NOTE

DIGGS V. NOVANT HEALTH, INC. AND THE EMERGENCE OF HOSPITAL LIABILITY FOR NEGLIGENT INDEPENDENT-CONTRACTOR PHYSICIANS IN NORTH CAROLINA

INTRODUCTION

Throughout the last half of the twentieth century, the developing importance of the health care industry has revolutionized the way in which physicians and patients view medical treatment. In 2000, health care expenditures in the United States reached over 1.3 trillion dollars, or thirteen percent of the gross domestic product, demonstrating the overwhelming prevalence of the health care industry.[1] Nowhere is this growth seen more clearly than in the expansion of hospitals over the last seventy-five years. Increasingly, hospitals advertise themselves and patients view them as multi-care facilities that provide complete medical care from the moment the patient enters the hospital.[2] Based on this patient perspective of hospitals, the North Carolina Court of Appeals in *Diggs v. Novant Health, Inc.* held that hospitals could be liable for the negligence of independent-contractor physicians providing care within their walls.[3] In this controversial decision, the Court of Appeals applied the doctrine of apparent agency to find the hospital vicariously liable for the alleged negligence of a physician who had no employment relationship with the hospital.[4]

The doctrine of apparent agency, as applied to the hospital-independent-contractor relationship, presupposes that there is no employment relationship.[5] The absence of an employment contract,

1. Robert Ward Shaw, Comment, *Punitive Damages in Medical Malpractice: An Economic Evaluation*, 81 N.C. L. REV. 2371, 2377–78 (2003).

2. *See* Shelley S. Fraser, Note, *Hospital Liability: Drawing a Fine Line with Informed Consent in Today's Evolving Health Care Arena*, 1 IND. HEALTH L. REV. 253, 253 (2004) (explaining that hospitals today hold themselves out as providers of complete health care who operate for-profit).

3. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 628 S.E.2d 851 (Ct. App. 2006), *cert. denied*, 648 S.E.2d 209 (N.C. 2007).

4. *Id.* at 307, 628 S.E.2d at 862.

5. Adam Alstott, Comment, *Hospital Liability for Negligence of Independent Contractor Physicians Under Principles of Apparent Agency*, 25 J.

however, does not prevent the majority of patients from presuming that any doctor providing care is an employee of the hospital.[6] This creates an irreconcilable tension between actual circumstances and those perceived by the patient. The patient sees the hospital as a provider of complete medical care, when in reality a large portion of the care provided comes from physicians who are not employed by the hospital. Before *Diggs,* no North Carolina court had applied apparent agency to find that a hospital could be liable for independent-contractor physicians working on the premises. The *Diggs* decision thus raises the controversial issue of whether hospitals can and should be vicariously liable for non-employee physicians when no formal employment relationship exists.

This Note will focus on the significant legal and policy issues raised by adopting apparent agency principles to hold hospitals liable for the negligence of independent-contractor physicians. First, this Note will focus on the specific circumstances in *Diggs* and the court's rationale for adopting and applying the apparent agency doctrine. Second, this Note will briefly discuss the history of hospital liability. Specifically, it will consider the parallel development of the apparent agency doctrine and a competing theory, agency by estoppel. Third, this Note will consider at length the development of hospital liability in North Carolina. Fourth, this Note will examine the issue of the patient's reliance in determining whether apparent agency should be adopted in the context of hospital liability. Finally, this Note will discuss the notice exception to hospital liability, specifically in emergency and non-emergency situations.

I. THE CASE

In *Diggs*, the court considered the alleged medical malpractice of an independent-contractor anesthesiologist during the plaintiff patient's gallbladder surgery.[7] The patient's general surgeon had hospital privileges at Forsyth Medical Center and, therefore, this hospital was one possible location for her surgery.[8] The patient testified that she also played a role in choosing the hospital and

LEGAL MED. 485, 487 (2004) (noting that apparent agency "bypass[es]" the requirements of respondeat superior).

6. Fraser, *supra* note 2, at 264; *see also* Burless v. W. Va. Univ. Hosps., Inc., 601 S.E.2d 85, 97 (W. Va. 2004) (indicating that in most circumstances it is reasonable for a patient to believe a physician is a hospital employee).

7. *Diggs*, 177 N.C. App. at 293, 628 S.E.2d at 854.

8. *Id.* Specifically, the patient testified that she chose Forsyth Medical Center because it was part of Novant Health, a much larger health care organization. *Id.* at 308, 628 S.E.2d at 863.

selected Forsyth Medical Center because of its reputation.[9] During the surgery, the anesthesiologist's assistant, under direct supervision of the anesthesiologist, perforated the patient's esophagus while attempting to perform an endotracheal intubation.[10] The patient sued the hospital, claiming it was vicariously liable for the negligence of the anesthesiologist in administering the anesthesia. The trial court refused to impute the anesthesiologist's alleged negligence to the hospital and granted the hospital's motion for summary judgment.[11] One of the primary reasons for the hospital's success at the summary judgment stage was that no North Carolina court had previously found a hospital liable for the negligence of independent-contractor physicians practicing in its facility.

The North Carolina Court of Appeals in *Diggs* unanimously reversed the trial court's grant of the summary judgment motion, and in doing so explicitly found the apparent agency doctrine to apply to potential hospital liability for an allegedly negligent independent-contractor physician. Before discussing apparent agency, the *Diggs* opinion first reasoned that the anesthesiologist was not the actual agent, or employee, of the hospital, and, therefore, the hospital could not be liable under a respondeat superior theory.[12] The court instead held that apparent agency principles could apply to hold Forsyth Medical Center liable for the anesthesiologist's alleged negligence.[13] Specifically, the court adopted a three-prong test for determining when a hospital could be liable:

> [A] plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees.[14]

The court reasoned that since there was evidence that the patient relied on the hospital for her care and believed all of her

9. *Id.*

10. *Id.* at 293, 628 S.E.2d at 854.

11. *Id*. at 293–94, 628 S.E.2d at 854.

12. *Id.* at 299–301, 628 S.E.2d at 857–58; *see also* Alstott, *supra* note 5, at 486 (discussing the general rule that the principal is not liable for the acts of independent contractors). Specifically, Alstott notes the difficulty for the patient in proving the physician acted negligently and was also an agent of the hospital. *Id.* at 487.

