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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOSEPH J. TADLOCK et al., Plaintiffs and Appellants, v. MERCY HEALTHCARE SACRAMENTO et al., Defendants and Respondents.	C044777 (Super. Ct. No. 01AS00923)

Joseph J. Tadlock went to the emergency room of Mercy San Juan Hospital for treatment for back pain. The emergency room physician who examined him, Alan J. Frueh, M.D., did not order an immediate MRI and, as a result, Tadlock claims he sustained serious injuries, including the loss of bladder and bowel control. Tadlock and his wife sued Dr. Frueh, Mercy San Juan Hospital, Mercy Healthcare Sacramento, and others. Tadlock claimed Dr. Frueh and the other doctors he consulted with failed to properly diagnose and treat him.

The hospital and Mercy Healthcare Sacramento filed a motion for summary judgment on the ground that their "conduct did not fall below the applicable standard of care." The trial court granted the motion on a different ground, concluding that the Tadlocks "fail[ed] to submit admissible evidence that [they] had a reasonable belief that Dr. Frueh was the ostensible agent of Mercy and that they relied upon that ostensible agency."

We conclude the trial court erred because the hospital and Mercy Healthcare Sacramento failed to present evidence that negated the complaint's allegations of ostensible agency and thus the Tadlocks were not required to demonstrate a triable issue of fact on that issue. We reverse.

FACTUAL BACKGROUND

On November 26, 1999, Joseph J. Tadlock went to the emergency room at Mercy San Juan Hospital and was seen by Dr. Frueh. Dr. Frueh took a history from Tadlock and noted that he complained of back pain radiating down his legs, buttocks, and groin area. Tadlock complained of leaking urine and an inability to feel himself urinate. After conducting a physical examination, Dr. Frueh ordered an MRI for Tadlock. After consulting with two other physicians, Dr. Frueh decided to delay the test until the next day. Tadlock was released from the hospital with instructions to return the next day.

Tadlock was ultimately diagnosed with Cauda Equina Syndrome and he lost his bowel and bladder function. It is Tadlock's contention that if the MRI test had been performed sooner and

the condition diagnosed earlier, his injuries would have been less severe.

PROCEDURAL BACKGROUND

I

Complaint

Tadlock and his wife sued Mercy San Juan Hospital, Mercy Healthcare Sacramento,[1] Medical Clinic of Sacramento, Inc., and the physicians involved in his care, including Dr. Frueh. The Tadlocks alleged the above facts and asserted a cause of action for negligence and one for loss of consortium. The Tadlocks pled "each of the Defendants was the agent and employee of each of the remaining Defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment." The hospital defendants filed a general denial.

II

Summary Judgment Motion

In its notice of motion and motion for summary judgment, the hospital defendants stated, "The grounds for this motion are that [the hospital defendants'] conduct did not fall below the applicable standard of care in this instance." The hospital defendants' separate statement of material facts in support of

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1 We shall refer to Mercy San Juan Hospital and Mercy Healthcare Sacramento as the hospital defendants for the sake of simplicity.

the motion contained, in its entirety, the following seven undisputed facts:

1. On November 26, 1999, an MRI technician was available;
2. The MRI technician on duty that day was not called to perform an MRI;
3. Tadlock's "physicians made the decision to postpone scheduling" of the MRI;
4. "None of the physicians involved in the decision to postpone [Tadlock's] MRI were employees of Mercy San Juan Hospital";
5. The nurses on staff at the hospital "provided [Tadlock] with timely neurological assessments and reported changes in [Tadlock's] status to the medical providers when appropriate";
6. Mercy's expert witness "opine[d] that the staff at Mercy San Juan Hospital comported themselves within the standard of care"; and
7. "Nothing that the staff at Mercy San Juan Hospital did or failed to do contributed to the plaintiff's injuries in this case."

In their memorandum of points and authorities in support of the motion, the hospital defendants argued that because they had an MRI technician available and their nurses performed their duties competently, the hospital defendants met the standard of care. Further, the hospital defendants noted "[t]he decision to postpone [Tadlock's] MRI for the following day was made by a group of physicians [who] were not employees of the hospital."

The Tadlocks opposed the motion for summary judgment by arguing that a triable issue of fact existed on the issue of whether Dr. Frueh was an ostensible agent of the hospital defendants. The Tadlocks filed their own "Separate Statement Of Disputed Material Facts" in which they set forth the facts of Tadlock's presentation to the emergency room and Dr. Frueh's examination, treatment, and ultimate decision to postpone the MRI examination. These facts were supported by Dr. Frueh's deposition testimony.[2]

The Tadlocks' separate statement included the following four facts which addressed the issue of ostensible agency:

1. Dr. Frueh worked exclusively at Mercy San Juan Hospital as an emergency room physician;
2. Dr. Frueh was the medical director of a section of the hospital defendants' emergency department;
3. The medical records from Tadlock's emergency room visit all have the name "Mercy San Juan Hospital" and "Mercy Healthcare Sacramento" on them, but do not have the name "Emergency Physician's Medical Group"; and
4. Dr. Frueh's identification badge contains the name "Mercy San Juan Hospital," but not the name of his medical group.

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[2] The Tadlocks' separate statement of disputed facts also included the fact that Dr. Frueh's conduct fell below the appropriate standard of care. The Tadlocks supported this fact with the declaration of an expert medical witness.

