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☞ Details: Medical service corporations

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1995-96
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance, Securities and Corporate Policy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (October 2012)

Wisconsin Society of Podiatric Medicine, Inc.

MEMORANDUM

TO: Ms. Josephine W. Musser,
Commissioner of Insurance

FROM: Dr. Kevin P. Kortsch,
Executive Secretary, Wisconsin Society of Podiatric Medicine

RE: Proposed Administrative Rule Regarding Patients Compensation Fund Coverage for Service Corporations

DATE: July 21, 1995

==========

Thank you for the opportunity to appear before you today and present testimony on this proposed administrative rule. My remarks are made with the approval of our Society's Board of Directors and its Public Policy Committee.

With all due respect for the Office of the Commissioner of Insurance and the Department's staff, this proposed administrative rule is an embarrassment to the Department. It reflects both bad public policy and is fundamentally inconsistent with the underlying legislation of last session, 1993 Wisconsin Act 473. The rule should be rewritten to reflect the undeniable legislative intent and statutory provisions before the real risk of litigation challenging it (or the related emergency rule) becomes even more serious.

My understanding is that the non-partisan Rules Clearinghouse has advised the Office of the Commissioner of Insurance the proposed rule is without statutory foundation. I find it truly amazing that an agency that represents itself as committed to serving Wisconsin consumers would even put to hearing a proposal that is without basic legal underpinnings. The statewide membership of the Wisconsin Society of Podiatric Medicine urges the Department to come to its senses and promulgate the proper rule that legislators have advised you was their intent.

Even more dismaying to our members was your approval of the emergency rule identical to the permanent rule before us today. How can the Department explain advancing an emergency rule when:

- The rule is fundamentally in error with regard to the underlying statutory and legislative intent; and

- The Department had over a year to develop and advance a permanent rule with no emergency rule needed?

The OCI's credibility and veracity has been called into question by its actions to date on this rule. There should exist a desire on the Office's part to expeditiously remedy the breach of public confidence and to correct the situation. The emergency rule should be immediately repealed and the proposed permanent rule should be rewritten. Our Society would be pleased to work with the Department and its staff toward that constructive objective, should you be so inclined.

1993 Wisconsin Act 473 and the related legislative intent was to encourage the organization, creation and operation of multi-disciplinary health care service corporations with the corporations owned by qualified individuals in addition to MDs and CRNAs. At the time the legislation was being considered, the Department referenced several respected studies that concluded such multi-disciplinary practices are beneficial to consumers, both in terms of health care costs and patient outcomes. The OCI should be advancing a service corporation administrative rule that encourages such professional arrangements, rather than precluding them. The rule should favor flexibility and innovation in the context and structure that health care is rendered, rather than locking providers into a historic narrow approach. The bottom line is: the rule should be rewritten.

Finally, I believe the underlying service corporation statute can be read to allow, though not require, the Patients Compensation Fund to also cover the independent acts (those without direction or supervision of an MD or CRNA) of an optometrist, pharmacist or other covered by the session law. I inquire whether that policy option was given any serious consideration by the Board of Governors of the Patients Compensation Fund.

Thank you for your consideration of this testimony. I hope it adequately conveys the extent to which our members are exorcised by the proposal before us today.

July 21, 1995

To: Josephine Musser
Commissioner of Insurance
State of Wisconsin
121 East Wilson, P. O. Box 7873
Madison, Wisconsin 53707-7873

From: Charles B. Brownlow, O.D., Executive Vice President

Re: Public hearing, July 21, 1995, for administrative rules related to Wisconsin Act 473

Good Morning. I am Charles B. Brownlow, a doctor of optometry and executive vice president of the Wisconsin Optometric Association. I wish to testify today on the portions of the proposed permanent rule which pertain to Wisconsin Act 473. I act as a lobbyist for the Association and in that role, I was involved in the discussions prior to the passage of AB 325, which then became Act 473. The Optometric Association and the Medical Society cooperated in several meetings on the bill, often working with representatives of the Office of the Commissioner of Insurance. The language that was eventually accepted had been analyzed from many different directions, and thus is quite clear in my memory.

As I read the text of the notice of the hearing, I believe that the description is quite accurate; the Patient Compensation Fund will cover service corporations only if their shareholders include medical doctors and/or certified registered nurse anesthetists. Any service corporation comprised completely of health care professionals but exclusive of shareholders who are medical doctors or anesthetists would not be covered by the Fund, and it is expected that such corporations and its providers would seek liability coverage elsewhere.

It is critical to understand that Act 473 does provide for Fund coverage of corporations which have some shareholders who are medical doctors and/or anesthetists, even though some of its shareholders are health care practitioners with licenses and certificates other than MD or CRNA. In such situations, it was agreed that the corporation could be covered by the fund, as could its

MDs and CRNAs and its other employees. Any shareholders who were health care professionals, however, would only be covered for care they provide under the supervision of an MD or CRNA. Each of the health care practitioners would purchase his/her own liability coverage for care provided independently, without supervision by any of the corporation's MDs or CRNAs.

I believe the statement in the third paragraph of the analysis prepared by the OCI is accurate: "The Fund does not cover them (health care practitioners) in any circumstances where they are not providing health care services under the direction and supervision of a physician or nurse anesthetist."

To properly reflect the intent of the negotiations undertaken by the parties interested in this issue and to properly reflect the language and intent of Act 473, it is critical that the Commissioner delete the language "only if all of its shareholders are physicians, nurse anesthetists or both." If there are additional changes necessary to provide coverage to service corporations with health care professionals who are shareholders but who are practicing under the supervision of MDs or CRNAs, I would urge that those changes also be made before the rule is forwarded to the legislature for review. There is no doubt in my mind that this change must be made to allow the rule to reflect the sentiments of the parties involved in the passage of this bill and to reflect the language of Act 473.

Act 473 was passed in March, 1994, the last days of the final floor period of the 1993-94 legislative session. Memories are fresh enough and there is sufficient time to be sure that any rules promulgated with respect to this issue clearly fit the Act itself. My members are disappointed that the emergency rule was advanced as it was, without any discussions with us or with others affected by it. We believe that it is more appropriate to now carefully advance the permanent rule, with the changes suggested earlier.

This issue is especially important in the mid-1990s, as creative solutions are being sought to rising health care costs and to questions of accessibility of care. Multi-disciplinary clinics are now very common, many of which include providers who are defined by Act 473 as health care

professionals and health care practitioners. Prior to the passage of this Act, many of these providers could be employees in the multi-disciplinary clinics but could not be shareholders, as all shareholders were required to hold the same license or certificate. Now, the clinics can be formed as service corporations and the shareholders can include providers with many different licenses and certificates. Thus those providing the care can actively participate in the ownership and decision-making for the corporation, allowing them to apply their own ideas for cost savings and for efficiencies in health care delivery.

Act 473 eliminated barriers to the creation of such multi-disciplinary corporation; the OCI rules should not create barriers to such creation.

Thank you for allowing me to provide input on this important issue. We worked very hard to pass a bill which would allow providers to work together in service corporations, and we will work just as hard to help create administrative rules which allow the same. My association members and I offer our support as a resource for the Commissioner as the permanent rule is readied for legislative review, and I am sure others who were involved in the process would be willing to do the same.

Are there any questions? Thank you.

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Attorneys at Law in
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Quarles & Brady

MEMORANDUM

TO: Office of the Commissioner of Insurance

CC: Attorney Alice M. Shuman
Mr. Peter Farrow
Mr. Danford C. Bubolz
Ms. Susan Ezalarab

FROM: Anthony H. Driessen for the Wisconsin Association of Nurse Anesthetists

RE: Proposed Service Corporation Administrative Rule

DATE: July 24, 1995

==========

Thank you for this opportunity to appear before you today on behalf of the statewide membership of the Wisconsin Association of Nurse Anesthetists. Our organization represents approximately 375 nurse anesthetists who practice in a variety of health care service contexts, including an increasing number that are professional service corporations.

Allow me to also indicate that when the underlying legislation was pending, I represented four interested health care professions supportive of the permissive initiative. They are the Wisconsin Association of Nurse Anesthetists, the Wisconsin Society of Podiatric Medicine, the Wisconsin Optometric Association and the Wisconsin Pharmacists Association. All four groups are registering their views with you today on this proposed permanent rule. All four respectfully urge the Department to reconsider the approach put forward.

I would like to divide my testimony into two parts:

1. The comments with regard to the Rules Clearinghouse report.

2. The legal analysis that will describe how the Department should reach an alternative policy and legal conclusion.

Rules Clearinghouse

The Wisconsin Association of Nurse Anesthetists agrees wholeheartedly with the positions stated at page two of the Rules Clearinghouse memo. Specifically, we agree:

- "However, the above statutes make it clear that the Patients Compensation Fund must cover a service corporation that is organized and operated in the state for the primary purpose of providing the medical services of physicians or nurse anesthetists. A service corporation does not lose that 'primary purpose' merely because it has a person who is not a physician or nurse anesthetist as a shareholder."

- "The requirement in the rule that the service corporation not only be organized and operated in the state for the primary purpose of providing the medical services of physicians or nurse anesthetists, but that it not have any shareholders who are not physicians or nurse anesthetists, is a requirement not authorized by law and contradicts the specific requirements of coverage for such service corporations."

It is disturbing to us that the Department has advanced a rule directly in conflict with the report of the Wisconsin Legislative Council Rules Clearinghouse.

