STATE OF MINNESOTA

IN SUPREME COURT

A18-1987

Court of Appeals

Hudson, J.
Dissenting, Anderson, J., Gildea, C.J.
Took no part, Chutich, J.

Alla K. Popovich, as wife and Guardian
Ad Litem for Aleksandr M. Popovich, et al.,

Appellants,

vs.

Filed: July 29, 2020
Office of Appellate Courts

Allina Health System,

Respondent,

Emergency Physicians Professional Association, et al.,

Defendants.

Brandon E. Thompson, Colin F. Peterson, Ciresi Conlin LLP, Minneapolis, Minnesota, for appellants.

Charles F. Webber, Nicholas J. Nelson, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota, for respondent.

Patrick Stoneking, Robins Kaplan LLP, Minneapolis, Minnesota, for amicus curiae Minnesota Association for Justice.

S Y L L A B U S

1. A hospital may be vicariously liable on a theory of apparent authority for the professional negligence of an independent contractor.

2. A plaintiff states a vicarious liability claim against a hospital for the professional negligence of an independent contractor in the hospital's emergency room based on a theory of apparent authority if (1) the hospital held itself out as a provider of emergency medical care; and (2) the patient looked to the hospital, rather than a specific doctor, for care and relied on the hospital to select the personnel to provide services.

Reversed and remanded.

O P I N I O N

HUDSON, Justice.

This appeal involves a medical malpractice action brought against a hospital system based on the alleged negligence of independent contractors involved in providing care for a patient in the emergency rooms of two different hospitals owned by the hospital system. At issue is whether a hospital can be held vicariously liable for the negligence of an independent contractor based on the doctrine of apparent authority. The court of appeals affirmed the dismissal of the medical malpractice action on the grounds that a hospital can be vicariously liable for a physician's negligence only if the physician is an employee of the hospital. We reverse and remand.

FACTS

Appellant Alla Popovich brought this medical malpractice action as wife and guardian ad litem for her husband, Aleksandr Popovich, alleging that her husband suffered a stroke after receiving negligent medical care in the emergency rooms of two hospitals owned and operated by respondent Allina Health System.

In the early morning hours of February 9, 2016, 38-year-old Aleksandr Popovich went to the emergency room at Unity Hospital complaining of dizziness, loss of balance, blurry vision, and trouble breathing. One of the physicians on duty ordered a computed tomography (CT) scan of Mr. Popovich's head, and a radiologist reviewed the scan. After spending approximately 2 hours in Unity Hospital's emergency department, Mr. Popovich returned home shortly before 7:00 a.m.

Later that morning, Mr. Popovich had trouble breathing and became unresponsive. An ambulance took him to the emergency room at Mercy Hospital, where he arrived at 11:16 a.m. A doctor working in the emergency room ordered a second CT scan of Mr. Popovich's head. A radiologist reviewed both the scan from Mr. Popovich's first emergency room visit at Unity Hospital and the second scan taken at Mercy Hospital. The radiologist identified abnormalities in the scans and noted swelling in Mr. Popovich's brain that had increased since the first scan.

After more tests showed abnormalities in Mr. Popovich's brain, he was transferred to Abbott Northwestern Hospital for further care. He arrived at Abbott at 5:37 p.m., where doctors diagnosed him with "dissection of the left proximal vertebral artery with thrombus." Mr. Popovich had suffered a stroke. The stroke left him with serious and irreversible brain damage. He spent several weeks in the hospital followed by a month of in-patient rehabilitation. He still cannot walk without great assistance, he has very little use of his right arm and leg, and he has severe speech and cognitive impairments. He will need therapy and nursing care for the rest of his life due to his permanent disability.

Allina owns and operates both of the hospitals where Mr. Popovich received treatment on February 9, 2016, Unity Hospital and Mercy Hospital. The emergency room doctors and radiologists involved in Mr. Popovich's care, however, were not Allina employees. The doctors working in the emergency rooms were employees of Emergency Physicians Professional Association (EPPA), an entity that contracted with Allina to provide doctors for emergency departments located within Allina-owned facilities. The radiologists that reviewed images of Mr. Popovich's brain were employees of Suburban Radiologic Consultants (SRC), a separate entity with a contract to provide radiology services to patients at Unity and Mercy Hospitals.

Alla Popovich[1] sued Allina, EPPA, and the emergency room physicians for medical malpractice in Hennepin County District Court. An amended complaint added a claim against SRC based on the alleged negligence of its employee, the unnamed radiologist who reviewed Mr. Popovich's first CT scan at Unity Hospital. The amended complaint asserted that if the emergency room doctors and the radiologist had recognized Mr. Popovich's stroke symptoms at an earlier point in the course of his treatment, he would not have suffered catastrophic injuries.[2]

As against Allina, the amended complaint alleges that Mr. Popovich suffered a stroke after receiving negligent care from the radiologist and two emergency room physicians, and asserts that Allina is vicariously liable for their negligent acts and

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[1] We refer to Aleksandr Popovich as "Mr. Popovich" throughout. We refer to the appellant in this case, his wife Alla, as "Popovich."

[2] The claims against the physicians, EPPA, and SRC are not at issue in this appeal.

omissions through the doctrine of apparent authority. The amended complaint acknowledges that the physicians were not employed by Allina.

Allina moved to dismiss the amended complaint for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e). Allina argued that the amended complaint does not state a claim because Minnesota law bars a suit against a hospital based on the negligence of independent contractors. The district court granted Allina's motion to dismiss, ruling that a hospital is not vicariously liable for the acts of non-employees. The district court relied on the court of appeals' decision in *McElwain v. Van Beek*, 447 N.W.2d 442, 446 (Minn. App. 1989), *rev. denied* (Minn. Dec. 20, 1989), which concluded that "a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital."