13. *Diggs*, 177 N.C. App. at 307, 628 S.E.2d at 862.

14. *Id.*

physicians were hospital employees, there was a genuine issue of fact as to whether the anesthesiologist was an apparent agent of the hospital.[15] Through the adoption of this three-prong test, the *Diggs* court significantly altered the standard of medical malpractice liability for hospitals in North Carolina.

II. BACKGROUND

A. Early Development of Hospitals' Vicarious Liability

Throughout the late nineteenth and early twentieth centuries, most individuals viewed hospitals as charitable institutions that offered some limited form of health care for the poor in their local communities.[16] The charitable nature of the hospital was based on the willingness of a small number of doctors to devote time to see destitute patients each week, and, therefore, courts generally viewed hospitals as immune from liability for any negligence.[17]

As medical and technological advances revolutionized the importance of the health care industry in the United States, however, hospitals transformed into for-profit institutions[18] offering a plethora of medical services to their patients. As the court in *Diggs* noted, "[t]he conception that the hospital does not undertake to treat the patient . . . no longer reflects the fact[s]."[19]

Based on this idea of the hospital as a provider of complete medical care, courts in the mid-twentieth century began to hold hospitals liable for the negligence of their employees based on

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15. *Id.* at 308–09, 628 S.E.2d at 863. This reasoning in *Diggs* relied almost exclusively on *Sword v. NKC Hospitals, Inc.* for determining when a hospital will be liable for the negligence of independent contractors. Sword v. NKC Hosps., Inc., 714 N.E.2d 142 (Ind. 1999). For standards developed by other courts in holding hospitals vicariously liable under the apparent agency doctrine, see generally 1 AM. LAW MED. MALPRACTICE § 6:21 (3d ed. 2008).

16. Howard Levin, Note, *Hospital Vicarious Liability for Negligence by Independent Contractor Physicians: A New Rule for New Times*, 2005 U. ILL. L. REV. 1291, 1294 (2005).

17. Steven R. Owens, Note, Pamperin v. Trinity Memorial Hospital *and the Evolution of Hospital Liability: Wisconsin Adopts Apparent Agency*, 1990 WIS. L. REV. 1129, 1131–32 (1990); Ryan A. Biller, *Apparent Agency in the Medical Malpractice Context After* York v. Rush-Presbyterian-St. Luke's Medical Center, 19 DUPAGE COUNTY BAR ASS'N BRIEF 10 (2007).

18. Levin, *supra* note 16, at 1294–95. For the North Carolina Supreme Court's view of hospitals in 1941, see *Smith v. Duke University*, 219 N.C. 628, 634, 14 S.E.2d 643, 647 (1941) ("Ordinarily, the hospital undertakes only to furnish room, food, facilities for operation, and attendance . . . ." (citing Martin v. St. Luke's Hosp., 195 Ill. App. 388, 390 (App. Ct. 1915))).

19. *Diggs*, 177 N.C. App. at 302, 628 S.E.2d at 859 (quoting Harris v. Miller, 335 N.C. 379, 389, 438 S.E.2d 731, 737 (1994)).

respondeat superior or corporate negligence principles.[20] The doctrine of respondeat superior holds the employer (the hospital) liable for the negligence of the employee (the physician) if the physician was acting within the scope of his employment.[21] Respondeat superior, however, necessitates that the physician be an employee of the hospital, and, as a result, most mid-twentieth century cases refused to find hospital liability for independent-contractor physicians.

B. The Rise of Apparent Agency and Agency by Estoppel

The rise of the hospital as a for-profit institution correlates with the period in which courts began to apply the apparent agency doctrine in the context of hospitals and independent-contractor physicians.[22] The initial reluctance to impute to hospitals liability for the negligence of independent-contractor physicians was based on contracts between the hospital and physician, the majority of which specified that the physician was an independent contractor, and that the hospital exercised no control over the physician's medical services. Furthermore, doctors do not always receive a salary from the hospital[23] and often bill separately for services rendered. Currently, there are two competing theories that circumvent the language of most agreements between hospitals and independent-contractor physicians and focus on the patient's expectations and the hospital's manifestations to determine whether the hospital can be liable where an employer-employee relationship does not exist. As of 1998, twenty-eight states and the District of Columbia had adopted some form of the two theories—apparent

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20. John Dwight Ingram, *Liability of Medical Institutions for the Negligence of Independent Contractors Practicing on Their Premises*, 10 J. CONTEMP. HEALTH L. & POL'Y 221, 222 (1994) [hereinafter Ingram, *Medical Institutions*].

21. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 501–02 (5th ed. 1984)). Section 220 of the Restatement (Second) of Agency requires that the hospital control the manner and work of the physician in his particular occupation in order to establish the master-servant relationship. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

22. *See, e.g.*, Seneris v. Haas, 291 P.2d 915 (Cal. 1955); Mehlman v. Powell, 378 A.2d 1121 (Md. 1977).

23. John Dwight Ingram, *Vicarious Liability of the Employer of an Apparent Servant*, 41 TORT TRIAL & INS. PRAC. L.J. 1, 8 (2005) [hereinafter Ingram, *Vicarious Liability*]. Consent forms often indicate that the physician treating the patient is an independent contractor. *See* Burless v. W. Va. Univ. Hosps., Inc., 601 S.E.2d 85, 89 (W. Va. 2004) (describing the terms of the patient's contract as: "I understand that the faculty physicians and resident physicians who provide treatment in the hospital are not employees of the hospital").

agency and agency by estoppel—to hold hospitals liable for the negligence of independent-contractor physicians.[24]

1. Apparent Agency

During the rise of hospital liability for independent-contractor physicians in the mid-twentieth century, courts relied predominantly upon the apparent agency doctrine in finding hospitals liable for the negligence of physicians where medical services provided by the physicians appeared to be "integral" to the hospital.[25] Section 429 of the Restatement (Second) of Torts codifies apparent (or "ostensible") agency as the term was used by these early courts and is still used by the majority of courts today:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.[26]

The general premise of section 429 as it applies to the potential liability of a hospital is that the third person (the patient) believes that the agent (the allegedly negligent physician) has certain authority specifically delegated by the principal (the hospital), and the patient's reasonable belief stems from certain manifestations made by the hospital.[27]

Although courts have adopted a broad spectrum of tests in determining whether the apparent agency doctrine is applicable to the hospital and the independent contractor, courts generally interpret section 429 to emphasize two important factors. These two factors are addressed at length in *Sword v. NKC Hospitals, Inc.*,[28] a case significantly relied upon by the *Diggs* court in its adoption of the apparent agency doctrine. First, a court must determine whether the hospital's actions "would lead a reasonable person to conclude that the individual who was alleged to be negligent was an

24. Alstott, *supra* note 5, at 490 (citing Daniel L. Icenogle, Annotation, *Hospital Liability as to Diagnosis and Care of Patients in Emergency Rooms*, 58 A.L.R. 5TH 613, § 10 (1998)).