Legal Analysis

We would advance this view with regard to the effect of 1993 Wisconsin Act 473:

- The amendment to sec. 655.005(2) addresses mandatory Fund coverage. Hence, the new language "or is a health care practitioner who is not providing health care services under the direction and supervision of a physician or nurse anesthetist" has the effect of not requiring the Fund to provide coverage. Permissive coverage by the Fund, acting in its discretion, is not precluded by that language.

- Section 655.005(2t) was added to Act 473 to ensure that the liability of a service corporation (or a partnership or cooperative) for the acts of its employees continues as it did before the legislation was passed. In other words, the Fund under the express language of the first sentence of existing sec. 655.005(2) continues to be obligated to provide coverage for claims against the health care provider or the employee of a health care provider for the acts or omissions of the employee acting within the scope of his or her employment and providing health care services. Of course, the existing exception with regard to a physician or a nurse anesthetist continues also.

- The new provision of Act 473 contained in sec. 655.27(3)(a)4. creates an exclusion purposely <u>without</u> the exclusion language added to sec. 655.005(2). In other words, the fact that sec. 655.27(3)(a)4. does <u>not</u> contain the provision "or is a health care practitioner who is not providing health care services under the direction and supervision of a physician or nurse anesthetist" produces the effect that the Patients Compensation Fund must cover <u>any and all</u> employees of a service corporation, partnership or cooperative health care provider, other than employees licensed as a physician or nurse anesthetist.

Thus, we have this situation:

1. The Patients Compensation Fund is expressly not <u>required</u> to provide coverage to "a health care practitioner who is not providing health care services under the direction and supervision of a physician or nurse anesthetist."

2. But the Patients Compensation Fund:

   A. Remains responsible, as it was prior to passage of Act 473, for the acts of employees of a service corporation, partnership or cooperative.

   B. Is required to set rates for service corporations, partnerships and cooperatives that reflect "risk factors and past and prospective loss in experience attributable to employees of the health care

> provider other than employees licensed as a a physician or a nurse anesthetist" whether or not the employees provide health care services under the direction and supervision of a physician or nurse anesthetist.

This is an indirect means to accomplish the result of having the service corporation responsible for the acts of employees, regardless of whether they are under the direction and supervision of a physician or nurse anesthetist.

Conclusion

We therefore would ask that the Department take this action:

1. Review our legal analysis to determine if the Department concurs with it. If so, have the proposed permanent rule reflect the approach we have outlined. At the same time, repeal the outstanding emergency rule.

2. If the Department finds the underlying act to be in need of further clarification, adopt the approach outlined by the Rules Clearinghouse and seek conforming statutory changes to enhance the Department's confidence in the approach outlined by the Legislative Council.

Thank you again for this opportunity to provide these comments to you. We, of course, are available to work with Department staff to ensure the rule accomplishes the legislative intent upon which it is intended.

AHD/pt


FORWARD
E PLURIBUS UNUM

STATEMENT BY REPRESENTATIVE SHERYL ALBERS
TO THE JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

AUGUST 17, 1995

On June 20, 1995, Senator Peggy Rosenzweig and I requested this Committee to suspend SECTION 3 of the emergency rule promulgated by the Office of the Commissioner of Insurance and the Board of Governors for the Patients Compensation Fund. Copies of our letter should be in your possession.

SECTION 3 of the emergency rule creates a definition of service corporation which includes a corporation organized under ss. 180.1901 to 180.1921, Stats., "only if all of its shareholders are physicians, nurse anesthetists or both." The request that Senator Rosenzweig and I made is based on the fact that we believe there is no statutory authority for that provision and it is contrary to legislative intent. As explained in our letter, the Patients Compensation Fund statutes requires coverage of a "corporation organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists." The emergency rule would deny coverage to such a corporation even if only one of its shareholders was a health care provider other than a physician or nurse anesthetist.

We do not question the ability of the Patients Compensation Fund to deny coverage for the acts of practitioners that are performed without supervision by nurse anesthetists or physicians. In fact, the statutes require that exclusion. However, to deny the corporation all coverage from the Patients Compensation Fund because only one of its shareholders is not a physician or nurse anesthetist contradicts the statutory requirement that such a corporation be covered as long as it has been organized and operated for the "primary purpose" of providing the services of physicians and nurse anesthetists. A service corporation does not lose its character as being organized for that purpose merely because it has one health provider, such as a registered nurse, as a shareholder.

Further, this rule, if allowed to remain in effect, will negate the compromise legislation enacted last session which allowed service corporations to be formed between various categories of health providers. 1993 Wisconsin Act 473 allowed some of the many categories of health care providers to form service corporations with each other. In this session we have under consideration two bills, Assembly Bills 193 and 325, that would enable speech-language pathologists, audiologists, chiropractors, physical therapists and dieticians to form service corporations with other health providers. If a service corporation is denied Patients Compensation Fund coverage if it has any shareholders other than physicians or nurse anesthetists, many service corporations would not chose to allow these other categories of health care providers to become shareholders.

Therefore, we request that you suspend SECTION 3 of the emergency rule.


FORWARD
E PLURIBUS UNUM

1ST CASE of Level 1 printed in FULL format.

Edward KASHISHIAN, Personal Representative of the Estate of Ruth Kashishian, Plaintiff-Appellant-Petitioner, v. Steven PORT, M.D., Issam Al-Bitar, M.D., and Mount Sinai Medical Center, Defendants-Respondents, WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN and Wisconsin Patients Compensation Fund, Defendants

KASHISHIAN v. PORT

No. 89-2039

SUPREME COURT OF WISCONSIN

167 Wis. 2d 24; 481 N.W.2d 277; 1992 Wisc. LEXIS 23

October 29, 1991, Oral argument
March 18, 1992, Decided
March 18, 1992, Filed

SUBSEQUENT HISTORY: [***1]

Motion for Reconsideration Denied on May 6, 1992.

PRIOR HISTORY:
Review of a decision of the Court of Appeals affirming an order of the Circuit Court for Milwaukee County, Judge Arlene D. Connors. Affirming in part; reversing in part and remanding for further proceedings consistent with this opinion 158 Wis. 2d 352 (table), 462 N.W.2d 550 (Ct. App. 1990).

DISPOSITION: By the Court. -- The decision of the court of appeals is affirmed in part, reversed in part, and cause remanded for further proceedings consistent with this opinion.

COUNSEL: For the plaintiff-appellant-petitioner there were briefs (in the court of appeals) Sean N. Duffey, Penelope D. Hillemann, Richard H. Schulz and Law Offices of Richard H. Schulz, Milwaukee, and oral argument by Mr. Duffey.

For the defendant-respondent, Steven Port, M.D., the cause was argued by David T. Flanagan, assistant attorney general, with whom on the brief was James E. Doyle, attorney general.

For the defendants-respondents, Issam Al-Bitar, M.D. and Mount Sinai Medical Center, there were briefs by Michael P. Malone, Thomas A. Ogorchock and Hinshaw & Culbertson, Milwaukee and oral argument by Mr. Ogorchock.

JUDGES: William A. Bablitch, J. [***2] Steinmetz, J. concurring.

OPINIONBY: BABLITCH

OPINION: [*28] [**278] WILLIAM A. BABLITCH, J. The plaintiff, Edward Kashishian (Kashishian), personal representative of the estate of Ruth Kashishian, seeks review of an unpublished decision of the court of appeals which dismissed, in part, Kashishian's medical malpractice action against Mount Sinai Medical Center (Mount Sinai) and in full his action against Dr. Steven

167 Wis. 2d 24, *28; 481 N.W.2d 277, **278;
1992 Wisc. LEXIS 23, ***2

Port. Kashishian first argues that Mount Sinai is liable for the allegedly negligent acts of Dr. Port because Dr. Port was an actual agent of Mount Sinai. We conclude that as a matter of law Dr. Port was not an actual agent of Mount Sinai, and therefore summary judgment as to this issue was appropriate.

The next issue presented, which is the primary issue, is whether Mount Sinai can be held vicariously liable, under the doctrine of apparent authority, for the allegedly negligent acts of Dr. Port who treated Ms. Kashishian at Mount Sinai. More broadly stated, the issue is whether hospitals can be held liable under the doctrine of apparent authority for the negligence of hospital doctors whose relationships with the hospital are those of independent contractors, and not those of employee/servants. [***3] We conclude, for the reasons listed [*29] below, that the doctrine of apparent authority can be a basis for a malpractice action against a hospital beyond the emergency room context in instances in which the elements necessary to prove apparent authority exist. We further conclude that an issue of material fact exists as to whether Dr. Port was the apparent agent of Mount Sinai, and therefore summary judgment as to this issue was inappropriate.

The third and final issue presented is whether Kashishian was required to file with the state a notice of claim pursuant to statute because of Dr. Port's status as a state employee. We conclude that such notice was required, and since Kashishian failed to file the notice of claim within the statutory period, Dr. Port was appropriately dismissed from the action. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Because this case comes to us following motions for summary judgment, the facts before us on review are limited. Ruth Kashishian entered Mount Sinai on April 2, 1986. Her attending physician was Dr. Hugh Davis. It is unclear from the record whether Ms. Kashishian entered the hospital to obtain [***4] a cardiac consultation regarding the proper treatment of her condition, whether she was admitted to receive care from her attending physician Dr. Davis, or both. At oral argument, Mr. Kashishian's attorney stated that Dr. Davis admitted Ms. Kashishian to Mount Sinai in order to receive a cardiac evaluation. It is also unclear from the record why Ms. Kashishian chose Mount Sinai as the hospital in which to receive her care.