Popovich appealed. A divided court of appeals affirmed the dismissal of the claims against Allina. *Popovich v. Allina Health Sys.*, No. A18-1987, 2019 WL 3000755, at *1 (Minn. App. July 8, 2019). Like the district court, the majority held that the court of appeals' prior decision in *McElwain* forecloses the vicarious liability claims against Allina. 2019 WL 3000755, at *3. The dissent, however, concluded that the majority erred by relying on *McElwain*, arguing that "Minnesota has never properly established any rule categorically immunizing hospitals from vicarious liability premised on the tortfeasor's apparent authority to act for the institution." *Id.* at *6 (Ross, J., dissenting). We granted Popovich's petition for review.

ANALYSIS

The merits of Popovich's medical malpractice claims are not before us. Instead, the task before us is two-fold. First, we must decide whether Popovich may bring a claim against Allina to hold Allina vicariously liable for the medical malpractice of an independent contractor based on a theory of apparent authority. If the answer to that question is "yes," we must determine the proper legal standard for apparent authority in this context. We consider these issues in turn below.

I.

The question of whether hospitals should be exempt from vicarious liability where a plaintiff seeks to hold a hospital responsible for the medical malpractice of an independent contractor based on a theory of apparent authority is an issue of first impression for our court.[3] This is a question of law that we review de novo. *See Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 214 (Minn. 2014).

Popovich argues that the court of appeals' decision in *McElwain* misinterpreted our precedent, that Minnesota law implicitly recognizes vicarious tort liability premised on a theory of apparent agency, and that there should be no categorical exemption for hospitals. 447 N.W.2d 442. Allina contends that the court of appeals' decisions, both in *McElwain* and in this case, represent a correct understanding of Minnesota law and that we should not

[3] Characterizing this as "a pure question of public policy," the dissent ignores *McElwain*. Plainly this case raises public policy issues. But we granted Popovich's petition for review to clarify the law—and it is impossible to clarify the law without discussing *McElwain*.

recognize apparent authority as a theory of vicarious liability as it applies to hospitals and the negligence of medical personnel who are not hospital employees.

Before addressing the parties' dispute over the court of appeals' decision in *McElwain*, we provide a brief review of our vicarious liability precedent. Minnesota recognizes both respondeat superior and apparent authority as theories of vicarious liability. Under the doctrine of respondeat superior, "an employer is vicariously liable for the torts of an employee committed within the course and scope of employment." *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988). A business or individual—a principal—is vicariously liable under the doctrine of apparent authority[4] where they hold an agent out "as having authority" or "knowingly" permit the agent to act on their behalf, and the agent is negligent. *Hockemeyer v. Pooler*, 130 N.W.2d 367, 375 (Minn. 1964). The "proof of the agent's apparent authority" is found in "the conduct of the principal, not the agent." *Id.*

We have previously held that respondeat superior applies to hospitals to impose vicarious liability on hospitals for the negligence of employees, including physicians and other medical personnel. *See St. Paul-Mercury Indem. Co. v. St. Joseph's Hosp.*, 4 N.W.2d 637, 638 (Minn. 1942) ("It is well established in this state that a hospital, private or charitable, is liable to a patient for the torts of its employees under the doctrine of respondeat superior."). In *St. Joseph's Hospital*, we explained that a hospital is vicariously liable for the negligence of its employees where the hospital has control over the actions

[4] Our prior decisions use the terms "apparent authority" and "apparent agency" interchangeably.

of the employees. *Id.* If there is a break in the chain of control between employer and employee, the hospital cannot be vicariously liable under the doctrine of respondeat superior. *Id.* at 639 (holding that the hospital was not vicariously liable for the negligence of its employees where a non-employee controlled their work at the time of the plaintiff's injury). We reaffirmed this rule of law with our decision in *Moeller v. Hauser*, 54 N.W.2d 639, 644–46 (Minn. 1952), holding a hospital vicariously liable for the negligence of an employee where the negligence occurred in the course of the employee's regular hospital duties and there was no break in the chain of control.

Neither *St. Joseph's Hospital* nor *Moeller* involved the issue of whether a hospital was vicariously liable for the actions of a non-employee based on a theory of apparent authority. Although the theories of respondeat superior and apparent authority are closely related concepts within the law of agency, they are theoretically distinct. Notably, respondeat superior requires the element of control, while apparent authority does not. Restatement (Second) of Agency § 2.03 cmt. a, c (Am. Law. Inst. 1958). Thus, a business may be vicariously liable for the negligence of a non-employee even if the business does not have control over the non-employee, as long as the business held the non-employee out as having authority or knowingly permitted the non-employee to assume authority. *See Hockemeyer*, 130 N.W.2d at 375; Restatement (Third) of Agency § 2.03 cmt. c (Am. Law. Inst. 2006) ("Apparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal.").

The court of appeals' decision in *McElwain* overlooks this critical distinction between theories of vicarious liability. The case concerned a hospital's potential vicarious liability for the alleged malpractice of a doctor working in the hospital's emergency room as an independent contractor. 447 N.W.2d at 446. The hospital argued that it could not be vicariously liable under either a theory of apparent authority or respondeat superior because the doctor was not a hospital employee, citing *Moeller* to support its argument in both instances.

The court of appeals held in favor of the hospital, but did not specifically refer to either respondeat superior or apparent authority in its decision, simply stating, "In Minnesota, a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital." *McElwain*, 447 N.W.2d at 446 (citing *Moeller*, 54 N.W.2d at 645–46). The court of appeals conflated the two theories of vicarious liability and cited *Moeller* for a holding we never made—that an employment relationship between a hospital and physician is a necessary condition for vicarious liability. *McElwain*'s reliance on *Moeller* as support for this proposition was therefore incorrect.

Allina argues that our statements about respondeat superior in *St. Joseph's Hospital* and *Moeller* "led naturally" to the rule created by *McElwain* because there can be no liability where the hospital has no control in the absence of an employment relationship. But this logic repeats the error of conflating the two theories of vicarious liability. Simply put: control is irrelevant to whether there is vicarious liability based on apparent authority.[5]

[5] The dissent credits Allina's argument about "control," asserting that we should exempt hospitals from liability based on apparent authority because hospitals cannot

Allina also makes several policy arguments as to why hospitals should be exempt from vicarious liability based on apparent authority. For example, Allina argues that patients already have sufficient remedies for medical malpractice, such as direct actions against physicians for negligence and direct actions against hospitals for negligent credentialing. Allina also claims that the rule of law proposed by Popovich will increase costs without an improvement in patient care.

