on paying customers and society became dependent on hospitals for comprehensive health care. *See* Montefusco at 1340. In the modern hospital industry, hospitals advertise and compete to induce the public to rely on them when in medical need. *See id.* at 1341. As hospitals

evolved, courts began to employ vicarious liability principles to hold hospitals responsible to compensate injured patients. *See id.* at 1338. The hospital emergency room has become the "community medical center" where the public, looking to the hospital to provide care, is unaware of the technical complexities surrounding the employment arrangements between the hospital and emergency room personnel. *Clark v. Southview Hospital*, 628 N.E.2d 46, 53 (Ohio 1994).

Washington has recognized the inability of traditional liability theories to capture relevant public policies bearing on tort liability in this context. In *Adamski*, the Court noted that application of the traditional rules of agency "usually leads to unrealistic and unsatisfactory results." 20 Wn. App. at 105. It recognized the "substantial body of special law emerging in this area [resulting in] an extension of hospital liability for negligent medical acts committed on its premises." *Id.* at 104-05 (brackets added); *see also Pedroza*, 101 Wn.2d at 230-31 (noting Washington's attempts to avoid the "artificial distinctions associated with the independent contractor defense" by applying vicarious liability for a physician performing an "inherent

function" of the hospital and for ostensible agency. (Citing *Adamski*)).

The Court in *Adamski* discussed *Beeck v. Tucson General Hospital*, 500 P.2d 1153 (Ariz. App. 1972), where in reversing summary judgment for the hospital the court considered that the patient had no choice in selecting the radiologist (the hospital having made that choice for her), and the radiologist performed a service which was "an inherent function of the hospital, a function without which the hospital could not properly achieve its purpose." 20 Wn. App. at 110 (quoting *Beeck*, 500 P.2d at 1158).

Similar to the "inherent function" basis for hospital liability, the Court discussed a "nondelegable duty" for hospital emergency services. *Id.* at 111 (citing *Schagrin v. Wilmington Med. Ctr., Inc.*, 304 A.2d 61, 64 (Del. Sup. Ct. 1973)). In *Schagrin*, the court recognized a hospital should not, by employing an independent contractor, avoid liability for injuries arising from the provision of hospital emergency services. 304 A.2d at 64. It was significant that a patient "who avails himself of 'hospital facilities' expects that *the hospital will attempt to*

cure him," not that "independent contractors performing medical services ordinarily performed by the hospital" would be solely responsible. *Adamski,* 20 Wn. App. at 106, 111 (quoting *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957), and *Schagrin*, 304 A.2d at 64).

Similarly, in *Simmons v. Tuomey Regional Med. Ctr.*, 533 S.E.2d 312, 320-21 (S.C. 2000), the South Carolina Supreme Court adopted a nondelegable duty for a hospital to render competent emergency room care and explained the inadequacy of basing liability solely on apparent agency:

> [I]t is appropriate to find a nondelegable duty in this case because apparent agency in its traditional form requires a representation by the principal (the hospital) and proof of reliance on that representation by the patient....
> [E]xpecting a patient in an emergency situation to debate or comprehend the meaning and extent of any representations by the hospital...imposes an unfair and improper burden on the patient....[T]he better solution, grounded primarily in public policy reasons...is to impose a nondelegable duty on hospitals.

(Brackets added.) The Court held that apparent agency and nondelegable duty are separate viable theories that may be raised by an injured patient. *See id.* at 323.

Other courts have substantially relaxed the traditional requirements for the application of ostensible agency in the

hospital-physician context. *See, e.g., Markel v. William Beaumont Hospital*, 982 N.W.2d 151, 153 (Mich. 2022) (the "act" of the hospital that gives rise to ostensible agency "is operating an emergency room staffed with doctors with whom the patient, presenting themselves for treatment, has no prior relationship"); *Williams v. Dimensions Health Corp.*, 279 A.3d 954, 957 (Md. 2022) (hospital may be vicariously liable for the negligence of emergency room physician regardless of the formal hospital-physician relationship); *Wilkins v. Marshalltown Med. & Surg. Ctr.*, 758 N.W.2d 232, 237 (Iowa 2008) (an agency relationship can be inferred because a patient looks to the hospital for care, not to the individual physician); *Clark*, 628 N.E.2d at 53 (hospital may be liable for negligent independent contractor emergency room care if the hospital "holds itself out to the public as a provider of medical services and … the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care"). The above-cited cases, while identifying their vicarious liability theories as "ostensible" or "apparent" agency, or "agency by estoppel," incorporate

principles from the "inherent function" or "nondelegable duty" doctrines described in *Adamski*.