Dr. Port's care of Ms. Kashishian began with an April 3, 1986, cardiology consultation. Dr. Hugh Davis requested the consultation. Kashishian contends that it is unclear from the record whether Dr. Davis' request [*30] was made to Mount Sinai's cardiology department or specifically to Dr. Steven Port. Dr. Port and Mount Sinai maintain that the record is clear that Dr. Davis' request was made specifically to Dr. Port. At the time of the requested consultation, Dr. Port was the Director of Nuclear Cardiology within the Cardiovascular Disease Section of the Milwaukee Clinical Campus located at Mount Sinai.

On April 4, 1986, a pericardiocentesis was performed upon Ms. Kashishian. The deposition of Dr. Port indicates that the decision to perform the pericardiocentesis [***5] was made after Ms. Kashishian's admission to the hospital. The cardiac catheterization report, which details the events that occurred during the pericardiocentesis procedure, identifies the physician as Steven Port, M.D. The report was signed by both Dr. Port and Dr. Al-Bitar. The "consent to operation or other procedures" signed by Ms. Kashishian before the operation indicates that both doctors would be performing the procedure.

Thus, the record is ambiguous as to who actually performed the procedure -- whether it was performed by Dr. Port, Dr. Al-Bitar or by both physicians acting together.

During the surgery, air was injected into Ms. Kashishian's heart. Ms. Kashishian suffered significant brain damage during the procedure. She died 75 days later on June 18, 1986. The complication occurring during the pericardiocentesis is the basis for Mr. Kashishian's medical malpractice lawsuit.

At the time he performed the pericardiocentesis, Dr. Port was employed by the University Physicians Milwaukee Clinical Campus Practice Plan, Inc. (MPP), which was in turn run by the University of Wisconsin Medical School. Dr. Port's position required him to be both a faculty member at the University [***6] of Wisconsin [*31] Medical School and to participate in the school's clinical program as Director of Nuclear Cardiology within the Cardiovascular Disease Section at Mount Sinai. The University of Wisconsin Medical School's Milwaukee Clinical Campus has been located at Mount Sinai since 1974 in accordance with affiliation agreements between the University of Wisconsin and Mount Sinai Medical Center, Inc. Pursuant to these agreements the University of Wisconsin School of Medicine's faculty and support personnel were to provide clinical, administrative and teaching services to the Milwaukee Clinical Campus located at Mount Sinai.

Sometime prior to June 17, 1987, Kashishian's counsel reviewed Ms. Kashishian's medical records, and on June 17, 1987, counsel wrote a letter to Drs. Port and Al-Bitar alleging their negligence in performing the pericardiocentesis. Kashishian asked that the doctors refer the letter to their liability insurance carriers. In a July 27, 1987, reply to the letter, an assistant attorney general, on behalf of Dr. Port, stated that Dr. Port was:

at all times material, a full-time member of the faculty of the University of Wisconsin Medical School, Milwaukee [***7] Clinic Campus. Any participation by Dr. Port in providing medical care to your client was undertaken as part of his faculty duties and this office will therefore defend Dr. Port in any legal proceeding that may result.

On June 22, 1988, Kashishian served a notice of claim upon the Attorney General of Wisconsin alleging that Dr. Port had, by negligent action, caused injury to Ruth Kashishian on April 4, 1986. This lawsuit was commenced on July 22, 1988.

Both Dr. Port and Kashishian moved for summary judgment. Dr. Port's motion, based on his alleged status [*32] as an employee of the state, claimed that Kashishian failed to timely file a notice of claim pursuant to sec. 893.82, Stats. 1983-84. Kashishian moved for a partial summary judgment seeking a declaration that, as a matter of law, Dr. Port had been acting as the actual or apparent agent of Mount Sinai when he treated Ruth Kashishian.

The circuit court ruled that as matter of law Dr. Port was an employee of the University of Wisconsin system and not an actual agent of Mount Sinai pursuant to a letter agreement between Dr. Port and the University of Wisconsin dated January 22, 1985. The court further held that since [***8] Dr. Port was a state employee, Kashishian was required to file a notice of claim with the state of Wisconsin pursuant to sec. 893.82, Stats. Because a notice was not timely

filed, the circuit court dismissed the action against Dr. Port. The circuit court also ruled that Dr. Port could not be the apparent agent of Mount Sinai without enlarging the parameters of the doctrine of apparent authority in Wisconsin. The circuit court therefore denied Kashishian's motion for summary judgment and granted summary judgment in favor of Mount Sinai.

The court of appeals affirmed the decision of the circuit court in all respects.

When reviewing a grant or denial of a motion for summary judgment, we apply the standards set forth under sec. 802.08(2), Stats., which provides that the judgment sought shall be rendered only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[*33] I.

We first address the issue of respondeat superior: whether Dr. Port was acting as the actual agent of Mount Sinai [***9] at the time of the alleged malpractice. Kashishian does not dispute that Dr. Port was an employee/servant of the University Physicians Milwaukee Clinical Campus Practice Plan, Inc. at the time of Ruth Kashishian's injuries. Rather, he argues that Dr. Port was at the same time an employee/servant of Mount Sinai. We disagree.

Under the doctrine of respondeat superior, an employer is responsible to third parties for the negligent conduct of its servants. Arsand v. City of Franklin, 83 Wis. 2d 40, 45, 264 N.W.2d 579 (1978). "'A servant is one employed to perform a service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right of control.'" Arsand, 83 Wis. 2d at 45-46 (quoting Heims v. Hanke, 5 Wis. 2d 465, 468, 93 N.W.2d 455 (1958) overruled on other grounds by Butzow v. Wausau Memorial Hospital, 51 Wis. 2d 281 (1971)) (emphasis omitted).

The right to control is the dominant test in determining whether an individual [***10] is a servant. However, other factors are considered, including the place of work, the time of the employment, the method of payment, the nature of the business or occupation, which party furnishes the instrumentalities or tools, the intent of the parties to the contract, and the right of summary discharge of employees. Pamperin v. Trinity Memorial, 144 Wis. 2d 188, 199, 423 N.W.2d 848 (1988).

[*34] Here, it is abundantly clear that Dr. Port was not a servant of Mount Sinai at the time of the alleged malpractice, but rather an independent contractor.

With respect to the element of control, Mount Sinai did not exercise control over the manner in which Dr. Port's cardiological services were provided. In Pamperin, 144 Wis. 2d at 200, this court, in discussing the control a hospital exerted over a radiologist, noted that "[t]he very nature of a radiologist's function requires the exercise of independent professional judgment. Accordingly, a hospital is not in a position to, and generally does not, exercise control over a radiologist's performance of his or her professional activities." [***11] This is equally true in the context of a

cardiologist. Mount Sinai may have required that physicians supplied by MPP be members of Mount Sinai's staff, and required the physicians to comply with the policies, by-laws, rules, and regulations of Mount Sinai. That does not indicate that a master-servant relationship existed anymore than it did in Pamperin. See Pamperin, 144 Wis. 2d at 201. Mount Sinai did not reserve control and there are no facts alleged to indicate that they had the right of control over the discretion and specific professional techniques in performing medical procedures employed by Dr. Port.

Other factors also indicate that Dr. Port was not Mount Sinai's servant at the time of the alleged malpractice. Dr. Port's paycheck came from the Milwaukee Practice Plan, a corporate entity controlled by the University. Richard E. Reiselbach, M.D., the Associate Dean of the University of Wisconsin Medical School, stated in an affidavit that at the time of Ms. Kashishian's injury he held the direct responsibility to supervise the activities of the University faculty at the Milwaukee Clinical Campus. He further indicated that [***12] all final decisions on appointments and reappointments [*35] of faculty to the Clinical Campus were made by the Dean of the University Medical School. Finally, the amount of compensation paid to each member of the University faculty at the Clinical Campus was determined by the Dean of the University.

Kashishian's argument for dual status relies primarily upon a letter dated January 19, 1982, which describes Dr. Port's employment. The letter reads:

[w]e would anticipate your joining the University of Wisconsin Medical School faculty of the Milwaukee Clinical Campus, which is located at the Mount Sinai Medical Center, as of April 1, 1982. You would hold the academic rank of Assistant Professor of Medicine (MCC) on the collateral faculty. Your initial faculty appointment would be for a period of three years . . ..

This letter also states that any renewal of Dr. Port's faculty appointment was subject to departmental and medical school review procedures. The other relevant portion of this letter reads: "Your Medical School appointment will be coterminous with the Mount Sinai Affiliation and/or your active employment as a full-time faculty member at the Mount Sinai Medical [***13] Center of Milwaukee. The Medical School will bear no financial responsibility for your salary or fringe benefits." Kashishian's reliance on this letter as determinative of the "actual agency" issue is misplaced. As the court of appeals noted, this letter may have been Dr. Port's contract in 1982, but it was subsequently modified by a letter dated January 23, 1985. This letter, quoted below n1 [*36] made Dr. Port an employee of MPP, and offers no support for a finding of a master/servant relationship between Mount Sinai and Dr. Port.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Dr. Port's modified employment contract dated January 22, 1985 informed Dr. Port that:

Effective January 1, 1985, all full-time faculty of the University of Wisconsin Medical School Milwaukee Clinical Campus are required, as a condition of their faculty appointments, to participate in the University of Wisconsin Milwaukee Clinical Practice Plan. . . .