25. *See, e.g.*, *Mehlman*, 378 A.2d at 1124.

26. RESTATEMENT (SECOND) OF TORTS § 429 (1965).

27. Alstott, *supra* note 5, at 488–89; *see also* Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023, 1034 (Miss. 2000) (McRae, J., specially concurring); George v. Fadiani, 772 A.2d 1065, 1069 (R.I. 2001) (citing Rodrigues v. Miriam Hosp., 623 A.2d 456, 462 (R.I. 1993)).

28. Sword v. NKC Hosps., Inc., 714 N.E.2d 142 (Ind. 1999).

employee or agent of the hospital."[29] Generally, a patient has no control over whether his radiologist, anesthesiologist, pathologist, or emergency-room physician is an employee of the hospital or an independent contractor.[30]

Courts look at a variety of factors in determining whether the hospital held itself out as employing one of these types of physicians. This is a low standard, designed to assist the patient in proving the apparent agency relationship existed between the hospital and the physician. Typically, if the hospital held itself out to the patient such that the patient would look to the hospital and not to the individual independent-contractor physician for care, then a court would find this condition satisfied.[31] In *Pamperin v. Trinity Memorial Hospital*, the court held that it was sufficient if any reasonable person would draw the conclusion from the given circumstances that the physician was an employee or agent of the hospital.[32] Furthermore, the court noted that the hospital's advertisements were a significant factor in leading it to conclude a reasonable person would think the negligent physician was an employee of the hospital.[33]

Additionally, this first factor can be satisfied merely by demonstrating that the hospital held itself out as a complete provider of medical care to the public.[34] In *York v. El-Ganzouri*,[35] the Illinois Appellate Court specifically noted that hospitals advertise themselves as providers of "medical care, and profit when competent service is provided by the independent doctors in their facilities."[36] From a policy perspective, the *York* court reasoned that holding hospitals vicariously liable for negligent independent contractors should encourage hospitals to increase supervision of and permit

29. *Id.* at 151 (quoting Kashishian v. Port, 481 N.W.2d 277, 282–83 (Wis. 1992)).

30. Fraser, *supra* note 2, at 254. As stated in *Gatlin*, most patients who enter the hospital are unable to choose their anesthesiologist, radiologist, or emergency room physician. *Gatlin*, 772 So. 2d at 1028 (citing Hardy v. Brantley, 471 So. 2d 358, 371 (Miss. 1985)).

31. Burless v. W. Va. Univ. Hosps., Inc., 601 S.E.2d 85, 94 (W. Va. 2004) (citing Osborne v. Adams, 550 S.E.2d 319, 321 (S.C. 2001)).

32. Owens, *supra* note 17, at 1143–45.

33. *Id.*

34. Ingram, *Medical Institutions*, *supra* note 20, at 226–27. Many courts note that patients consider themselves patients of the hospital and not of a specific physician. *Id.* at 227. In certain situations, there is even a presumption that all physicians working with the patient are hospital employees. *Id.* at 226.

35. York v. El-Ganzouri, 817 N.E.2d 1179 (Ill. App. Ct. 2004).

36. *Id.* at 1203–04.

only high-quality physicians to practice in their hospitals.[37] Many commentators argue that a hospital's reputation as a provider of care will satisfy this first factor in *Sword*.[38] The presumption is thus largely in favor of the patient in demonstrating that a physician appeared to be a hospital employee.

The second factor applied in *Sword* to determine whether an apparent agency relationship existed concentrates on whether "the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence."[39] This factor is a logical outgrowth of the first factor and inquires as to whether the patient actually relied on the hospital's representations.[40] Under the apparent agency doctrine set forth in section 429, the patient must show he believed the hospital provided his entire medical care, including the services of the independent-contractor physician. This element, known as actual reliance, is satisfied if the patient relied on the fact that he believed the physician was under the control of the hospital.[41] Like the first factor in *Sword*, the second factor also favors the patient and presumes the patient's actual reliance when he enters the hospital and comes under the care of a physician whom he believes to be an employee of the hospital.[42] The court in *Burless v. West Virginia University Hospitals, Inc.*, in holding that an issue of apparent agency existed between a hospital and an allegedly negligent physician, stated, "the person who avails himself of 'hospital facilities' expects that the *hospital* will attempt to cure him."[43] Therefore, if the hospital holds itself out as providing complete medical care to the patient, courts generally find that the patient has relied on the hospital under apparent agency principles, thus demonstrating the appeal of this doctrine for patient medical-

37. *Id.*; *see also* Ingram, *Vicarious Liability*, *supra* note 23, at 11 ("'[H]ospitals increasingly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health services.'" (quoting Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 793 (Ill. 1993))).

38. Ingram, *Medical Institutions*, *supra* note 20, at 226–27.

39. Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 151 (Ind. 1999) (quoting Pamperin v. Trinity Mem'l Hosp., 423 N.W.2d 848, 856 (Wis. 1988)).

40. Alstott, *supra* note 5, at 489. There is a substantial amount of controversy surrounding this element of apparent agency because courts oftentimes presume reliance. *Id.*

41. Ingram, *Medical Institutions*, *supra* note 20, at 226. Some courts also find that a patient may rely on the hospital's reputation as a provider of quality health care in satisfying the element of actual reliance. *See* Burless v. W. Va. Univ. Hosps., 601 S.E.2d 85, 94–95 (W. Va. 2004).

42. *See* Levin, *supra* note 16, at 1304.