Courts have found multiple policy bases that support the concepts that operating an emergency department constitutes a hospital's representation that it will provide competent emergency care and that a patient's seeking hospital emergency department care constitutes reliance, concepts that are present in the "nondelegable duty" and "inherent function" theories. *See Popovich v. Allina Health System*, 946 N.W.2d 885, 894 (Minn. 2020) (it is contrary to the fundamental purpose of the apparent authority doctrine to allow hospitals to escape vicarious liability for the negligence of emergency room physicians through "little-known contractual relationships, even as hospitals reap both reputational and financial benefits from operation of their emergency rooms"); *Yarbrough v. Northwestern Memorial Hosp.*, 104 N.E.3d 445, 452 (Ill. 2017) ("the fervent competition between hospitals to attract patients, combined with the reasonable expectations of the public that the care providers they encounter in a hospital are also hospital employees, raised serious public policy issues with respect to a hospital's liability

for the negligent actions of an independent contractor physician" (citation omitted)); *Clark*, 628 N.E.2d at 53 ("Public policy dictates that the public has every right to assume and expect that the hospital is the medical provider it purports to be").

When a hospital holds itself out to the public as providing emergency medical services and selects the specific individual who will provide those services, "we do not believe that it is unfair to hold that entity liable for the individual's negligence.... holding principals liable under these circumstances is consistent with the fundamental purposes of the tort compensation system of deterring wrongful conduct and shifting the blame to the party who is in the best position to prevent the injury." *Cefaratti v. Aranow*, 141 A.3d 752, 770 (Conn. 2016); *see also Kashishian v. Port*, 481 N.W.2d 277, 285 (Wisc. 1992) (holding a hospital liable under these circumstances represents good public policy as it provides an incentive to the hospital to monitor physicians. "This will result in higher quality medical care since the hospital is in the best position to enforce strict adherence to policies regarding patient safety") (citation omitted).

In *Adamski*, the Court cites *Restatement (Second) of Agency* § 267 (1958) as setting forth the "ostensible agency" theory. 20 Wn. App. at 112. Section 267 is a traditional statement of apparent agency, which here would require a representation by the hospital and proof of reliance on that representation by the patient. *See* § 267, cmt. a. Essex's estate cannot reasonably be expected to produce such evidence. Patients suffering extreme physical pain while seeking hospital emergency care are not typically noting representations by hospital staff regarding the employment status of emergency room physicians.

Under the alternative basis in *Adamski* for establishing vicarious liability pursuant to the "inherent function" or "nondelegable duty" theories, there is no requirement to show express representation by the hospital, and reliance is established by a patient seeking medical care from the hospital that invites the public to rely on its competence. Recognizing this basis for liability of hospitals fairly allows compensation for patients who are injured by emergency department physicians selected by the hospital. Review is warranted to examine whether *Essex* captures

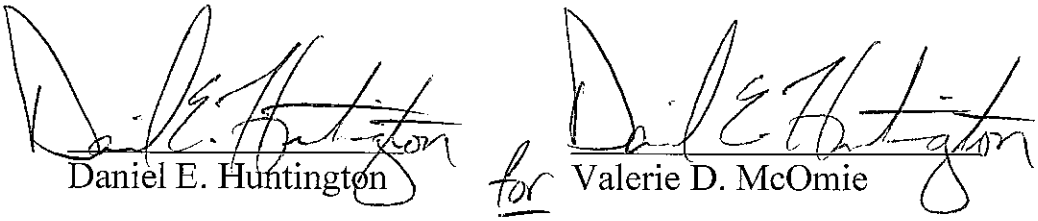
the public policies informing the tort liability of hospitals in this context.

VI. CONCLUSION

The Court should grant review.

This document contains 2,483 words, excluding the parts of the document exempted from the word found by RAP 18.17.

DATED this 24th day of April, 2023.



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On behalf of WSAJ Foundation

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 24th day of April 2023, I served the foregoing document by email to the following persons:

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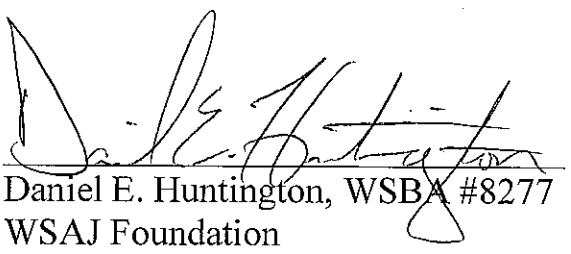

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Comments:

Attached please find Washington State Association for Justice Foundation's Motion to File Amicus Curiae Memorandum on Petition for Review and the accompanying proposed Amicus Curiae Memorandum.

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