The purposes of the Clinical Practice Plan are, within the scope of the Affiliation Agreement between Mount Sinai Medical Center and the University of Wisconsin Medical School, to provide the terms and conditions upon which the Milwaukee Clinical Campus Faculty may perform compensated professional services.

. . .

To participate in the Clinical Practice Plan, you must become an employee of University Physicians Milwaukee Clinical Practice Plan, Inc. (MPP). This letter is your formal letter of employment with MPP. . . . While acting within the scope of your faculty appointment you will be considered an agent of the University of Wisconsin System within the meaning of @ 895.46 Wis. Stats., as you are at present.

The letter goes on to state that:

Although your duties and responsibilities, your compensation and other matters relating to your service as a faculty member are essentially unchanged from what they have been, your employment by MPP does represent a modification of your letter of appointment to the faculty. It is necessary that we have your written agreement to this modification and your acceptance of employment by MPP.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[***14]

The other factors offered by Kashishian -- Mount Sinai's power to review appointments and the requirement that the faculty appointees be members of Mount Sinai's staff -- do not compel the conclusion that Dr. Port was Mount Sinai's servant. As we indicated in Pamperin, these factors have mainly a "focus on maintaining professional standards; they do not indicate that a master-servant relationship exists." 144 Wis. 2d at 201. The limited control which Mount Sinai had over Dr. Port did not transform their relationship into a master-servant relationship. Rather, Dr. Port was an independent [*37] contractor at the time of Ruth Kashishian's injury. Accordingly, we conclude that the doctrine of respondeat superior is not applicable in this case.

II.

We now turn to the issue of whether Mount Sinai can be held liable for Dr. Port's acts under the doctrine of apparent authority. Kashishian argues that the applicability of the doctrine of apparent authority to the hospital/independent physician context, as set forth by this court in Pamperin, 144 Wis. 2d 188, should not be limited solely to facts [***15] involving treatment in a hospital emergency room or limited to facts involving patients who enter the hospital without a personal attending physician. Kashishian points out that this court in Pamperin, although expressly limiting its decision to the emergency room, noted it was not addressing the doctrine with respect to other types of hospital-patient relationships. He therefore suggests that Pamperin did not foreclose the future application of apparent authority to other factual contexts.

Mount Sinai and Dr. Port claim that the Pamperin decision is expressly limited to the emergency room fact situation and should not be expanded. According to Mount Sinai and Dr. Port, the doctrine of apparent authority does

not apply when a patient is admitted by her own personal attending physician and then receives services at the hospital. We disagree. We conclude, for the reasons listed below, that the doctrine of apparent authority can be a basis for a malpractice action against a hospital beyond the emergency room context in instances in which the elements necessary to prove apparent authority exist.

[*38] The development in the law of the doctrine of apparent authority [***16] is based on a number of supporting rationales. Cases and commentaries on the doctrine invariably point to the recognition that hospitals increasingly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health care services. One need only pick up a daily newspaper to see full and half page advertisements extolling the medical virtues of an individual hospital and the quality health care that the hospital is prepared to deliver in any number of medical areas. Modern hospitals have spent billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities. n2 All of these expenditures have but one purpose: to persuade those in need of medical services to obtain those services at a specific hospital. In essence, hospitals have become big business, competing with each other for health care dollars. As the role of the modern hospital has evolved, and as the image of the modern hospital has evolved (much of it self-induced), so too has the law with respect to the hospital's responsibility and liability towards those it successfully beckons. Hospitals not only employ [***17] physicians, surgeons, nurses, and other health care workers. [*39] they also appoint physicians and surgeons to their hospital staffs as independent contractors. What is the responsibility of hospitals when these independent contractors render negligent health care? Can they escape liability for the rendering of negligent health care in all instances simply because the person rendering the care was an independent contractor, regardless of how hospitals held themselves out to the consuming public, regardless of how the doctor rendering the health care held himself or herself out to the consuming public, and regardless of the perception created in the mind of the consuming public? We think not.

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n2 United States hospitals spent $ 1.54 billion on advertising and marketing of their services in 1989, an average of $ 320,717 per hospital (an increase of 15 percent over 1988). Advertising consumed $ 687 million of this total, an average of $ 142,975 per hospital. . . . Of 1988 marketing expenditures of hospitals responding to the survey, 55.3 percent was spent to reach consumers, 8.9 percent to reach businesses and 20.7 percent to reach physicians. . . . These expenditures seem to be effective: more than 50 percent of consumers nationwide recall seeing or hearing a hospital advertisement. Steven R. Owens, Comment, Pamperin v. Trinity Memorial Hospital and the Evolution of Hospital Liability: Wisconsin Adopts Apparent Agency, 1990 Wis. L. Rev. 1129 n.1 (1990) (citations omitted).

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[***18]

In Pamperin, this court for the first time applied the doctrine of apparent authority to impose liability on a hospital, in an emergency room context, for the negligence of hospital physicians who were independent contractors. "Under apparent authority, a principal may be held liable for the acts of one who

reasonably appears to a third person, through acts by the principal or acts by the agent if the principal had knowledge of those acts and acquiesced to them, to be authorized to act as an agent for the principal." Pamperin, 144 Wis. 2d at 203.

Specifically with respect to the potential liability of hospitals under the doctrine of apparent authority, we held that liability exists if the following three elements are present:

(1) the hospital, or its agent, acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of [***19] the [*40] hospital or its agent, consistent with ordinary care and prudence. Pamperin, 144 Wis. 2d at 208.

In using the term "agent," we were referring to the individual who was alleged to be negligent. We limited our decision in Pamperin to the emergency room context because those were the facts presented. However, we specifically left open the question of a hospital's liability for its services in a situation where the patient enters the hospital with a personal attending physician. See Pamperin 144 Wis. 2d at 193. We are now presented with facts beyond the emergency room context to another context involving an independent contractor, and we must determine if our holding in Pamperin should be expanded.

As we recognized in Pamperin, a large number of other jurisdictions have been willing to apply the doctrine of apparent authority to the hospital/independent physician context. E.g., Paintsville Hospital v. Rose, 683 S.W.2d 255 (Ky. 1985); Arthur v. St. Peters Hospital, 405 A.2d 443 (N.J. 1979); Grewe v. Mt. Clemens General Hospital, 273 N.W.2d 429 (1978). [***20] The courts noted in Pamperin are only a few that have joined the growing trend in applying apparent authority to the hospital/independent physician context. See also Jackson v. Power, 743 P.2d 1376 (Alaska 1987); Stanhope v. Los Angeles College of Chiropractic, 128 P.2d 705 (Cal. App. 1942); Richmond County Hosp. Authority v. Brown, 361 S.E.2d 164 (Ga. 1987); Mehlman v. Powell, 378 A.2d 1121 (Md. 1977); Hardy v. Brantley, 471 So. 2d 358 (Miss. 1985); Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, (Or. App. 1982); Shephard v. Sisters of Providence Oregon, 750 P.2d 500 (Or. App. 1988); Albain v. Flower Hosp., 50 Ohio St. 3d 251, 553 N.E.2d 1038 (Ohio 1990); Whitaker v. Zirkle, 374 S.E.2d 106 (Ga. App. 1988). This nationwide acceptance of the [*41] application of the doctrine of apparent authority in the hospital context has been described by one commentator as follows:

[i]t [***21] appears inevitable that the doctrine will be fully embraced by the courts in view of the steady expansion of hospital liability and the acceptance of the ostensible agency theory by a majority of the jurisdictions considering the issue . . .. [O]stensible agency has not taken hold in some jurisdictions only because no case has yet been presented with sufficient factual grounds to support application of the doctrine. Thus, to date plaintiffs have failed more often because of problems of evidence rather than problems of law. G. Keith Phoenix and Anne L. Schlueter, Hospital Liability For the Acts of Independent Contractors: The Ostensible Agency Doctrine, 30 St. Louis U. L.J. 875, 885 (1986).

We noted in Pamperin that there are a number of rationales and policy considerations that support this development in the law. For example, hospitals no longer merely provide the facilities where physicians practice, but rather, hospitals offer a variety of health care services. Pamperin, 144 Wis. 2d at 204. As one commentator noted, "[t]oday's hospitals are larger and more complex than ever before and operate as [***22] highly integrated systems utilizing a team approach to medical care." Note, Theories For Imposing Liability Upon Hospitals For Medical Malpractice: Ostensible Agency and Corporate Liability, Wm. Mitchell L. Rev. 561 (1985) (footnotes omitted). Furthermore, hospitals increasingly hold themselves out as offering and rendering quality health care and patients frequently look to the hospital, not a particular physician, for their care and treatment. Pamperin 144 Wis. 2d 204. As one court described:

[*42] There may have been a time when all the world knew hospitals were mere structures where physicians treated and cared for their patients. In such a society one would be hard pressed to show that he justifiably relied on the hospital to care for his illness or injury through doctors employed for that purpose. But the situation has evolved. Most modern hospitals hold themselves out to the public as providing many health related services including services of physicians. A patient is likely to look to the hospital, not just to a particular doctor he comes into contact with through the hospital. Richmond County Hospital Authority v. Brown, 361 S.E.2d 164, 166 (Ga. 1987). [***23]