The existence of other remedies does not justify granting a hospitals-only exemption from the general rule of vicarious liability based on apparent authority. We have long allowed plaintiffs to hold individuals and businesses vicariously liable for the acts and

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control the acts of independent contractor physicians. Not only is the matter of control irrelevant to apparent authority for the reasons already stated, we doubt the dissent's claim that hospitals are entirely powerless to affect the quality of care administered within their facilities. For example, the dissent cites to an ethics manual stating that physicians' foremost duty is to their patients. Physicians can continue to make specific treatment decisions with respect to individual patients while adhering to a hospital's policies designed to avoid medical errors. The two are not mutually exclusive. The dissent's claim ignores the important difference between a general workplace policy and a specific instruction to a medical professional about how to proceed in an individual case.

omissions of apparent agents,[6] and have done so despite the existence of other remedies.[7] Furthermore, the majority of courts considering the same issue have held that hospitals may be vicariously liable for the negligence of independent contractors under a theory of apparent authority.[8] Allina cites no evidence from these jurisdictions to support its

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[6] *See, e.g.*, *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552, 557 (Minn. 1970) (holding a franchisor vicariously liable to a newspaper company for advertising services provided to a franchisee because the franchisee acted with apparent authority in making the contract); *McGee v. Breezy Point Estates*, 166 N.W.2d 81, 89–90 (Minn. 1969) (holding sellers of real estate responsible for statements that their apparent agent made to escrow agents); *Burkel v. Pro-Vid-All Mills, Inc.*, 141 N.W.2d 143, 145 (Minn. 1966) (holding a feed company liable to pay the salary of a turkey salesman based on the statements of the company's apparent agent); *Lindstrom v. Minn. Liquid Fertilizer Co.*, 119 N.W.2d 855, 861–63 (Minn. 1963) (holding a fertilizer manufacturer and distributor liable for a contract made by an apparent agent); *Nehring v. Bast*, 103 N.W.2d 368, 376 (Minn. 1960) (holding an insurance company liable for the negligence of an apparent agent); *Temple, Brissman & Co. v. Greater St. Paul Corp.*, 248 N.W. 819, 819−20 (Minn. 1933) (holding a property management company vicariously liable for a contract executed on its behalf by an apparent agent); *Jewison v. Dieudonne*, 149 N.W. 20, 22–23 (Minn. 1914) (ruling in favor of a personal injury plaintiff where the plaintiff based his claim on a theory of apparent authority to hold the former owner of a storefront vicariously liable for injuries suffered on the premises); *Larson v. Great N. Ry. Co.*, 133 N.W. 867, 868 (Minn. 1911) (holding a railroad company liable for the negligence of an apparent agent).

[7] For example, a tort claim based on a nondelegable duty theory may provide a remedy in some cases for those injured by the negligence of independent contractors. *See Conover v. N. States Power Co.*, 313 N.W.2d 397, 404 (Minn. 1981) ("[A]n employer should not be permitted to escape a direct duty of care for the personal safety of another by delegating that responsibility to the independent contractor for the proper conduct of certain types of work.").

[8] *See Brown ex rel. Brown v. St. Vincent's Hosp.*, 899 So. 2d 227, 235–36 (Ala. 2004); *Jackson v. Power*, 743 P.2d 1376, 1381 (Alaska 1987); *Barrett v. Samaritan Health Servs.*, 735 P.2d 460, 467–68 (Ariz. Ct. App. 1987); *Ermoian v. Desert Hosp.*, 61 Cal. Rptr. 3d 754, 780 (Cal. Ct. App. 2007); *Cefaratti v. Aranow*, 141 A.3d 752, 762–63 (Conn. 2016); *Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 722 (Del. 1970); *Godwin v. Univ. of S. Fla. Bd. of Trs.*, 203 So. 3d 924, 929 (Fla. Dist. Ct. App. 2016); *Jones v. HealthSouth Treasure Valley Hosp.*, 206 P.3d 473, 480 (Idaho 2009); *Gilbert v. Sycamore Mun. Hosp.*,

argument that failing to exempt hospitals from apparent authority as a theory of vicarious liability will have deleterious effects on hospital systems.[9] Hospitals have a variety of

622 N.E.2d 788, 794 (Ill. 1993); *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 147 (Ind. 1999); *Wilkins v. Marshalltown Med. & Surgical Ctr.*, 758 N.W.2d 232, 236–37 (Iowa 2008); *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 258 (Ky. 1985); *Mehlman v. Powell*, 378 A.2d 1121, 1123–24 (Md. 1977); *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 433 (Mich. 1978); *Hefner v. Dausmann*, 996 S.W.2d 660, 666 (Mo. Ct. App. 1999); *Butler v. Domin*, 15 P.3d 1189, 1196–97 (Mont. 2000); *Renown Health, Inc. v. Vanderford*, 235 P.3d 614, 618 (Nev. 2010); *Dent v. Exeter Hosp., Inc.*, 931 A.2d 1203, 1210–11 (N.H. 2007); *Basil v. Wolf*, 935 A.2d 1154, 1172 (N.J. 2007); *Zamora v. St. Vincent Hosp.*, 335 P.3d 1243, 1248–49 (N.M. 2014); *Hill v. St. Clare's Hosp.*, 490 N.E.2d 823, 828–29 (N.Y. 1986); *Diggs v. Novant Health, Inc.*, 628 S.E.2d 851, 858–61 (N.C. Ct. App. 2006); *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 53 (Ohio 1994); *Roth v. Mercy Health Ctr., Inc.*, 246 P.3d 1079, 1089–90 (Okla. 2011); *Eads v. Borman*, 277 P.3d 503, 514 (Or. 2012); *Green v. Pa. Hosp.*, 123 A.3d 310, 317 (Pa. 2015); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 461–62 (R.I. 1993); *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 436 (Tenn. 2008); *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 949 (Tex. 1998); *Mohr v. Grantham*, 262 P.3d 490, 498 (Wash. 2011); *Burless v. W. Va. Univ. Hosps., Inc.*, 601 S.E.2d 85, 92–93 (W. Va. 2004); *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 855 (Wis. 1988); *Sharsmith v. Hill*, 764 P.2d 667, 672 (Wyo. 1988).