43. *Burless*, 601 S.E.2d at 93 (emphasis added) (quoting Bing v. Thunig, 143 N.E.2d 3, 8 (N.Y. 1957)).

malpractice claims.[44]

While the apparent agency doctrine as it applies to the vicarious liability of hospitals favors the patient, there is an affirmative defense available to the hospital. Specifically, the hospital will not be liable if it provides notice or can otherwise show that a patient knew or should have known that his physician was an independent contractor and not an employee of the hospital.[45] While the court in *Sword* held that the hospital could be liable under an apparent agency theory, the court noted that the hospital could have avoided any liability by giving "meaningful" notice that the provider of care was not a physician controlled by the hospital.[46] There is a substantial controversy as to what constitutes proper notice to the patient. One state's approach is to require the posting of visible signs throughout the hospital stating that the physicians in the hospital are independent contractors and not employees.[47] Without any notice, patients generally do not know that physicians are independent contractors and are not expected to inquire as to the employment status of each physician.[48] Additionally, there is a question as to what notice is sufficient in emergency room situations as compared to non-emergency circumstances to give a patient actual knowledge of the physician's independent-contractor status. It is significant issues such as these that raise concerns as to the application of the apparent agency doctrine to impose vicarious liability on hospitals.

2. Agency by Estoppel

With the rise of hospital liability in the medical malpractice context, agency by estoppel arose as a competing doctrine to the apparent agency theory of liability for negligent physicians. Agency

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44. There is a significant controversy as to whether it is appropriate to presume the subjective thoughts of the patient when he enters the hospital. *See* James F. Blumstein, *Of Doctors and Hospitals: Setting the Analytical Framework for Managing and Regulating the Relationship*, 4 IND. HEALTH L. REV. 211, 225–28 (2007). Specifically, Blumstein questions the "integrity and viability" of this doctrine because it relies so heavily on the subjective testimony of the patient. *Id.* at 227. Other commentators similarly note that almost any well-prepared patient could testify that he relied on the fact that he believed his physician to be an employee of the hospital. Ingram, *Vicarious Liability*, *supra* note 23, at 9.

45. Pamperin v. Trinity Mem'l Hosp., 423 N.W.2d 848, 861 (Wis. 1988) (Steinmetz, J., dissenting) (arguing that apparent agency is a weak doctrine since it can easily be avoided by "strategically" placing notices to patients in the hospital).

46. Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 152 (Ind. 1999).

47. Fraser, *supra* note 2, at 266 (citing ALASKA STAT. § 9.65.096(a) (2006)).

48. Seneris v. Haas, 291 P.2d 915, 927 (Cal. 1955).

by estoppel is an equitable doctrine that is applied to prevent one party (the hospital), due to its own acts, from taking advantage of the reasonable reliance of the other party (the patient) on this conduct.[49]

Although this theory is often confused with apparent, or "ostensible," agency, they are two distinct concepts with distinguishable nuances that are especially significant in the hospital liability context.[50] Section 267 of the Restatement (Second) of Agency contains the agency by estoppel language adopted by most courts:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.[51]

The essential basis of agency by estoppel is that the institution, the hospital, either misrepresented its relationship with the independent-contractor physician or was silent as to this relationship and knew the other party would misconstrue it.[52]

Agency by estoppel has two main requirements that are similar to those of apparent agency. Both doctrines require the hospital to hold itself out as the principal of the negligent independent-contractor physician and both also necessitate that the patient rely on this representation by the hospital.[53] The divergence in the principles of apparent agency and agency by estoppel, however, arises from the detrimental reliance requirement inherent in the estoppel doctrine. Specifically, unlike apparent agency, agency by estoppel requires both reliance *and* a change in position by the patient based on the representations of the hospital as the alleged

49. Alstott, *supra* note 5, at 489.

50. Many courts fail to distinguish between these two theories and instead rely on a combination of the different requirements of each doctrine. *See, e.g.*, Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 n.2 (Tex. 1998) (arguing that there is no distinction between apparent agency and agency by estoppel); *see also* Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 52 (Ohio 1994). It is important to note that these two doctrines should nevertheless be separated in the hospital liability context because of the significance of the different standards of reliance.

51. RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

52. Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 448–49 (1996).

53. Levin, *supra* note 16, at 1297–98.

employer of the independent contractor.[54]

Detrimental reliance requires the patient to meet a higher burden by showing that he relied on the holding out of the hospital as the employer of the negligent independent-contractor physician. Specifically, the patient must show that, had he known his physician was not an employee of the hospital, he would have either stopped treatment or gone to another hospital.[55] Therefore, unlike section 429 of the Restatement (Second) of Torts, where the patient need only show that the hospital held itself out as a provider of medical care, under section 267 the patient must show that she relied to her detriment on the holding out of the hospital and, had she known differently, would have sought alternative care.[56] In certain situations, courts may even require that the patient demonstrate bad faith on the part of the hospital in misrepresenting its relationship with the negligent independent-contractor physician.[57] As stated in *Mehlman v. Powell*, a change in position must also be in justifiable reliance on the hospital's holding out of the independent-contractor physicians as part of the hospital's staff.[58] Patients often do not know the employment status of each of their physicians, and thus, the requirement of showing that a change in position would have occurred imposes a high burden of proof that severely limits patients' ability to prove reliance.[59]

C. North Carolina Courts' Development of Hospital Liability

North Carolina courts have traditionally recognized the doctrine of apparent agency,[60] but the theory met little success with regard to hospital liability for negligent independent-contractor physicians prior to *Diggs*. Although North Carolina courts have never formally adopted the apparent agency doctrine as it applies to hospitals' vicarious liability, the concept has appeared in a number of cases throughout the last seventy-five years. *Smith v. Duke University* was the first North Carolina case to mention apparent agency in the

54. Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 148–49 (Ind. 1999).

55. *See* Ingram, *Medical Institutions*, *supra* note 20, at 225 (citing Sztorc v. Nw. Hosp., 496 N.E.2d 1200, 1202 (Ill. App. Ct. 1986).

56. *See* Sanchez v. Medicorp Heath Sys., 618 S.E.2d 331, 334 (Va. 2005) (explaining that reliance is not required under apparent agency liability for hospitals).

57. McWilliams & Russell, *supra* note 52, at 448.

58. 378 A.2d 1121, 1123–24 (Md. 1977). For a discussion of *Mehlman* as a paradigm of agency by estoppel application, see Diane M. Janulis & Alan D. Hornstein, *Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 NEB. L. REV. 689, 698–701 (1985).