With respect to emergency care, this rationale is strengthened by the awareness that patients often seek emergency care and treatment from a hospital, in reliance on the hospital, and are unaware of the status of the various professionals in the emergency room. However, courts applying the apparent authority doctrine in other jurisdictions have not limited its application to emergency rooms. See, e.g., Doctors Hosp. of Augusta v. Bonner, 392 S.E.2d 897 (Ga. App. 1990); Sharsmith v. Hill, 764 P.2d 667 (Wyo. 1988); Sztorc v. Northwest Hosp., 496 N.E.2d 1200 (Ill. App. 1 Dist. 1986). Implicit in these opinions is a recognition that the existence of apparent authority is a question for the trier of fact and should apply where the circumstances establish apparent authority. They also recognize that the rationales and policies supporting the application of the apparent agency doctrine in the emergency room setting apply equally in other areas of the hospital -- when the elements necessary to establish apparent authority are present. We agree with this authority. Furthermore, we are not persuaded [***24] by Mount Sinai and Dr. Port's argument that, although perhaps not limited to the emergency room, the doctrine of apparent authority does not apply [*43] when a patient is admitted to the hospital by his/her personal attending physician and then receives the services of the hospital. As one court discussing this issue has noted:

The relevant relationship in this case is between the hospital and Temply, [the surgical independent contractor resident] not between it and any private physician with whom the plaintiff contracted. The fact that plaintiff contracted with a private physician as her primary surgeon is not, as a matter of law, inconsistent with hospital's having clothed Temply [the independent contractor physician] with ostensible authority to act as its agent in assisting the private doctors. Shephard v. Sisters of Providence, 750 P.2d 500, 505 (Or. App. 1988).

We agree. Nor is the plaintiff's contact with a private personal physician

necessarily inconsistent with the hospital having held out specialists and/or consultants as its apparent agents.

Commentators on the doctrine of apparent authority have also noted that the doctrine [***25] of apparent authority has not been applied solely in the emergency room context. See, e.g., G. Keith Phoenix and Anne L. Schlueter, Hospital Liability For the Acts of Independent Contractors: The Ostensible Agency Doctrine, 30 St. Louis U. L.J. 875, 879 (1986) (footnotes omitted) ("[h]istorically, cases imposing liability based on the ostensible agency theory involved either treatment in the emergency room or treatment or tests provided in hospital-based departments such as radiology."). See also, Steven R. Owens, Pamperin v. Trinity Memorial Hospital and the Evolution of Hospital Liability: Wisconsin Adopts Apparent Agency, 1990 Wis. L. Rev. 1130 and accompanying note (1990) (noting that although [*44] Pamperin only addressed the emergency room context, the doctrine of apparent authority likely affects non-emergency room contexts). We agree with other jurisdictions and commentary on this issue and hold that the doctrine of apparent authority is not limited to the emergency room context. Nor is it limited to situations where a patient enters the hospital without a personal attending physician. We conclude [***26] that the doctrine of apparent authority applies to any factual situation in which the elements necessary to prove apparent authority exist: (1) the hospital, or the individual alleged to be negligent, acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the individual alleged to be negligent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or the individual alleged to be negligent, consistent with ordinary care and prudence.

In Pamperin, we listed these three criteria for the existence of apparent authority, and found that these three criteria can be satisfied in a hospital emergency room setting. We can discern no reason to conclude, as a matter of law, that the doctrine of apparent authority should not exist in other contexts concerning hospitals and independent physicians when all the elements are present or when a question of material fact exists as to the elements. We so hold.

Mount Sinai and Dr. [***27] Port argue that to extend the doctrine of apparent authority to cover factual situations such as presented here would be contrary to our statement in Pamperin in which we said:

[*45] [t]he 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. Where a patient seeks care from a physician who then uses the hospital facilities, the hospital would not be liable under the doctrine of apparent authority. 144 Wis. 2d at 208.

They also point to our language that as to the element of reliance, the plaintiffs must show that they are seeking care from the hospital and not merely looking to the hospital "as a place for his or her personal physician to provide medical care." Id. at 212. However, nothing about our holding today undermines these statements. They apply with equal force to a plaintiff's claim of apparent authority in a non-emergency room context. In other words, had Dr.

Davis who admitted her to Mount Sinai been the negligent party, and assuming that the elements outlined [***28] above were not existent, the hospital would not be liable for his negligence under the doctrine of apparent authority.

Contrary to the assertion of Mount Sinai and Dr. Port, the holding we set forth today represents good public policy. We agree with the many courts and commentators who have set forth the numerous reasons why applying the doctrine of apparent authority to hold hospitals liable under apparent authority is sound public policy. As one author has noted:

holding a hospital liable for a physician's negligent acts provides a stronger incentive to the hospital to monitor and control physicians. This will result in higher quality medical care since the hospital is in the best position to enforce strict adherence to policies regarding patient safety, whether it be by rules, regulations, or other means. Second, . . . [holding the hospital liable] places the burden of liability on a [*46] financially dependable defendant so that an injured patient may receive adequate compensation. Note, Medical Malpractice -- Ostensible Agency and Corporate Negligence -- Hospital Liability May Be Based On Either Doctrine of Ostensible Agency or Doctrine of Corporate Negligence, 17 St. Mary's L. J. 551, 573 (1986) [***29] (footnotes omitted).

Additionally, another commentary has posited that:

reasons once asserted for exempting hospitals from liability for the acts of physicians who were independent contractors are now outweighed by stronger public policy. . . .

. . . .

Since modern hospitals are run like businesses, it is reasonable to require them to insure against malpractice by all their personnel, including doctors. Payment of insurance premiums by hospitals can be negotiated along with other terms of employment and can be absorbed as a cost of doing business. If hospitals become more directly involved in malpractice liability, they will undoubtedly develop a greater interest in monitoring the quality of care being provided. Note, Theories For Imposing Liability Upon Hospitals For Medical Malpractice: Ostensible Agency and Corporate Liability, 11 Wm. Mitchell L. Rev. 561, 581-583 (1985) (footnotes omitted).

An author discussing our decision in Pamperin also set forth a cogent analysis in support of the application of apparent authority to the hospital/physician context. He stated:

Once the doctrine of apparent agency is firmly in place, it provides [***30] powerful incentives for the hospital to ensure high quality health care. When the hospital incurred no liability for the actions of its independent-contractor [*47] physicians, it had little financial incentive to ensure that those physicians were more than minimally competent and had more than minimal resources at their disposal. With the doctrine of apparent agency in place, the hospital will be held financially responsible, as if it had full control over the independent contractor. This should prompt cost-conscious hospital administrators to do what they can to ensure quality care and the absolute minimum of malpractice awards. Note, Pamperin v. Trinity Memorial Hospital and the Evolution of Hospital Liability: Wisconsin Adopts Apparent

Agency, 1990 Wis. L. Rev. 1127, 1151 (1990) (footnotes omitted).

Finally, Professor Southwick in an article in the Journal of Legal Medicine suggests that:

[I]t is time for the hospital, all of its employees, and all physicians admitted to membership on the medical staff to be insured by the same insurance carrier . . . to reduce the costs and the excessive length of the litigation process . . .. In the [***31] long run [not doing so] is unproductive and very costly to the health care industry. In turn, it is costly to patients. Southwick, Hospital Liability -- Two Theories Have Been Merged, 4 J. Legal Med. 1, 49 (1983).

For the reasons set forth above we conclude that the doctrine of apparent authority can be a basis for a medical malpractice action against a hospital for the negligent acts of independent contractors under any factual situation in which the elements necessary to prove apparent authority exist.

Having concluded that the doctrine of apparent authority extends beyond the emergency room setting, we now must determine whether summary judgment was appropriately granted with respect to this issue. We conclude [*48] an issue of material fact exists as to whether Dr. Port was the apparent agent of Mount Sinai.

In Dr. Port's deposition, when asked about the request for the cardiac consultation he states that "[W]e were asked to evaluate her for the possibility of doing a pericardiocentesis." (Emphasis added.) Furthermore, the Cardiac Consultation Record states that Ruth Kashishian was "referred to us" for evaluation, that "we believe" the patient [***32] is in no impending danger, and that "our plans are" institution of tetracycline in the pericardial sac. One could draw the reasonable inference from this document that it was the cardiology department, or Dr. Port as a member of that department, that was consulted.

Additionally, the consultation record and the "consent to procedures" form found in the record are both printed on Mount Sinai letterhead. The consent form signed by Ms. Kashishian did not identify Dr. Port as an employee of the University of Wisconsin, although in contrast it said he might be assisted by Medical Students from the University of Wisconsin. The consultation record begins with the phrase "Consulting Service: Cardiology."

Lastly, Kashishian submitted an affidavit with attached advertisements that indicate that shortly before Ms. Kashishian entered Mount Sinai Medical Center, the hospital was advertising itself as providing quality health care in specialized areas of medicine, including cardiology. One advertisement stated "[Mount Sinai] [has] an international reputation for excellence in cardiovascular medicine. In fact there's only a handful of hospitals in the country that can come up to our comprehensive [***33] capabilities and our record."

[*49] From the above, we find that a trier of fact could reasonably believe that Dr. Port was acting under the apparent authority of Mount Sinai. A contrary conclusion is also possible. Accordingly, we reverse the court of appeals determination that as a matter of law Dr. Port was not the apparent

agent of Mount Sinai and hold that since a dispute of material fact exists, the question of apparent authority in this case is one for the trier of fact.

III.

We turn now to the issue of whether Mr. Kashishian's failure to timely file a notice of claim with the state pursuant to statute mandated dismissal of Dr. Port from Mr. Kashishian's medical malpractice action. We hold that it does.