Exceptions to this pattern include Colorado and Virginia, where courts have not allowed plaintiffs to hold hospitals vicariously liable for the acts of non-employees under a theory of apparent agency. *See Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 454–55 (Colo. App. 2005) (explaining that it is "unclear" whether Colorado courts could allow the use of apparent authority to hold a hospital liable for the medical malpractice of independent contractor physicians and continue to recognize the state's corporate practice of medicine doctrine); *Sanchez v. Medicorp Health Sys.*, 618 S.E.2d 331, 335–36 (Va. 2005) ("The theory of apparent or ostensible agency . . . has never been used in Virginia to impose vicarious liability on an employer for the negligent acts of an independent contractor. In light of that fact, we are unwilling to apply that theory in order to hold Medicorp vicariously liable for the alleged negligence of its independent contractor . . . .").

[9] In fact, empirical evidence indicates that the number of malpractice suits and settlements declined nationwide, despite the trend of courts holding that hospitals may be vicariously liable for the negligence of independent contractors under a theory of apparent authority. *See* Myungho Paik, Bernard Black & David A. Hyman, *The Receding Tide of Medical Malpractice Litigation: Part 1 - National Trends*, 10 J. Empirical Legal Stud. 612, 624, 630 (2013) (reviewing national data on medical malpractice claims and finding that both the number of paid claims and the number of claims filed decreased between 1992

methods to address these risks, should they arise. Hospitals can establish policies and monitor the quality of care administered within their facilities.[10] Hospitals can also allocate risk through the agreements they have with the independent contractors providing care to patients in the emergency room.[11] In contrast, the typical emergency room patient has significantly less bargaining power and little ability to predict or manage the risks of negligent medical care.

Nor are we persuaded by the dissent's argument that the regulation of hospitals through state and federal laws means that hospitals should be exempt from vicarious liability based on apparent authority. The same could be said of many industries. For example, the food service industry is subject to a variety of health and safety regulations, including licensing requirements and regular inspections. *See, e.g.*, Minn. Stat. § 157.16

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and 2012). While we share Allina's concern about the many challenges facing hospital systems, doctors, and patients in Minnesota, we are not convinced that those challenges require us to grant hospitals a categorical exemption from liability based on a theory of apparent authority.

[10] *See* Barry R. Furrow, *Enterprise Liability and Health Care Reform: Managing Care and Managing Risk*, 39 St. Louis U. L.J. 79, 109 (1994) ("The hospital is arguably in the best position to monitor conduct within its walls, to enforce adherence to policies, and to provide a source of compensation to injured patients.").

[11] *See* 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, 229 (1994) ("Nonemployee physicians providing medical services in the hospital have a contractual relationship with the hospital. As such, the parties are free to make any agreement they wish between themselves. In addition to its common law right to indemnification when held vicariously liable, the hospital can provide in its nonemployee physician contracts that the physician will defend, indemnify and hold the hospital harmless from all claims and liabilities resulting from the physician's negligence." (footnotes omitted)).

(2018) (requiring "food and beverage service establishments" to apply for an annual license); Minn. Stat. § 157.20 (2018) (providing for regular inspections of the same establishments by the State Commissioner of Health); Minn. R. ch. 4626 (2019) (listing hundreds of regulations for the food service industry). Nothing about such regulation justifies an exemption from the doctrine of apparent authority.

There is also a strong public policy argument in favor of applying apparent authority to hold hospitals vicariously liable for the negligence of independent contractors, as Popovich correctly observes. We have long recognized that the doctrine of apparent authority prevents businesses and individuals alike from placing "secret limitations" on their "liability to third persons" for the acts or omissions of their agents. *Lindstrom v. Minn. Liquid Fertilizer Co.*, 119 N.W.2d 855, 862 (Minn. 1963).[12] Here, Allina acknowledges that many members of the public are unaware of the arrangements it has with the physicians that provide services for the emergency rooms located within Allina-owned hospitals. It would be contrary to the fundamental purpose of the apparent authority doctrine to allow hospital systems to escape vicarious liability for the negligence of independent contractors working in emergency rooms through these little-known contractual relationships, even as hospitals reap both reputational and financial benefits

[12] The dissent takes issue with our citation to *Lindstrom* because the case did not involve vicarious liability for medical malpractice. We cite *Lindstrom* not for its factual similarity to this case, but for its explanation of the rationale underlying the doctrine of apparent authority.

from operation of their emergency rooms.[13] We therefore see no reason to grant to hospitals a categorical exemption from vicarious liability based on apparent authority.

For these reasons, we hold that a plaintiff may assert a claim against a hospital to hold the hospital vicariously liable for the negligence of a non-employee based on a theory of apparent authority.[14]

II.

We turn next to the question of the appropriate legal standard for apparent authority in a case involving a hospital and the alleged medical malpractice of non-employees providing services to patients in the hospital's emergency room. This is a question of law. *See Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019) ("The application or extension of our common law is a question of law that we review de novo.").

Apparent authority "is not actual authority; rather it is authority which the principal holds the agent out as possessing or knowingly permits the agent to assume." *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 313 (Minn. 1997). Our precedent sets forth two basic requirements for establishing a claim against a principal based on apparent authority.

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[13] *See* Elizabeth Isbey, Note, Diggs v. Novant Health, Inc. *and the Emergence of Hospital Liability for Negligent Independent-Contractor Physicians in North Carolina*, 43 Wake Forest L. Rev. 1127, 1145 (2008) ("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.").

[14] Accordingly, we abrogate the court of appeals' decisions in *McElwain*, 447 N.W.2d 442, and *Kramer v. St. Cloud Hospital*, No. A11-1187, 2012 WL 360415 (Minn. App. Feb. 6, 2012), *rev. denied* (Minn. Apr. 25, 2012), to the extent that they are inconsistent with this holding.