59. Ingram, *Medical Institutions*, *supra* note 20, at 225.

60. *See* Daniel Boone Complex, Inc. v. Furst, 43 N.C. App. 95, 107, 258 S.E.2d 379, 388 (N.C. Ct. App. 1979).

context of hospital liability for negligent independent-contractor physicians.[61] However, *Smith* did not develop a standard for determining when a hospital would or would not be liable. Instead, the North Carolina Supreme Court cursorily mentioned that the hospital could not be found liable because apparent authority was not at issue.[62]

Although courts in other states began to apply the apparent agency doctrine in order to find hospitals liable for the negligence of independent contractors during the late twentieth century, North Carolina courts instead required an employer-employee relationship in order to establish respondeat superior liability. For example, in *Willoughby v. Wilkins*, a patient claimed permanent damages resulting from her medical care and brought suit against the hospital for the alleged negligence of the physician in the emergency room.[63] In finding for the patient, the court did not discuss the possibility of the hospital holding itself out as a complete provider of care, the patient's belief that the physician was an employee of the hospital, or the hospital's representation of the same. Instead, the court reasoned that since the agreement between the independent-contractor physician and the hospital stated that the physician would perform services in the "best interest" of the hospital, this was sufficient to establish a question of fact as to whether an employer-employee relationship existed.[64] This decision demonstrates the court's desire to create a lower burden of proof in order to allow the patient to more easily establish an employment relationship between the hospital and the allegedly negligent independent-contractor physician.

In contrast, the court in *Hylton v. Koontz* refused to find an employment relationship even though the independent-contractor agreement was similar to that in *Willoughby*. Specifically, the

61. Smith v. Duke Univ., 219 N.C. 628, 635, 14 S.E.2d 643, 648 (1941); *see also* Hylton v. Koontz, 138 N.C. App. 629, 532 S.E.2d 252, 257 (Ct. App. 2000) (noting that the dispositive fact in determining an agency relationship is whether an employer has retained the right of control).

62. *Smith*, 219 S.E. 2d at 635, 14 S.E.2d at 648. Even though *Diggs* cites *Smith* as the foundation for apparent agency, as of 1998, North Carolina was not recognized as a state that had adopted apparent agency for hospital liability. *See* Alstott, *supra* note 5, at 490.

63. Willoughby v. Wilkins, 65 N.C. App. 626, 628, 310 S.E.2d 90, 92 (N.C. Ct. App. 1983).

64. *Id*. at 634–35, 310 S.E.2d at 96; *see also* Rucker v. High Point Mem'l Hosp., Inc., 20 N.C. App. 650, 202 S.E.2d 610 (Ct. App. 1974) (holding that a question of fact existed as to the employment relationship between the hospital and the independent contractor when the physician contracted to work for a specific salary and to provide services to patients in the best interest of the hospital).

contract had detailed requirements for physicians regarding patient evaluation and care at the hospital.[65] Instead of focusing on the employment relationship, however, the *Hylton* court concentrated on the possibility of establishing an agency relationship based on the amount of control the hospital exerted. The reasoning in *Hylton*, juxtaposed with that of *Willoughby*, illustrates the divergent views of the Court of Appeals for claims of hospital liability based on an employment or actual agency theory.

In *Hoffman v. Moore Regional Hospital*, the North Carolina Court of Appeals departed from the notion of employer-employee relationships and discussed hospital liability in terms of apparent agency. In *Hoffman*, the patient instituted an action against a hospital based on the negligence of a radiologist working on its premises.[66] The *Hoffman* court held that the hospital could not be vicariously liable for the alleged negligence of the independent-contractor radiologist. The court did discuss apparent agency and focused on the elements of detrimental reliance in determining that there was no issue as to an apparent agency relationship between the hospital and the radiologist.[67] Even if the hospital held itself out as the provider of services, including those of the radiologist, the patient in *Hoffman* did not demonstrate that she "would have sought treatment elsewhere or done anything differently had she known for a fact that [the radiologist] was not an employee of the hospital."[68] The high burden of proof for the patient and the paucity of cases even discussing apparent agency demonstrate the reluctance of North Carolina courts to adopt any form of this doctrine with regard to potential hospital liability.

The application of apparent agency to relationships other than those between hospitals and independent-contractor physicians provides an essential perspective on North Carolina's development of this doctrine. For example, in *Sweatt v. Wong*, a patient instituted an action against her physician for the negligence of another physician (Dr. Stanton), in whose care her primary physician (Dr. Sweatt) left her while on vacation.[69] The court held that there were facts which established that Dr. Sweatt could be vicariously liable for the alleged negligence of Dr. Stanton under an apparent agency theory. While the court seemed to adopt the requirement in *Hoffman* that the patient rely to his detriment on

65. *Hylton*, 138 N.C. App. at 636–37, 532 S.E.2d at 257–58.

66. Hoffman v. Moore Reg'l Hosp., Inc., 114 N.C. App. 248, 249, 441 S.E.2d 567, 568 (Ct. App. 1994).

67. *Id.* at 252, 441 S.E.2d at 570.

68. *Id.*

69. Sweatt v. Wong, 145 N.C. App. 33, 35, 549 S.E.2d 222, 223, (Ct. App. 2001).

Dr. Sweatt in order to establish apparent agency, it simply stated that because the family was not offered a choice as to a physician, that fact alone was enough to show reliance.[70] This reasoning requires only actual reliance by the patient on the physician and does not necessitate that the patient demonstrate she would have sought treatment elsewhere as required in the *Hoffman* opinion.

Similarly, in *Noell v. Kosanin*, the North Carolina Court of Appeals found that a private-practice physician could be liable for the negligence of his independent-contractor anesthesiologist.[71] In finding for the patient, the *Noell* court similarly stated that it adopted the *Hoffman* requirement that the patient rely to his detriment on the principal's representation. However, the court found detrimental reliance through only the patient's assumptions that his physician was in charge of anesthesia because all services were represented on one bill.[72] The court did not discuss whether the patient would have sought care elsewhere or would have refused treatment. The absence of this discussion suggests that North Carolina courts typically require actual reliance, not the higher standard of detrimental reliance, when determining the potential liability of individuals for the negligence of any apparent agents.

