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HOSPITAL'S NONDELEGABLE DUTY

by Ted Babbitt

In its initial opinion in the case of Wax v. Tenet Health System Hospitals, Inc., 31 Fla. L. Weekly D1385 (Fla. 4th DCA, May 17, 2006), the Fourth District discussed a trial court's inappropriate striking of witnesses. This opinion has led to an overreaction by many trial judges believing that that opinion completely ties their hands with reference to the issuance of sanctions for disobeying pretrial orders. In my opinion, that is not the case. See my prior article in this Journal, "Pretrial Disclosure" September, 2006.

In granting a rehearing in Wax v. Tenent Health System Hospitals, Inc., 32 Fla. L. Weekly D641 (Fla. 4th DCA, March 7, 2007), the Fourth District adopts new law on a hospital's ability to delegate responsibility for the actions of third party staff physicians. In that case, the plaintiff pled non-delegable duty regarding the actions of an anesthesiologist who was not employed by the hospital. Plaintiff moved for partial summary judgment on the issue of non-delegable duty, as did the defendant hospital, and the trial court granted the hospital's motion finding as a matter of law that the hospital had no non-delegable duty for the delivery of anesthesia services.

The appellate court reviewed the facts of both the Wax case and Pope v. Winter Park Healthcare Group, Ltd., 939 So. 2d 185 (Fla. 5th DCA 2006) which involved an identical issue. In both cases a plaintiff contended that the hospital had a non-delegable duty to provide a patient with appropriate care, arguing that

an implied contract formed upon admitting the patient and that any attempt by the hospital to delegate that duty to an independent contractor physician failed as a matter of law.

In the Wax case, plaintiff relied on Fla. Stat. 395.002(13)(b) (2005) which defines a hospital as an entity which makes available "treatment facilities for surgery" and a regulation adopted by the Agency for Health Care Administration which requires that such hospitals "shall have an anesthesia department, service or similarly titled unit directed by a physician member of the organized professional staff."

At Page D642, the Fourth District finds:

> "Plaintiff argues that these statutes and the regulations adopted thereunder establish that the hospital had an expressed legal duty to furnish anesthesia services to its surgical patients 'consistent with established standards." §395.1055(1)(d), Fla. Stat. (2005). In providing such services the hospital was obligated to do so in accordance with established standards for anesthesiology. In other words, plaintiff argues, the hospital had a clearly established legal duty to furnish non-negligent anesthesia services.
>
> We conclude that because the statute and regulation impose this duty for non-negligent anesthesia services on all surgical hospitals, it is important enough that as between the hospital and its patient it should be deemed non-delegable without the patient's express consent. Personal autonomy in making health care decisions is the policy established by statute, and where health care is concerned that usually means informed decisions."

The seminal case on non-delegable duty is Irving v. Doctors Hospital of Lake Worth, Inc., 415 So. 2d 55 (Fla. 4th DCA 1982). In that case, the Fourth District required the trial court to give a jury instruction on non-delegable duty in the case of an emergency room physician. In the Wax case, the Fourth District goes much further, adopting much of the reasoning of the Pope case, supra. The Court finds that, absent an express consent by a plaintiff that the plaintiff freely and knowingly agrees to discharge a hospital from liability for negligence in the performance of services by an anesthesiologist, there is liability as a matter of law when such an anesthesiologist performs services negligently and the plaintiff is injured.

In the Pope case, supra, the Fifth District remanded the case back to the trial court to address the question of the effect of the papers signed by the plaintiff. In Wax, the Court finds as a matter of law that the contract entered into fails to meet the test of waiver by the plaintiff of negligent conduct of the anesthesiologist. At Page D643, the Court holds:

> "Unlike the contract in *Pope*, however, we find no language at all in this form that might fairly and reasonably be construed to stand as an agreement to discharge the hospital from its primary statutory and contractual duty of providing non-negligent anesthesia services. If there were negligence in the provision of anesthesia services, then the Hospital would be liable as a matter of law."

AHCA regulations may impose non-delegable duties on a hospital under the reasoning of this case for many other specialists. The same regulations imposing a non-delegable duty on a hospital for anesthesia services by this

opinion, deals with many other specialties. There is reason to suppose that this opinion will also impose a non-delegable duty on hospitals for the diverse specialties listed in that regulation. If that is the case, this opinion makes a tremendous change in the area of hospital liability.

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