The first is that the principal must have either "held the agent out as having authority" or "knowingly permitted the agent to act on its behalf." *Hockemeyer*, 130 N.W.2d at 375. The second is "reliance," meaning that the plaintiff was aware of these representations of authority by the principal. *See Foley v. Allard*, 427 N.W.2d 647, 653 (Minn. 1988); *Truck Crane Serv. Co. v. Barr-Nelson, Inc.*, 329 N.W.2d 824, 826–27 (Minn. 1983).

The parties agree that apparent authority requires an element of reliance, but they disagree on the applicable standard. Allina argues that a plaintiff must show actual reliance to hold a hospital vicariously liable for the negligence of a non-employee under a theory of apparent authority. Actual reliance, as explained by Allina, would mean that a plaintiff's claim fails unless the plaintiff can show that the patient would not have accepted care had the patient known that the personnel in the emergency room were not actually agents or employees of the hospital.[15] Popovich contends that Allina's position is inconsistent with our precedent because we have never held a plaintiff to the type of actual reliance advocated by Allina. We agree with Popovich.

Our precedent does not describe an actual reliance standard whereby a plaintiff must show that certain actions would not have been taken but for the appearance of an agent's

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[15] The dissent also advocates for an actual reliance standard. The dissent does not, however, explain how our precedent supports the adoption of an actual reliance standard. There simply is no ruling by this court—even in a contract case—where we have said that a plaintiff must show actual reliance. Why should we require actual reliance in cases where the defendant is a hospital when we don't require it for any other type of business? And while the dissent criticizes the reliance standard adopted herein as "subjective," the same criticism would apply to an actual reliance standard. A standard that requires plaintiffs to show that they would have acted differently in a counterfactual world where they had more information about the contractual relationship between hospital and doctor is not an "objective" standard.

authority.[16] That said, we have never addressed apparent authority in the context of medical malpractice and the hospital emergency room. We find guidance, however, in the decisions of other state supreme courts—in particular the Ohio Supreme Court's rejection of a "but for" reliance standard.

The Ohio Supreme Court initially adopted the type of "but for" reliance standard that Allina asks us to apply here. *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1049–50 (Ohio 1990). In *Albain v. Flower Hospital*, the court held that a hospital patient could not establish reliance because the record did not show that the patient "would have refused" care if she had known the doctor "was not an employee of the hospital." *Id.* at 1050. Just 4 years later, the court reversed course. *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 53 (Ohio 1994). The court rejected the "but for" reliance standard adopted in *Albain* because the standard "force[d] the emergency patient to demonstrate that she would have chosen to risk further complications or death rather than be treated by a physician of whose independence she had been unaware." *Clark*, 628 N.E.2d at 50. According to the court, that standard also imposed a burden on the emergency room patient to "ascertain and understand the contractual arrangement between the hospital and treating

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[16] Indeed, no jurisdiction currently imposes a "but for" standard of reliance in the emergency room context, although there are jurisdictions that require a showing of actual or detrimental reliance. *See Bain v. Colbert Cty. Nw. Ala. Health Care Auth.*, 233 So. 3d 945, 957 (Ala. 2017) (explaining that the plaintiff must show she "actually relied on the appearance" that the doctor was an agent or employee of the hospital); *Rodrigues v. Miriam Hosp.*, 623 A.2d at 462 ("The patient must establish (1) that the hospital, or its agents, acted in a manner that would lead a reasonable person to conclude that the physician was an employee or agent of the hospital, (2) that the patient actually believed the physician was an agent or a servant of the hospital, and (3) that the patient thereby relied to his detriment upon the care and skill of the allegedly negligent physician.").

physician, while simultaneously holding that her belief upon arrival that the hospital would provide her with a physician is insufficient." *Id.* The court acknowledged that this was a burden "virtually impossible" to meet. *Id.*

Reversing its decision in *Albain*, the Ohio Supreme Court held that "[a] hospital may be held liable under the doctrine of agency by estoppel" for negligent emergency room care provided by an independent contractor if the hospital "holds itself out to the public as a provider of medical services and in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care." *Clark*, 628 N.E.2d at 53. The reasoning of *Clark* is persuasive, and a number of other courts considering the issue have adopted a similar standard.[17]

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[17] *See Cefaratti v. Aranow*, 141 A.3d 752, 771 (Conn. 2016) ("[T]he plaintiff may establish apparent agency by proving that: (1) the principal held itself out as providing certain services; (2) the plaintiff selected the principal on the basis of its representations; and (3) the plaintiff relied on the principal to select the specific person who performed the services that resulted in the harm complained of by the plaintiff."); *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 796 (Ill. 1993) ("[T]he element [of holding out] is satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors. The element of justifiable reliance on the part of the plaintiff is satisfied if the plaintiff relies upon the hospital to provide complete emergency room care, rather than upon a specific physician."); *Wilkins v. Marshalltown Med. & Surgical Ctr.*, 758 N.W.2d 232, 237 (Iowa 2008) (concluding that a jury could infer an agency relationship between hospital and physician where the hospital "held itself out to the public as maintaining a 24-hour emergency room" and the hospital selected the physician to provide the necessary services); *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 433 (Mich. 1978) ("[T]he critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems."); *Renown Health v. Vanderford*, 235 P.3d 614, 618 (Nev. 2010) ("[H]ospitals may be held liable for the acts of independent contractor emergency room doctors if the hospital selects the doctor and it is reasonable for the patient to assume that the doctor is an agent of the hospital."); *Roth v. Mercy Health Ctr., Inc.*, 246 P.3d 1079, 1090 (Okla. 2011) ("To determine whether a doctor was a hospital's ostensible agent, the

We are persuaded by the weight of authority from other jurisdictions and decline to impose actual or "but for" reliance as an element of apparent authority in a case involving medical malpractice in an emergency room. Instead, a plaintiff states a claim on a theory of apparent authority where (1) the hospital held itself out as a provider of emergency medical care; and (2) the plaintiff looked to the hospital for care and relied on the hospital to select the personnel to provide services to the plaintiff. This standard mirrors our traditional description of apparent authority because it has two basic elements: holding out and reliance.