Section 893.82(3), Stats. 1983-1984, states that:

No civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney [***34] general written notice of a claim . . ..

Kashishian argues that he may maintain a suit against Dr. Port irrespective of the fact that he did not comply with the notice provisions for one of these three reasons; either: (1) Dr. Port was serving a dual capacity and may be sued as an actual agent of Mount Sinai instead of in his capacity as a state employee; or (2) Dr. Port was serving a dual capacity and may be sued as an apparent agent of Mount Sinai; or (3) because applying the notice [*50] requirements to Kashishian under the facts of this case would deny petitioner his right to due process. We disagree with all three.

Acceptance of Kashishian's first argument requires a finding that Dr. Port was an actual agent of Mount Sinai. We concluded in Part I of this opinion that Dr. Port was not an actual agent of Mount Sinai. Therefore, Kashishian's first argument is without merit.

Likewise, a possible finding that Dr. Port was acting as the apparent agent of Mount Sinai does not permit Kashishian to maintain this suit against Dr. Port absent satisfaction of the notice requirements. The doctrine of apparent authority holds a principal liable for the acts of its agents. The doctrine's [***35] application in this case, should it apply, does not change Dr. Port's status as a state employee, does not change the fact that in treating Ms. Kashishian Dr. Port was acting within the scope of his state employment, and does not negate the notice requirements.

Relying on the Restatement of the Law of Agency (2d), Sections 217B and 359C, Kashishian suggests that a court may not hold a principal liable for the negligent acts of an agent and at the same time dismiss the agent from the action. However, Kashishian's reliance on the Restatement for this assertion is misplaced. The Restatement provides that "[i]f the action is based solely upon the tortious conduct of the agent, judgments on the merits for the agent and against the principal, or judgments of varying amounts for compensatory damages are erroneous." This simply means that a principal cannot be held liable for the acts of the agent if the agent's acts were adjudged not negligent. In this case, Dr Port's negligence is not being determined. He is being dismissed from the action for a failure to file a timely notice of claim. Such a dismissal is appropriate despite the fact [*51] that the suit may be maintained against [***36] Mount Sinai. See Pamperin, 144 Wis. 2d at 215 (Steinmetz, J.,

dissenting) (noting that the statute of limitations had run against the negligent doctors and they could not be joined as defendants. The majority in Pamperin, however, allowed the plaintiffs to proceed with their lawsuit against the hospital).

Lastly, Kashishian claims that he neither knew nor should have known prior to the expiration of the 120-day period established by sec. 893.82., Stats., that Dr. Port was a state employee. Therefore, he asserts that barring this action because the 120-day period expired before notice under sec. 893.82 was given would violate his due process rights. We disagree.

In this case, the alleged negligently caused injury to Ms. Kashishian took place on April 4, 1986. She died on June 18, 1986. On July 27, 1987, the Attorney General wrote the petitioner and informed him that since the respondent, Dr. Port was a University of Wisconsin employee, the state's attorney general would defend Dr. Port in the action. Yet it was not until June 22, 1988 that Kashishian filed his notice of claim to the attorney general. As Dr. Port points out, Kashishian [***37] was well aware of Dr. Port's identity and role in the alleged negligence at the latest on July 27, 1987, but the notice of claim was not filed until June 22, 1988 -- approximately 330 days after counsel had actual knowledge and numerous days after the date counsel was actively investigating the claim by requesting consent to review Ms. Kashishian's medical records. Thus, we need not determine if knowledge of Dr. Port's status as a state employee is required for enforcement of the notice of claim statute, as Kashishian did not comply with the statutory time limits even if the 120-day period began [*52] running on the date that he had actual notice. For the reasons set forth above we conclude that Kashishian's failure to file a timely notice of claim pursuant to statute mandates summary judgment dismissing Dr. Port from this action.

By the Court. -- The decision of the court of appeals is affirmed in part, reversed in part, and cause remanded for further proceedings consistent with this opinion.

CONCURBY: STEINMETZ

CONCUR: STEINMETZ, J. (concurring).

I dissented in Pamperin v. Trinity Memorial, 144 Wis. 2d 188, 423 N.W.2d 848 (1988), because [***38] the court over-extended the doctrine of apparent authority to a radiologist who was an independent contractor. In Pamperin, the plaintiff was unaware of the radiologist's relationship with the hospital or that he even existed, and was unaware that the radiologist would be reading x-rays and giving an opinion to the hospital concerning the plaintiff's condition.

In contrast, in the present case, the patient was fully aware of the doctor's involvement in her treatment. Dr. Steven Port consulted with Ms. Kashishian and alerted her of his decisions concerning her surgery and other health care matters. Moreover, Ms. Kashishian signed a consent form before the operation acknowledging that Dr. Port was one of the doctors performing the procedure. Because Ms. Kashishian had knowledge of the doctor's involvement in her care, this court has properly decided that an issue of material fact exists as to whether Dr. Port was the apparent agent of Mount Sinai.

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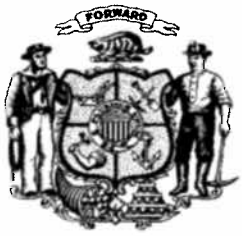

FORWARD

CHAPTER 655

HEALTH CARE LIABILITY AND PATIENTS COMPENSATION

Cross–reference: See definitions in ss. 600.03 and 628.02.

SUBCHAPTER I

GENERAL PROVISIONS

655.001 Definitions. In this chapter:

(1) "Board of governors" means the board created under s. 619.04 (3).

(2) "Claimant" means the person filing a request for mediation under s. 655.44 or 655.445.

(4) "Department" means the department of health and social services.

(6) "Fiscal year" means the period beginning on July 1 and ending on the following June 30.

(7) "Fund" means the patients compensation fund under s. 655.27.

(7t) "Health care practitioner" means a health care professional, as defined in s. 180.1901 (1m), who is an employe of a health care provider described in s. 655.002 (1) (d), (e) or (f) and who has the authority to provide health care services that are not under the direction and supervision of a physician or nurse anesthetist.

(8) "Health care provider" means a person to whom this chapter applies under s. 655.002 (1) or a person who elects to be subject to this chapter under s. 655.002 (2).

(9) "Nurse anesthetist" means a nurse licensed under ch. 441 who is certified as a nurse anesthetist by the American association of nurse anesthetists.

(10) "Patient" means an individual who received or should have received health care services from a health care provider or from an employe of a health care provider acting within the scope of his or her employment.

(10m) "Physician" means a medical or osteopathic physician licensed under ch. 448.

(11) "Principal place of practice" means any of the following:

(a) The state in which a health care provider furnishes health care services to more than 50% of his or her patients in a fiscal year.

(b) The state in which a health care provider derives more than 50% of his or her income in a fiscal year from the practice of his or her profession.

(12) "Representative" means the personal represent spouse, parent, guardian, attorney or other legal agent of a p

(13) "Respondent" means the person alleged to have negligent in a request for mediation filed under s. 655. 655.445.

History: 1975 c. 37, 79; 1977 c. 26 s. 75; 1977 c. 131; 1977 c. 203 s. 106; Order, 88 W (2d) xiii (1979); 1979 c. 124, 185, 355; 1983 a. 189 s. 329 (5); 340; 1987 a. 27, 182, 264, 403; 1989 a. 187; 1991 a. 214; 1993 a. 473.

Medical malpractice panels: The Wisconsin approach. Kravat. 61 MLR

A summary of the new statutes governing medical malpractice. Saichek Oct. 1986.

Recent developments in Wisconsin medical malpractice law. 1974 WLR

Testing the constitutionality of medical malpractice legislation: The Wi medical malpractice act of 1975. 1977 WLR 838. See also: State ex rel. Stry v. Wilkie, 81 W (2d) 491.

655.002 Applicability. (1) MANDATORY PARTICIP Except as provided in s. 655.003, this chapter applies to all following:

(a) A physician or a nurse anesthetist for whom this sta principal place of practice and who practices his or her prof in this state more than 240 hours in a fiscal year.

(b) A physician or a nurse anesthetist for whom Michi a principal place of practice, if all of the following apply:

1. The physician or nurse anesthetist is a resident of this

2. The physician or nurse anesthetist practices his or he fession in this state or in Michigan or a combination of both than 240 hours in a fiscal year.

3. The physician or nurse anesthetist performs more dures in a Michigan hospital than in any other hospital. In thi division, "Michigan hospital" means a hospital located in M gan that is an affiliate of a corporation organized under th of this state that maintains its principal office and a hospital state.

(c) A physician or nurse anesthetist who is exempt un 655.003 (1) or (3), but who practices his or her profession o the scope of the exemption and who fulfills the require under par. (a) in relation to that practice outside the scope exemption. For a physician or a nurse anesthetist who is s to this chapter under this paragraph, this chapter applies o claims arising out of practice that is outside the scope exemption under s. 655.003 (1) or (3).

(d) A partnership comprised of physicians or nurse an tists and organized and operated in this state for the primar pose of providing the medical services of physicians or anesthetists.

(e) A corporation organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists.

(f) A cooperative sickness care association organized under ss. 185.981 to 185.985 that operates a nonprofit sickness care plan in this state and that directly provides services through salaried employes in its own facility.

(g) An ambulatory surgery center that operates in this state.

(h) A hospital, as defined in s. 50.33 (2) (a) and (c), that operates in this state.

(i) An entity operated in this state that is an affiliate of a hospital and that provides diagnosis or treatment of, or care for, patients of the hospital.