III. ANALYSIS

A. Adoption of the Apparent Agency Doctrine and the Issue of Reliance

The *Diggs* court began its discussion of agency principles by stating that "[t]here will generally be no vicarious liability on an employer for the negligent acts of an independent contractor."[73] In its analysis, the *Diggs* court focused only on the terms of the exclusive anesthesiology agreement between the hospital and the allegedly negligent anesthesiologist. Like many other courts encountering this issue, the *Diggs* court noted that the hospital had no right to control the anesthesiologist's work.[74] Furthermore, the court noted that the anesthesiologist's practice group billed

70. *Id.* at 37, 549 S.E.2d at 227.

71. Noell v. Kosanin, 119 N.C. App. 191, 196–97, 457 S.E.2d 742, 745–46 (Ct. App. 1995).

72. *Id.* at 196–97, 457 S.E.2d at 746.

73. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 299, 628 S.E.2d 851, 857 (Ct. App. 2006), *cert. denied*, 648 S.E.2d 209 (N.C. 2007).

74. *Id.* at 299–300, 628 S.E.2d at 857–58. The hospital's lack of control over negligent independent-contractor physicians is a primary reason that the apparent agency doctrine is needed in this context. *See, e.g.*, Burless v. W. Va. Univ. Hosps., Inc., 601 S.E.2d 85, 89 (W. Va. 2004) (holding that the hospital did not have the requisite amount of control to establish actual agency).

separately for its services and had a contract that explicitly stated there was no exercise of control by the hospital. Even the mention of a potential actual-agency relationship under these circumstances gives credence to the traditional North Carolina cases which focus on attempting to find an employer-employee relationship instead of adopting an apparent agency test.[75] In holding that no actual-agency relationship existed between the hospital (Forsyth Medical Center) and the allegedly negligent physician (Dr. McConville), however, the *Diggs* court foreshadowed the adoption of a less stringent standard by which to hold the hospital liable.

The court signaled its intent to adopt the apparent agency doctrine by beginning that section of its opinion with a lengthy discussion of the changing role of the hospital.[76] This is an important policy consideration when juxtaposing a hospital of today, such as Forsyth Medical Center, with a hospital in the early 1940s, the time period in which the North Carolina Supreme Court first declined to adopt vicarious liability of hospitals under an apparent agency theory.[77] Essentially, a patient seeking treatment at a hospital today believes that it is the hospital's responsibility to cure him through the services of physicians and nurses whom he believes to be employees.[78] The majority of patients who enter the hospital do not know the details of the physician-hospital relationship and instead should be able to rely on the manifestations of the physician and hospital that are providing care. This fact illustrates that a different standard should be adopted in order to hold modern hospitals more responsible for negligent independent-contractor physicians and demonstrates the weakness of North Carolina's continued attempt to define the hospital-physician relationship as "employer-employee" when, in most cases, this formal relationship is absent.

In discussing the adoption of apparent agency to hold hospitals liable for the negligence of independent-contractor physicians, the *Diggs* court emulated the analysis used by the court in *Sword v.*

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75. Hylton v. Koontz, 138 N.C. App. 629, 636, 532 S.E.2d 252, 257 (N.C. Ct. App. 2000) (discussing the potential for an employer-employee relationship despite contract language which established the negligent physician was an independent contractor); *see also* Willoughby v. Wilkins, 65 N.C. App. 626, 635–36, 310 S.E.2d 90, 94 (Ct. App. 1983) (holding that in a situation similar to *Diggs*, there was sufficient evidence to find an employer-employee relationship).

76. *See supra* notes 16–21 and accompanying text.

77. Smith v. Duke Univ., 219 N.C. 628, 635–36, 14 S.E.2d 643, 648 (1941).

78. Rabon v. Rowan Mem'l Hosp., Inc., 269 N.C. 1, 11, 152 S.E.2d 485, 492 (1967); *see also* Janulis & Hornstein, *supra* note 58, at 690–92 (discussing the depersonalization of hospitals in the last fifty years); Owens, *supra* note 17, at 1147.

NKC Hospitals., Inc.[79] The *Diggs* court focused exclusively on section 429 of the Restatement (Second) of Torts as adopted by *Sword*, which articulates the elements of apparent agency. Specifically, the court ruled in *Diggs* that:

> a hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital.[80]

While the court cited significant policy considerations for holding hospitals vicariously liable, it never mentioned the possibility of adopting the more stringent standard of agency by estoppel. This emphasis on the tort-based doctrine of apparent agency rather than the more difficult agency by estoppel standard has important implications for the possible increased liability of hospitals.[81]

One of the most glaring absences in this decision is the lack of a comparison of apparent agency with agency by estoppel.[82] The court in *Diggs* departed from the standard developed in *Hoffman*, one of the only prior North Carolina cases to discuss the apparent agency liability of a hospital for an allegedly negligent independent-contractor physician. In *Hoffman*, the court applied the detrimental reliance standard found in section 267 of the Restatement (Second) of Agency.[83] Instead of following the precedent set by *Hoffman*, the *Diggs* court relied on *Sword* and merely required that the hospital have held itself out as a provider of care, and that the patient reasonably relied on this representation.[84] The *Diggs* court held that if there were any indication that either the advertisements or reputation of the hospital could lead a patient to believe that the hospital was the employer of the independent-contractor physician, then the hospital could be liable under an apparent agency theory. The court's finding in *Diggs* that the hospital need only hold itself

79. 714 N.E.2d 142 (Ind. 1999).

80. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 304, 628 S.E.2d 851, 860 (Ct. App. 2006), *cert. denied*, 648 S.E.2d 209 (N.C. 2007).

81. The importance of this decision is demonstrated by the filing of numerous amicus briefs by the North Carolina Hospital Association and other similar hospital organizations. *See, e.g.*, *id.* at 311-12, 628 S.E.2d at 865.

82. *See* Alstott, *supra* note 5, at 487–88 (noting that apparent agency and agency by estoppel are not interchangeable). This point stresses that while there is a common goal to find the hospital liable, the difference in the theories should be noted. *Id.*

83. Hoffman v. Moore Reg'l Hosp., Inc., 114 N.C. App. 248, 252, 441 S.E.2d 567, 570 (Ct. App. 1994).

84. *Diggs*, 177 N.C. App. at 304, 628 S.E.2d at 859–60.

out as a provider of care adopts the actual reliance standard of apparent agency and places a significantly lower burden of proof on the patient to hold the hospital liable.