The first element requires courts to analyze the actions of the principal—the hospital—to determine whether the hospital represented itself in the community as a location where members of the public could seek emergency treatment from qualified medical personnel. Focusing the fact-finder's analysis on the hospital's representations to the public is consistent with the ways in which the practice of medicine and the business of health care have changed significantly in the modern age.[18] Today, "hospitals are now

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Court considers whether the patient, at the time of admittance, looks to the hospital solely for treatment of his or her physical ailments, with no belief that the physicians were acting on their own behalf rather than as agents of the hospital."); *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 436 (Tenn. 2008) ("To hold a hospital vicariously liable for the negligent or wrongful acts of an independent contractor physician, a plaintiff must show that (1) the hospital held itself out to the public as providing medical services; (2) the plaintiff looked to the hospital rather than to the individual physician to perform those services; and (3) the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee."); *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 856 (Wis. 1988) ("The rule we adopt today applies only where the patient looks to the hospital as the provider of health care, and the hospital selects the physicians and its staff.").

[18] *See* Hadley Hamilton, Boren ex. rel. Boren v. Weeks *and the Extension of Apparent Agency Liability to Tennessee Hospitals for the Negligence of Independent Contractor*

run like businesses and promote themselves based on the superior quality of the health care they offer." *Eads v. Borman*, 277 P.3d 503, 512 (Or. 2012). By advertising to "compete with each other for the health care dollar," hospitals induce "the public to rely on them in their time of medical need." *Clark*, 628 N.E.2d at 53.

The allegations of Popovich's amended complaint[19] indicate that Allina, like other hospital systems, advertised the quality of its care to the public. Allina's advertisements referred to "[o]ur board-certified emergency medicine physicians and skilled, caring nurses." Popovich alleges that Allina made representations "online, through physical advertising, through signage, and in other ways" that both its Unity Hospital and its Mercy Hospital "had a fully-staffed emergency department, capable of providing emergency services twenty-four hours a day, 365 days a year." Allina also represented to the public that "a full-time radiologist is on staff" in the emergency department of Unity Hospital. Such statements to the public are similar to the "general and implied" representations that other courts have found to satisfy the element of holding out in claims against hospitals based on apparent authority. *See Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 151 (Ind. 1999) (collecting cases).

Physicians: Does the Fine Print Really Matter Anymore?, 29 Temp. J. Sci. Tech. & Envtl. L. 257, 257–58 (2010) ("The modern hospital typically advertises itself as a multifaceted institution providing the public with the best available healthcare through a vast array of specialty physicians and services.").

[19] We accept as true the facts alleged in the complaint because the district court dismissed Popovich's claims against Allina for failure to state a claim upon which relief may be granted. *See Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

The second element, "reliance," focuses on the beliefs of patients and considers whether the patient looked to the hospital, rather than to a particular doctor, to provide care. Specifically, the fact-finder should determine if the plaintiff relied on the hospital to select the physician and other medical professionals to provide the necessary services.[20] This reliance standard reflects the reality that most people who go to the emergency room do not know which medical professionals will treat them once they arrive. Instead, they rely on the hospital to select the professionals for them.[21] That is precisely what happened here—Allina assigned the doctors who provided care to Mr. Popovich. The amended complaint specifically alleges that Mr. Popovich went to Unity Hospital seeking

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[20] This is analogous to the example provided by the Restatement (Second) of Agency § 267 (Am. Law. Inst. 1958), regarding the liability of a taxicab company for the negligence of an independent contractor driver when the driver's negligence injures a passenger. The Restatement illustration explains that liability arises if a passenger relied on the company to furnish safe drivers. *Id.* cmt a., illus. 1. Similarly, liability for a hospital may arise where a patient relies upon a hospital to provide the services of a competent physician in the emergency room.

[21] *See* Hadley Hamilton & Samuel D. Hodge, Jr., *A Look behind the Closed Doors of the Emergency Room - A Medical/Legal Perspective*, 16 Mich. St. U. J. Med. & L. 1, 18 (2011) ("A number of hospitals have set up departments, including the ER, as independent contractors to reduce their exposure for professional negligence. . . . The problem with this approach is that patients have no idea that the hospital has contracted out the services of the ER and signed this type of agreement. Instead, individuals believe that they are being treated by hospital employees and not an outside group."); *see also Clark*, 628 N.E.2d at 53 ("The public, in looking to the hospital to provide such care, is unaware of and unconcerned with the technical complexities and nuances surrounding the contractual and employment arrangements between the hospital and the various medical personnel operating therein."). By contrast, a claim might fail if the patient went to the emergency room to meet the patient's personal physician or arranged in advance to consult with a particular emergency room doctor.

emergency medical care and relied on the hospital to provide "an appropriate health care provider."

We therefore hold that a plaintiff states a vicarious liability claim against a hospital for the professional negligence of independent contractors in the hospital's emergency room based on a theory of apparent authority if (1) the hospital held itself out as a provider of emergency medical care; and (2) the patient looked to the hospital, rather than a specific doctor, for care and relied on the hospital to select the personnel to provide services.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

CHUTICH, J., took no part in the consideration or decision of this case.

D I S S E N T

ANDERSON, Justice (dissenting).

Today, the court announces a rule that makes hospitals liable for the negligent acts of independent medical professionals. Because this new rule is inconsistent with the longstanding common law of Minnesota, and creates an unworkable reliance requirement, I respectfully dissent.

We are presented here with something not often seen, even in courts of last resort—a pure question of public policy: Should we extend the common law of Minnesota by applying the doctrine of apparent authority to Minnesota hospitals that use independent contractor physicians in their emergency rooms? No decision of our court guides the application of apparent authority to the negligent acts of independent contractor medical providers in a hospital setting.[1] The application or extension of the common law is reviewed de novo. *Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019).

Generally, "an employer is not liable for the consequences of the negligent acts of an independent contractor." *Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 277 N.W. 226, 228 (Minn. 1937); *see also* Restatement (Second) of Torts § 409 (Am. Law. Inst. 1965) (noting the general rule that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants").