(j) A nursing home, as defined in s. 50.01 (3), whose operations are combined as a single entity with a hospital described in par. (h), whether or not the nursing home operations are physically separate from the hospital operations.

(2) OPTIONAL PARTICIPATION. All of the following may elect, in the manner designated by the commissioner by rule under s. 655.004, to be subject to this chapter:

(a) A physician or nurse anesthetist for whom this state is a principal place of practice but who practices his or her profession fewer than 241 hours in a fiscal year, for a fiscal year, or a portion of a fiscal year, during which he or she practices his or her profession.

(b) Except as provided in sub. (1) (b), a physician or nurse anesthetist for whom this state is not a principal place of practice, for a fiscal year, or a portion of a fiscal year, during which he or she practices his or her profession in this state. For a health care provider who elects to be subject to this chapter under this paragraph, this chapter applies only to claims arising out of practice that is in this state and that is outside the scope of an exemption under s. 655.003 (1) or (3).

History: 1987 a. 27; 1991 a. 214.

In an action governed by ch. 655 no claim may be brought by adult children for the loss of society and companionship of an adult parent; s. 895.04 is inapplicable to ch. 655 actions. Dziadosz v. Zimeski, 177 W (2d) 59, 501 NW (2d) 828 (Ct. App. 1993).

In an action governed by ch. 655, no recovery may be had by a parent for the loss of society and companionship of an adult child. Wells Estate v. Mt. Sinai Medical Center, 183 W (2d) 666, 515 NW (2d) 705 (1994).

655.003 Exemptions for public employes and facilities and volunteers. Except as provided in s. 655.002 (1) (c), this chapter does not apply to a health care provider that is any of the following:

(1) A physician or a nurse anesthetist who is a state, county or municipal employe, or federal employe or contractor covered under the federal tort claims act, as amended, and who is acting within the scope of his or her employment or contractual duties.

(2) A facility that is exempt under s. 50.39 (3) or operated by any governmental agency.

(3) A physician or a nurse anesthetist who provides professional services under the conditions described in s. 146.89, with respect to those professional services provided by the physician or nurse anesthetist for which he or she is covered by s. 165.25 and considered an agent of the department, as provided in s. 165.25 (6) (b).

History: 1989 a. 187, 206; 1991 a. 214.

655.004 Rule–making authority. The director of state courts, department and commissioner may promulgate such rules under ch. 227 as are necessary to enable them to perform their responsibilities under this chapter.

History: 1975 c. 37; Sup. Ct. Order, 88 W (2d) xiii (1979); 1987 a. 27; Stats. 1987 s. 655.004; 1989 a. 187 s. 28.

655.005 Health care provider employes. (1) Any person listed in s. 655.007 having a claim or a derivative claim against a health care provider or an employe of the health care provider, for damages for bodily injury or death due to acts or omissions of the employe of the health care provider acting within the scope of his or her employment and providing health care services, is subject to this chapter.

(2) The fund shall provide coverage, under s. 655.27, for claims against the health care provider or the employe of the health care provider due to the acts or omissions of the employe acting within the scope of his or her employment and providing health care services. This subsection does not apply to an employe of a health care provider if the employe is a physician or a nurse anesthetist or is a health care practitioner who is not providing health care services under the direction and supervision of a physician or nurse anesthetist.

(2t) Subsection (2) does not affect the liability of a health care provider described in s. 655.002 (1) (d), (e) or (f) for the acts of its employes.

History: 1985 a. 340; 1987 a. 27; Stats. 1987 s. 655.005; 1989 a. 187; 1991 a. 214; 1993 a. 473.

655.006 Remedy. (1) (a) On and after July 24, 1975, every patient, every patient's representative and every health care provider shall be conclusively presumed to have accepted to be bound by this chapter.

(b) Except as otherwise specifically provided in this chapter, this subsection also applies to minors.

(2) This chapter does not apply to injuries or death occurring, or services rendered, prior to July 24, 1975.

History: 1975 c. 37; 1987 a. 27; Stats. 1987 s. 655.006.

655.007 Patients' claims. On and after July 24, 1975, any patient or the patient's representative having a claim or any spouse, parent or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter.

History: 1975 c. 37, 199; 1983 a. 253.

This chapter was inapplicable to third–party claim based on contract where no bodily injury was alleged. Northwest General Hospital v. Yee, 115 W (2d) 59, 339 NW (2d) 583 (1983).

655.009 Actions against health care providers. An action to recover damages on account of malpractice shall comply with the following:

(1) COMPLAINT. The complaint in such action shall not specify the amount of money to which the plaintiff supposes to be entitled.

(2) MEDICAL EXPENSE PAYMENTS. The court or jury, whichever is applicable, shall determine the amounts of medical expense payments previously incurred and for future medical expense payments.

(3) VENUE. Venue in a court action under this chapter is in the county where the claimant resides if the claimant is a resident of this state, or in a county specified in s. 801.50 (2) (a) or (c) if the claimant is not a resident of this state.

History: 1975 c. 37, 198, 199; 1983 a. 253; 1985 a. 340.

655.01 Forms. The director of state courts shall prepare and cause to be printed, and upon request furnish free of charge, such forms and materials as the director deems necessary to facilitate or promote the efficient administration of this chapter.

History: 1975 c. 37, 199; Sup. Ct. Order, 88 W (2d) xiii (1979); 1989 a. 187 s. 28.

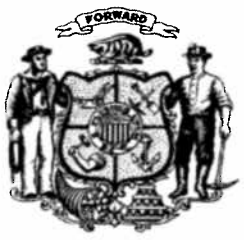
655.013 Attorney fees. (1) With respect to any act of malpractice after July 24, 1975, for which a contingency fee arrangement has been entered into before June 14, 1986, the compensation determined on a contingency basis and payable to all attorneys acting for one or more plaintiffs or claimants is subject to the following unless a new contingency fee arrangement is entered into that complies with subs. (1m) and (1t):

(a) The determination shall not reflect amounts previously paid for medical expenses by the health care provider or the provider's insurer.

(b) The determination shall not reflect payments for future medical expense in excess of $25,000.

(1m) Except as provided in sub. (1t), with respect to any act of malpractice for which a contingency fee arrangement is entered into on and after June 14, 1986, in addition to compensation for


WISCONSIN STATE LEGISLATURE


FORWARD

Ins. Service Corp Bill

STATE OF WISCONSIN

1993 Senate Bill 618

Date of enactment: April 28, 1994
Date of publication*: May 12, 1994

1993 Wisconsin Act 473

AN ACT *to amend* 180.1903 (1), 180.1911 (1), 180.1915, 180.1921 (2), 448.08 (4), 655.005 (2) and 655.23 (3) (a); *to repeal and recreate* 448.08 (4); and *to create* 180.1901 (1m), 180.1903 (3), 180.1903 (4), 655.001 (7t), 655.005 (2t) and 655.27 (3) (a) 4 of the statutes, *relating to* health care professional service corporations and to employe coverage under the patients compensation fund.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 180.1901 (1m) of the statutes is created to read:

180.1901 (1m) "Health care professional" means an individual who is licensed, registered or certified by any of the following:

(a) Board of nursing under ch. 441.

(b) Medical examining board under ch. 448.

(c) Optometry examining board under ch. 449.

(d) Pharmacy examining board under ch. 450.

(e) Psychology examining board under ch. 455.

(f) Examining board of social workers, marriage and family therapists and professional counselors under ch. 457.

SECTION 2. 180.1903 (1) of the statutes is amended to read:

180.1903 (1) One or more natural persons licensed, certified or registered pursuant to any provisions of the statutes, if all have the same license, certificate or registration or if all are health care professionals, may organize and own shares in a service corporation. A service corporation may own, operate and maintain an establishment and otherwise serve the convenience of its shareholders in carrying on the particular profession, calling or trade for which the licensure, certification or registration of its organizers is required.

SECTION 3. 180.1903 (3) of the statutes is created to read:

180.1903 (3) Liability may not accrue to a service corporation or its shareholders solely as a result of a decision to organize under sub. (1) or solely as a result of a decision to include or exclude a category of health care professionals as eligible to become shareholders of the service corporation.

SECTION 4. 180.1903 (4) of the statutes is created to read:

180.1903 (4) Each health care professional, other than a physician or nurse anesthetist, who is a shareholder of a service corporation and who has the authority to provide health care services that are not under the direction and supervision of a physician or nurse anesthetist shall carry malpractice insurance that provides coverage of not less than the amounts established under s. 655.23 (4).

SECTION 5. 180.1911 (1) of the statutes is amended to read:

180.1911 (1) ~~Each~~ Except as provided in s. 180.1913, each shareholder, director and officer of a service corporation must at all times be licensed, certified or registered by a state agency in the same field of endeavor~~, except as provided in s. 180.1913~~ or be a health care professional. An individual who is not so licensed, certified or registered may not have any part in the ownership or control of the service corporation, except that the nonparticipant spouse of a married individual has the rights of ownership provided under ch. 766. A proxy to vote any shares of the service corporation may not be given to a person who is not so licensed, certified or registered.