The actual reliance element adopted in *Diggs* stands in stark contrast to the stricter standard of detrimental reliance. Several North Carolina courts attempted to apply the detrimental-reliance standard formulated in *Hoffman*, but in reality applied only an actual reliance standard so as to find that the principal could be liable.[85] For example, in *Sweatt v. Wong*, the court specifically articulated the detrimental-reliance standard and presented no evidence that showed the patient would have acted any other way had she known differently. Nonetheless, the court found that the reliance requirement was met. While the court in *Hoffman* laid the foundation for strict agency by estoppel, later cases have applied only the requirement of actual reliance under the guise of detrimental reliance. Therefore, there is some confusion as to the appropriate standard for determining vicarious liability for independent-contractor physicians. These divergent opinions demonstrate the need for clarification by the North Carolina Supreme Court as to the correct standard.

There are several potential consequences stemming from the inconsistency of North Carolina courts in applying different standards of patient reliance on hospital representations. First, this split in the North Carolina Court of Appeals provides contradictory information to both hospitals and patients as to what a patient must show to prove an apparent agency relationship between the hospital and an independent-contractor physician. If a later court reverts back to the detrimental reliance standard articulated in *Hoffman*, which is still good law, this raises the burden as to what the patient must prove as compared to *Diggs*. The *Diggs* court attempted to distinguish *Hoffman* by finding that the *Hoffman* hospital never held itself out as a provider of care, and therefore the court could apply detrimental reliance.[86] This finding misapplies the detrimental-reliance standard and unnecessarily commingles the two separate doctrines. Both apparent agency and agency by estoppel require a holding out by the hospital that it is a provider of care. The *Hoffman* court specified that it assumed the hospital to have held itself out in such a manner and *then* focused on detrimental reliance, as required by traditional agency by estoppel.[87] Therefore, *Diggs* unsuccessfully attempts to distinguish *Hoffman*

85. *See, e.g.*, Noell v. Kosanin, 119 N.C. App. 191, 457 S.E.2d 742 (Ct. App. 1995).

86. *Diggs,* 177 N.C. App. at 307, 628 S.E.2d at 863.

87. *Hoffman*, 114 N.C. App. at 252, 441 S.E.2d at 570.

from an almost identical factual scenario and demonstrates *both* the competing theories of apparent agency and agency by estoppel that have been applied with regard to hospital liability in North Carolina.

Additionally, the issue of the appropriate standard of reliance raises significant policy issues as to patient and hospital protection in the medical malpractice context. Under the more lenient apparent-agency theory adopted in *Diggs*, the patient satisfies the "reliance" requirement by showing that the hospital held itself out as a complete provider of care[88] and that he looked to the hospital rather than the specific physician for care.[89] As noted by numerous commentators, the overly simple burden on the patient under the apparent agency doctrine explains the hesitancy of many courts to adopt this doctrine in order to find hospitals liable.[90] This doctrine gives hospitals almost no opportunity to rebut a patient's claim, since it is based solely on a patient's personal impressions.[91] Interestingly, *Diggs* does not even mention reliance of the patient in the test it ultimately adopts, but only that "the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees."[92] This absence suggests a standard even lower than reliance which requires only that the patient had a reasonable belief that the allegedly negligent physician was an employer.

The reliance standard in *Diggs* further allows any well-prepared patient to testify that he relied on the hospital's advertisements and reputation as a provider of care.[93] The plaintiff in *Diggs* testified that she chose Forsyth Medical Center because it was part of a larger healthcare organization, and she believed that medical care would be provided by employees of the hospital.[94] It seems more than coincidental that the patient had such a well-organized basis for her hospital decision that additionally satisfied both requirements of apparent agency. Due to the simplicity of this actual-reliance standard as articulated in *Diggs*, any court would likely find an apparent-agency relationship could exist and,

88. *Diggs*, 177 N.C. App. at 307, 628 S.E.2d at 862.

89. *Id.*

90. *See* Blumstein, *supra* note 44, at 227. Blumstein notes that apparent agency seems to be an "intellectual halfway house" used only when respondeat superior does not apply and that this compromise theory calls into question the entire integrity of the doctrine. *Id.* at 226–27.

91. *Id.* at 227.

92. *Diggs*, 177 N.C. App. at 307, 628 S.E.2d at 862.

93. Ingram, *Vicarious Liability*, *supra* note 23, at 9–10; *see also* Ingram, *Medical Institutions*, *supra* note 20, at 226–27.

94. *Diggs*, 177 N.C. App. at 308, 628 S.E.2d at 863.

therefore, that the hospital could be liable for the negligent independent-contractor physician.[95]

While the requirements of apparent agency seem to favor the patient, the alternative theory of agency by estoppel adopted in *Hoffman* and discussed in *Sweatt v. Wong*[96] goes too far in the opposite direction and creates an impossible burden for patients. The majority of patients who enter the hospital do not know or care that their physician is an independent contractor not employed by the hospital.[97] Therefore, it seems almost impossible that a patient could successfully show that, had he known the doctor was an independent contractor, he would have sought care elsewhere. More significantly, in emergency situations patients often do not have the opportunity to make a meaningful choice in selecting a physician. Agency by estoppel and the requirement to show a change in position is therefore ineffective and should be inapplicable to the hospital liability context, especially in the circumstances of urgent care. It should be replaced by the more lenient apparent-agency doctrine.

Comparing the two doctrines, apparent agency's lower burden for patients seems superior to agency by estoppel's almost impossible standard. If the purpose of the hospital is truly to provide complete care to the patient, allowing a hospital to be immune from suit for physician negligence eviscerates the quality health care image it so often advertises. Permitting a hospital to reap the benefits of physicians providing care in its facility while escaping liability for its physicians' wrongdoings is inequitable. The adoption of the apparent-agency doctrine in North Carolina for hospital liability increases the impetus for hospitals to attempt to select only the most qualified physicians to work in its hospitals.[98] Furthermore, it provides an opportunity for patients to obtain compensation from a profit-seeking corporation that is better able to pay as compared to the individual physician. This issue of reliance thus unquestionably demonstrates how imperative it is that the North Carolina Supreme Court address the issue of hospital liability for independent-contractor physicians and to determine which standard future courts should apply in order to resolve significant notice and public policy concerns.