[1] The parties engage in an extended exchange about whether a 1989 court of appeals decision that declined to extend the doctrine of apparent authority to hospitals—*McElwain v. Van Beek*, 447 N.W.2d 442 (Minn. App. 1989), *rev. denied* (Minn. Dec. 20, 1989)—was, or was not, correctly decided. Having taken review of the current dispute, our court will decide this question; therefore, further analysis of the court of appeals decision is unnecessary, and I do not discuss it here.

And similarly, as a matter of common law agency principles, a principal's liability for the tortious acts of its agents acting outside the scope of the agent's employment is limited. *See* Restatement (Second) of Agency § 219 (Am. Law. Inst. 1958).

An exception to the general rule that an employer is not liable for the negligence of an independent contractor is found in the common law doctrine of apparent authority. The parties do not dispute the basic principles of apparent authority. "[A] principal is bound not only by the agent's actual authority but also by that which the principal has apparently delegated to him." *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552, 555 (Minn. 1970). "Apparent authority is that authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988). And "[t]he doctrine is based on the conduct of the principal, not the conduct of the agent." *Id.* Importantly here, apparent authority "exists only as to those third persons who learn of the manifestation from words or conduct for which the principal is responsible." *Duluth Herald & News Tribune*, 176 N.W.2d at 555. Under the doctrine of apparent authority, "one who deals with an agent is put to a certain burden of reasonableness and diligence." *Truck Crane Serv. Co. v. Barr-Nelson, Inc.*, 329 N.W.2d 824, 827 (Minn. 1983).

Appellant Alla Popovich argues, at the beginning of her brief to our court, "[h]ospitals—like every other business in Minnesota—should be liable for the harmful conduct of their apparent agents." And on this fundamental point, that hospitals are like every other business in Minnesota, I part company with Popovich and the court.

It is true, as Popovich asserts, that our court has extended this doctrine to a variety of Minnesota businesses. But medical care in general, and hospital operations in specific, are not just any business and are not comparable to the routine business workings to which we have applied apparent authority in the past.[2]

Hospitals are the subject of intense state and federal legislative scrutiny. Hospitals must be licensed by the State of Minnesota and are subject to regular inspection by the state. *See* Minn. Stat. §§ 144.50–.54 (2018). Everything from the number of beds in a hospital during a hospital construction moratorium, *see* Minn. Stat. § 144.551 (2018), to the minimum number of onsite providers, *see* Minn. R. 4640.0900 (2019), and even the food served, *see* Minn. R. 4640.2800 (2019), is subject to state regulation. Additionally, hospitals with emergency rooms cannot turn away persons needing emergency care, regardless of the patient's ability to pay. *See* 42 U.S.C. § 1395dd (2018) (an unfunded federal mandate for emergency rooms). In light of these extensive regulations and given

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[2] When asked, the court has extended the doctrine of apparent authority to a number of areas. *See, e.g.*, *Duluth Herald & News Tribune*, 176 N.W.2d at 557 (franchises); *Burkel v. Pro-Vid-All Mills, Inc.*, 141 N.W.2d 143, 145 (Minn. 1966) (wage disputes); *Nehring v. Bast*, 103 N.W.2d 368, 374 (Minn. 1960) (third-party dealings with insurance agents); *Sauber v. Northland Ins. Co.*, 87 N.W.2d 591, 598 (Minn. 1958) (phone calls to businesses); *Granberg v. Pitz*, 262 N.W. 166, 168 (Minn. 1935) (foreclosure); *Temple, Brissman & Co. v. Greater St. Paul Corp.*, 248 N.W. 819, 819 (Minn. 1933) (corporate audits). But, in other cases, the court has declined. *See, e.g.*, *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 313 (Minn. 1997) (declining to extend apparent authority doctrine to service of process); *Barton-Parker Mfg. Co. v. Wilson*, 104 N.W. 968, 968–69 (Minn. 1905) (concluding that the general manager of a retail store was without apparent authority to contract for a new line of goods because the store owner had first told the plaintiff that he did not desire to put in that line of goods). Regardless of the area in which the court has applied apparent authority, it has never modified the doctrinal requirement of reliance as it does so here.

that the Legislature has not chosen to prohibit the use of independent contractor physicians in hospital emergency rooms, it is hardly self-evident why we should extend the common law here to further expand hospital liability.

Largely absent from the court's opinion is a discussion of why we should extend apparent authority to hospitals. The closest the court comes to addressing this underlying justification is in a footnote where the court asserts that it would be "inequitable" to restrict litigation over an alleged failure to meet the appropriate standard of care to the physicians that provided the care, as opposed to the hospital that provided the facility, and cites a law review article to support its position. The "reputational and financial benefit[]" that may inure to a hospital's benefit from the operation of an emergency room does nothing to explain the need for extending the apparent authority doctrine here.

Both the court and Popovich are enamored of the "secret limitations" language in our decision in *Lindstrom v. Minnesota Liquid Fertilizer Co.*, 119 N.W.2d 855, 862 (Minn. 1963). But *Lindstrom* was a contractual dispute involving the failure to pay a financial obligation, not vicarious liability for the alleged failure of a licensed professional to exercise the appropriate standard of medical care. *Id.* There are no dark and mysterious "secret limitations" here. Rather, the liability, if any, stems from the medical decisions of independent medical professionals whom the hospital does not, and cannot, control. I would not extend the apparent authority doctrine to hospitals in this context, or at least, I would not do so without a much stronger argument that doing so will somehow improve care or accomplish some other goal. Ultimately, extending the common law is a discretionary act and, based on the record before us, I would not do so here.

Because I would not extend the common law here, it is not necessary to reach the nettlesome issue of reliance, a requirement we have always had with apparent authority claims. The poor fit of a reliance requirement in this setting illustrates, separately, why we should not impose the apparent authority doctrine on hospitals.