SECTION 6. 180.1915 of the statutes is amended to read:

180.1915 Contract and tort relationships preserved. Sections 180.1901 to 180.1921 do not alter any contract, tort or other legal relationship between a person receiving professional services and one or more persons who are licensed, certified or registered to render ~~the~~ those professional services and who are shareholders in the same service corporation. Any legal liability which may arise out of the professional service shall be

* Section 991.11, WISCONSIN STATUTES 1991-92: **Effective date of acts.** "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

joint and several among ~~the~~ those shareholders of the same service corporation. A shareholder, director, officer or employe of a service corporation is not personally liable for the debts or other contractual obligations of the service corporation. A service corporation may charge for the services of its directors, officers, employes or agents, may collect such charges and may compensate those who render such personal services.

SECTION 7. 180.1921 (2) of the statutes is amended to read:

180.1921 (2) The report shall show the name and post-office address of each shareholder, director and officer of the service corporation and shall certify that, with the exceptions permitted in s. 180.1913, each shareholder, director and officer is ~~duly~~ licensed, certified, registered or otherwise legally authorized to render the same professional or other personal service in this state or is a health care professional. The service corporation shall prepare the report on forms prescribed and furnished by the secretary of state, and the report shall contain no fiscal or other information except that expressly called for by this section. The secretary of state shall forward report blanks by 1st class mail to every service corporation in good standing, at least 60 days before the date on which the service corporation is required by this section to file an annual report.

SECTION 8. 448.08 (4) of the statutes is amended to read:

448.08 (4) PROFESSIONAL PARTNERSHIPS AND CORPORATIONS PERMITTED. Notwithstanding any other provision in this section, it is lawful for 2 or more physicians, 2 or more podiatrists or 2 or more physical therapists, who have entered into a bona fide partnership for the practice of medicine, podiatry or physical therapy, to render a single bill for such services in the name of such partnership; and it also is lawful for a service corporation ~~of physicians, podiatrists or physical therapists~~ to render a single bill for ~~such~~ services in the name of the corporation; provided that each individual physician, podiatrist or physical therapist ~~rendering~~ that renders billed services ~~so billed for shall be~~ and each individual licensed, registered or certified under ch. 449, 450, 455 or 457 that renders billed services is individually identified as having rendered such services.

SECTION 9. 448.08 (4) of the statutes, as affected by 1993 Wisconsin Acts 107 and .... (this act), is repealed and recreated to read:

448.08 (4) PROFESSIONAL PARTNERSHIPS AND CORPORATIONS PERMITTED. Notwithstanding any other provision in this section, it is lawful for 2 or more physicians or 2 or more podiatrists, who have entered into a bona fide partnership for the practice of medicine or podiatry, to render a single bill for such services in the name of such partnership; and it also is lawful for a service corporation to render a single bill for services in the name of the corporation; provided that each individual physician or podiatrist that renders billed services and each individual licensed, registered or certified under ch. 449, 450, 455 or 457 that renders billed services is individually identified as having rendered such services.

SECTION 10. 655.001 (7t) of the statutes is created to read:

655.001 (7t) "Health care practitioner" means a health care professional, as defined in s. 180.1901 (1m), who is an employe of a health care provider described in s. 655.002 (1) (d), (e) or (f) and who has the authority to provide health care services that are not under the direction and supervision of a physician or nurse anesthetist.

SECTION 11. 655.005 (2) of the statutes is amended to read:

655.005 (2) The fund shall provide coverage, under s. 655.27, for claims against the health care provider or the employe of the health care provider due to the acts or omissions of the employe acting within the scope of his or her employment and providing health care services. This subsection does not apply to an employe of a health care provider if the employe is a physician or a nurse anesthetist or is a health care practitioner who is not providing health care services under the direction and supervision of a physician or nurse anesthetist.

SECTION 12. 655.005 (2t) of the statutes is created to read:

655.005 (2t) Subsection (2) does not affect the liability of a health care provider described in s. 655.002 (1) (d), (e) or (f) for the acts of its employes.

SECTION 13. 655.23 (3) (a) of the statutes is amended to read:

655.23 (3) (a) Except as provided in par. (d), every health care provider either shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state or shall qualify as a self-insurer. Qualification as a self-insurer is subject to conditions established by the commissioner and is valid only when approved by the commissioner. The commissioner may establish conditions that permit a self-insurer to self-insure for claims that are against employes who are health care practitioners and that are not covered by the fund.

SECTION 14. 655.27 (3) (a) 4 of the statutes is created to read:

655.27 (3) (a) 4. For a health care provider described in s. 655.002 (1) (d), (e) or (f), risk factors and past and prospective loss and expense experience attributable to employes of that health care provider other than employes licensed as a physician or nurse anesthetist.

SECTION 15. **Initial applicability.** The treatment of section 655.27 (3) (a) 4 of the statutes first applies to fees set for fiscal years beginning after June 30, 1995.

SECTION 16. **Effective dates.** This act takes effect on the day after publication, except as follows:

(1) The repeal and recreation of section 448.08 (4) of the statutes takes effect on July 1, 1994.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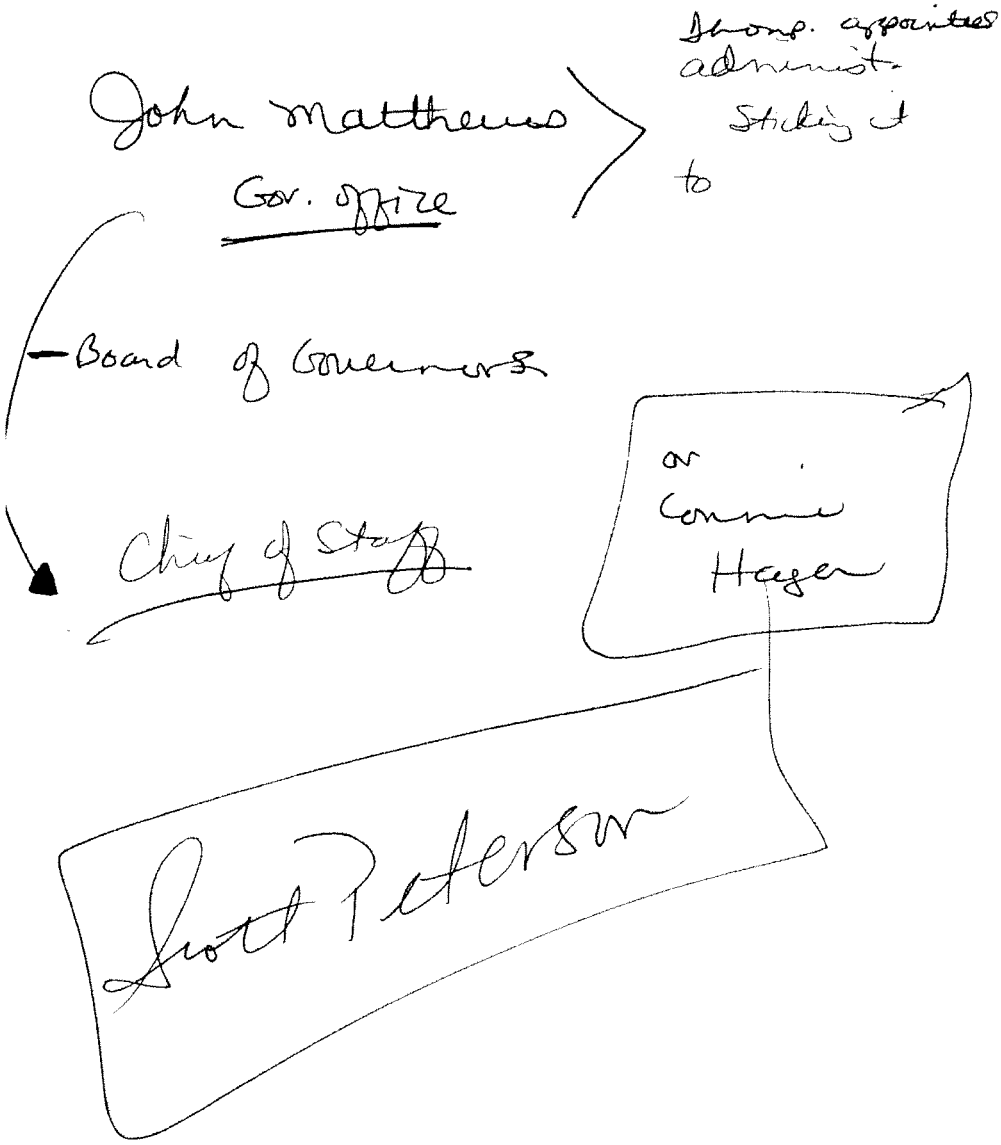

✡ Will all these new practitioners be EMPLOYEES of the corp.?

COVERS

Physicians
Nurse anesthetists } malpractice

Corporation
→ for negligent hiring ?

NOT for Respondeat Superior → employee
Apparent Authority → agent

YES FOR corp. employees 1) w/in SCOPE
2) providing health care

NOT for → employee who is 1) phys.
2) N.A
3) health care practitioner not under direction or supervision.

(corp. could still be liable under reg. but PCF would not cover this.

isn't this simply all the new people we want to let in?

Is an employee always acting under direct supervision & direction so long as they are acting w/in the scope of employment?

3)

6553.01

(1)t Can't a health care practitioner be an employee and have authority to provide health care services but NOT be under the direct supervision and direction of a physician or nurse anesthetist.

So: if dentist in service corp pulls a tooth & is malpractice - even if corp. found liable under reg. hiring, PCF NOT cover.

BUT if Dr. tells Dentist "PULL THAT TOOTH SO I CAN DO "THIS" " & its malp. PCF pays for corp. liability cuz Dentist Acting directly under direction & supervision of Physician.