95. As noted in Ingram, *Medical Institutions*, *supra* note 20, at 10, this allows patients to preemptively satisfy the first element of apparent agency.

96. *See supra* notes 68–69 and accompanying text.

97. Fraser, *supra* note 2, at 267.

98. Owens, *supra* note 17, at 1152–53.

B. The Notice Exception

One of the most important issues raised in *Diggs* is the potential for the hospital to provide notice to the patient of the independent-contractor physician's status in order to prevent the application of apparent agency to hold the hospital vicariously liable. Almost immediately following its adoption of the apparent agency standard of section 429 Restatement (Second) of Torts, the *Diggs* court noted the following caveat: "A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor."[99] The court stated that the consent form at issue, which stated only that the anesthetic would be administered by an anesthesiologist, did not satisfy the notice requirement alluded to in *Sword*. [100] The court also distinguished the consent form in *Hoffman*, which did constitute proper notice because it provided a list of five possible physicians who would provide services.[101] This vague distinction fails to give hospitals and patients a sufficient basis to determine what comprises proper notice and does not demonstrate what affirmative actions hospitals must take to avoid liability under an apparent agency theory.

In examining cases from other jurisdictions, there is substantial controversy as to what notice should be sufficient to avoid liability. Many cases have applied the apparent-agency doctrine to find hospitals liable in spite of the fact that the hospital provided meaningful notice through either a consent form or a sign indicating that physicians who provided treatment were independent contractors.[102] Other courts have found that hospitals should not be able to give notice that operates as a waiver of liability under any circumstances because of patients' inability to make a reasonable choice as to their physician, whether an employee or independent contractor, once they arrive at the hospital.[103]

There are several factors that the North Carolina Supreme Court should analyze in determining a standard for what constitutes "meaningful notice" under *Diggs*. These factors include: telling staff members the importance of referring to physicians as independent

99. *Diggs*, 177 N.C. App. at 307, 628 S.E.2d at 862.

100. *Id*. at 308, 628 S.E.2d at 863.

101. Hoffman v. Moore Reg'l Hosp., 114 N.C. App. 248, 249, 441 S.E.2d 567, 569 (Ct. App. 1994).

102. *See, e.g.*, Burless v. W. Va. Univ. Hosps., Inc., 601 S.E.2d 85, 97 (W. Va. 2004); Fraser, *supra* note 2, at 275 (quoting Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 54 (Ohio 1994)).

103. *See* Owens, *supra* note 17, at 1148–49. Many cases do not discuss the possibility of a notice exception under the apparent agency theory. *See* Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023 (Miss. 2000).

contractors, posting signs throughout the hospital indicating the independent-contractor status of physicians working within the hospital, prohibiting physicians from wearing clothing with the hospital's name or logo, and mandating that the independent-contractor physicians bill separately for their services.[104] To comply with the written-notice "standard" adopted by *Diggs*, as first discussed in the *Sword* decision, hospitals must now focus on two specific factors. First, they must provide notice to patients in a consent form that indicates the name of the patient's physician *and* the physician's status as an independent contractor working within the hospital. The consent form should further state that the hospital retains no control over any services rendered by the independent-contractor physician. Additionally, the hospital should post written signs throughout the hospital specifically stating the independent-contractor status of physicians. Although these mechanisms would appear to put a reasonable patient on notice, the vagueness of the guidance given by the *Diggs* court as to what constitutes sufficient notice indicates the need for the North Carolina Supreme Court to articulate the appropriate standard.

From a policy perspective, the availability of a notice exception that allows hospitals to avoid liability raises several issues pertaining to patient care. First, a patient will not likely understand the importance of the physician's discussion of his independent-contractor status until he institutes a medical malpractice action. Additionally, it is likely that by the time the patient enters the hospital, he is unable or unwilling to leave the hospital simply because this employment relationship is missing, even if he is completely aware of it.[105] The costs of this situation in which the patient knows of the independent-contractor status but urgently needs care should not be borne by the patient, but should fall on the hospital who agreed to allow the allegedly negligent physician to use its facilities. Finally, it would be a heavy and virtually impossible burden to require patients to inquire as to the employment status of each physician treating them throughout the course of their hospital visit.[106]

These issues are only amplified when patient choice is analyzed from the perspective of emergency and non-emergency situations. Specifically, the *Diggs* court noted the *Sword* caveat that written notice might not suffice if the patient "did not have an adequate opportunity to make an informed choice."[107] While no North

104. Fraser, *supra* note 2, at 265–66.

105. *See* Owens, *supra* note 17, at 1147.

106. *Burless*, 601 S.E.2d at 97.

107. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 304, 628 S.E.2d 851, 860 (Ct. App. 2006), *cert. denied*, 648 S.E.2d 209 (N.C. 2007).

Carolina case has addressed the application of the apparent agency doctrine to the context of hospital and independent-contractor relationships in emergency and non-emergency situations, this issue is an important factor that should be considered in determining what constitutes meaningful notice. Due to the contrasting factors present in an emergency and non-emergency situation, providing different standards for patient notice as to the hospital's relationship with the independent-contractor physician is appropriate.[108] When in an emergency situation, patients should be able to rely on the hospital holding itself out as a provider of services as sufficient to provide a question of fact as to the apparent-agency relationship between the hospital and independent-contractor physician. In the non-emergency situation presented in *Diggs*, however, the notice exception should preclude hospital liability only if the hospital clearly states in a written notice to the patient that the physician treating him is an independent contractor not under control of the hospital.

CONCLUSION

The decision in *Diggs* represents an unprecedented and unforeseen change in medical malpractice liability in North Carolina. Hospitals are now, more than ever, responsible for providing quality health care services delivered by capable physicians. The significance of this decision is seen in the plethora of briefs filed by patients over the last year in jurisdictions throughout the country alleging hospital liability under this doctrine. The *Diggs* opinion, however, leaves numerous questions unanswered, such as the appropriate reliance standard and the notice required by hospitals to avoid liability.[109] Only a resolution of these issues by the North Carolina Supreme Court will clarify the future of hospitals' liability in North Carolina.

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108. This point is argued quite persuasively by Levin, *supra* note 16, at 1329–31.

109. The *Sword* opinion, relied on extensively by *Diggs*, noted that the Supreme Court examined this issue after the appellate court's invitation to review apparent agency liability for hospitals. Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 152 (Ind. 1999).

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