Our case law has repeatedly held that it is not enough for a third party to encounter an apparent agent; the third party must also rely on the alleged appearance of agency. *See, e.g.*, *Foley*, 427 N.W.2d at 653 (stating that the district court properly granted summary judgment to the defendant company on the plaintiff's apparent authority claim because there was no evidence of reliance by the plaintiff); *Schlick v. Berg*, 286 N.W. 356, 358 (Minn. 1939) (discussing apparent authority and noting that "authority by holding out is of no importance until a third party relies thereon"); *Eberlein v. Stockyards Mortg. & Tr. Co.*, 204 N.W. 961, 962 (Minn. 1925) ("[O]nly those who have acted in reliance on apparent authority are entitled to recover where the agent possessed no actual authority, express or implied.").

In the contractual universe in which apparent authority claims often arise, it is relatively easy to see the reliance and the resulting damages. In the emergency care setting, it is entirely unclear what resulting damages occur when a patient relies on the apparent agency of a medical professional who works at the hospital. While it very well may be true that emergency room patients are under the impression that it is the hospital, and not the physicians, that provides services, or that employees, rather than independent contractors, provide care, it is not clear that legal outcomes should turn on these impressions. Implicitly, vicarious liability for hospitals, even under an apparent authority

theory, should apply only if patients, informed that an emergency room was staffed by independent contractors, would select a different hospital that directly employed its physicians.

Under the court's rule, the hospital is liable simply because it has independent contractors working in the emergency room located in the physical building owned by the hospital; that is, based simply on the fact that the hospital provides the space in which the nonemployee physician exercises independent medical judgment. The extension of relief under an apparent authority theory to all potential patient-plaintiffs who enter an emergency room is, effectively, either strict liability or a close relative of strict liability. *See, e.g.*, *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984) (holding that a manufacturer's duty to warn under a strict liability theory "extends to all reasonably foreseeable users"); *Hansen v. City of St. Paul*, 214 N.W.2d 346, 349 (Minn. 1974) (stating that the city was strictly liable for dog bite injuries under the theory that the city violated its nondelegable duty when it permitted inherently dangerous dogs to prowl uncontrolled upon the public sidewalks in a residential area).

The imposition of strict liability without guidance from the Legislature is generally disfavored. *See State v. Arkell*, 672 N.W.2d 564, 568 (Minn. 2003). And in the medical setting, holding hospitals strictly liable for the acts of independent medical professionals should be particularly disfavored because physicians have ethical obligations to act for the benefit of the patient free from the control of any nonphysician. *See American College of Physician's Ethics Manual*, 170 Annals of Internal Med. (Supplement) S1, S15 (2019) ("The physician's first and primary duty is to the patient. Physicians must base their

counsel on the interests of the individual patient, regardless of the physician's employment or practice status, the patient's insurance, or the medical care delivery setting."). The majority's speculation that a "workplace policy" may control an independent physician's professional judgment is misplaced. The independent treatment decisions and judgment of medical providers cannot be controlled by hospitals; thus, none of the usual rationales of deterrence, superior loss-spreading ability, and recognition of consumers' relative inability to protect themselves provide the necessary policy justifications for the court's adoption of strict tort liability for hospitals. Rather, the cost of malpractice is shifted away from the providers at fault and shifts toward the medical facilities.

The court's reliance on a foreign jurisdiction decision, *Clark v. Southview Hospital & Family Health Center*, 628 N.E.2d 46 (Ohio 1994), is instructive, although perhaps in ways not intended. In its first review of the application of apparent authority to hospitals, the Ohio Supreme Court held that a hospital may be found liable for the acts of its staff physicians only when "(1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital's authority" and "(2) the plaintiff was thereby induced to rely upon the ostensible agency relationship." *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1049 (Ohio 1990), *overruled by Clark*, 628 N.E.2d 46. Four years later, Ohio abandoned the actual reliance element of its test, concluding that the reliance element was "virtually impossible" for a plaintiff to establish. *Clark*, 628 N.E.2d at 50.

It is no surprise that the Ohio Supreme Court has struggled with the reliance element of apparent authority. The first element established by the court today has the same issues

that Ohio faced under its unworkable standard: What does it mean for a hospital to hold itself out as a provider of emergency care? *See id.* at 55 (Moyer, C.J., dissenting) (criticizing the majority and noting the problem that exists here: "[W]hat does it mean for a hospital to 'hold itself out' to the public as a provider of medical services? Does not every medical hospital do so when it erects a sign saying 'hospital' on its premises?").

In addition, the reliance element of the court's new test, which requires that the plaintiff look to the hospital, and not the physician, to provide competent care, is similarly "entirely subjective." *Id.* (noting that "[o]nce a plaintiff testifies that he or she 'looked to the hospital' as opposed to the individual practitioner, a hospital defendant will have almost no effective means to disprove the plaintiff's subjective state of mind"). Similarly here, a review of the record shows that Popovich alleges only that "[b]ased in part on the fact that Allina advertised the emergency medicine capabilities of Unity Hospital," Mr. Popovich selected care there. And as to the selection of his care at Mercy Hospital, the record shows no reason why the Popovich family selected care at that facility. But under the strict liability form of apparent authority announced today, this void in the evidence does not matter: a hospital will have no ability to disprove the subjective element of the test, and a plaintiff need do little more than identify the hospital to establish hospital liability.

Finally, the reliance test adopted by the court means that our new modified apparent authority doctrine may be overcome through minimal steps taken by the hospital. A hospital may easily disclaim liability under the apparent authority doctrine by posting signs and adding disclosures to patient paperwork. *See Duluth Herald & News Tribune*, 176 N.W.2d at 557–58 (observing that franchisers may protect themselves from liability

through apparent authority "by insuring that their franchisee outlets make it clear to their customers and creditors that they are not dealing with a franchiser but with an independent business as a franchisee" and suggesting that this be accomplished in "advertising which candidly discloses the relationship which exists"); *see also Diggs v. Novant Health, Inc.*, 628 S.E.2d 851, 862 (N.C. Ct. App. 2006) ("A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor."). This means, of course, that hospitals will immediately adopt these communication practices, and the practical effect of extending the common law of apparent authority to hospitals will be, with the exception (perhaps) of Popovich, principally an issue of academic interest. This result also undercuts the rationale for extending the common law to a setting in which we must disturb existing practices to reach an ill-fitting result.

For all of these reasons, I respectfully dissent.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.