To support these facts, the Tadlocks presented Dr. Frueh's deposition testimony and 10 pages of Tadlock's medical records from Mercy San Juan Hospital. In his deposition, Dr. Frueh testified he works for Emergency Physicians' Medical Group, which in turn contracts with various hospitals to provide medical services. Dr. Frueh has provided medical services exclusively for Mercy San Juan Hospital. Further, when on duty, Dr. Frueh wears a badge that contains his name, his picture, and "Mercy San Juan Hospital." All of the medical records used by Dr. Frueh were provided by Mercy San Juan Hospital and show the hospital's name on them, not his employer -- Emergency Physicians' Medical Group. Based on these facts, Tadlock argued a triable issue of material fact existed on the question of whether Dr. Frueh was an ostensible agent of the hospital defendants.

The hospital defendants, in their reply brief, argued the Tadlocks failed to create a triable issue of fact as to the issue of "ostensible agency." The hospital defendants argued the Tadlocks failed to present anything in the form of declaration testimony that the Tadlocks actually relied on the ostensible agency of Dr. Frueh.

The hospital defendants also seized on the language of one of the medical forms tendered by the Tadlocks: The "Conditions Of Admission Or Treatment" form. That form purports to be signed by Tadlock, and in the third paragraph in small print states, "Medical And Surgical Consent: The patient is under the care and supervision of his/her attending physician(s). The

undersigned recognizes that all physicians and surgeons furnishing services to the patient, including the Radiologist, Pathologist, Anesthesiologist and the like, are independent contractors and are NOT employees or agents of the hospital. The undersigned consents to X-ray examination, laboratory procedures, anesthesia, medical or surgical treatment, or hospital services rendered the patient under the general or special instructions of the physician(s)." (A copy of this document is attached to this opinion as appendix A) The hospital defendants contend this form was sufficient, by itself, to demonstrate they had put Tadlock on notice that Dr. Frueh was not their agent and that notice precluded Tadlock from relying on the ostensible agency of Dr. Frueh. The hospital defendants argued the motion should be granted because the Tadlocks presented no evidence of their subjective belief about Dr. Frueh's agency and did not refute the claim that they were put on notice by the consent form.

The trial court issued its tentative ruling concluding that it would grant the motion because the Tadlocks failed to "submit admissible evidence that [Tadlock] had a reasonable belief that Dr. Frueh was the ostensible agent of Mercy and that [he] relied upon that ostensible agency." At oral argument, the Tadlocks' attorney argued that the hospital defendants failed to shift the burden to them to demonstrate anything about agency because the issue of ostensible agency was not in the hospital defendants' moving papers. The Tadlocks also offered to submit a supplemental declaration on the circumstances of the signing of

the consent form, but never followed through on that offer. The trial court confirmed its tentative ruling and entered judgment in favor of the hospital defendants. The Tadlocks appeal.

DISCUSSION

The Tadlocks argue the trial court erred because "Mercy's moving papers failed to establish as a matter of law that the physicians who treated [Tadlock] were not acting as actual or ostensible agents of [the hospital defendants] when such care and treatment was rendered and thus the trial court's finding in that regard and shift of the burden of proof to Plaintiffs based thereon was erroneous." We conclude the hospital defendants failed to negate that Dr. Frueh was their ostensible agent.

I

Standard Of Review

A defendant may move for summary judgment "if it is contended that the action has no merit . . . ." (Code Civ. Proc., § 437c, subd. (a).) "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Id.*, subd. (p)(2).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." (*Id.*, subd. (c).)

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.)

"In undertaking our independent review of the evidence submitted, we apply '"the same three-step process required of the trial court: First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]"' [Citation.]" (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392.)

II

The Complaint And Burden Of The Parties

Here, as to the first step, the complaint alleges that each of the defendants is the agent of the other defendants and was

acting within the course and scope of that agency. The hospital defendants answered with a general denial. Thus, the pleadings put the issue of agency at issue and we must now examine whether the hospital defendants established facts which negated the Tadlocks' contentions and justified a judgment in their favor.

Our Supreme Court has set forth the relative burdens of the parties in the second two steps of our summary judgment analysis. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. (See Evid. Code, § 500.) . . . [¶] Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact . . . . A burden of production entails only the presentation of 'evidence.' (Evid. Code, § 110.) A burden of persuasion, however, entails the 'establish[ment]' through such evidence of a 'requisite degree of belief.' (*Id.*, § 115.)" (*Ibid.*, fn. omitted.)

Thus, the party moving for summary judgment bears the burden of producing sufficient evidence to support its motion *and* the burden of persuading the court, based on the law that governs the particular causes of action or defenses at issue,

that he or she is entitled to judgment as a matter of law based on that evidence. Thus, a defendant must establish that the plaintiff cannot establish an essential element of his or her cause of action; or alternatively, the defendant can present evidence that negates, i.e., disproves an essential element of that cause of action. Until the defendant does this, there is no requirement for the plaintiff to do anything in response. As we shall explain, in this case, the hospital defendants have failed to meet this burden.

III

Ostensible Agency

"A hospital is liable for a physician's malpractice when the physician is actually employed by or is the ostensible agent of the hospital." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103.) We turn to the law on ostensible agency.

Civil Code section 2300 provides, "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civil Code section 2334 further provides, "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof."

The import of these sections was examined in *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448 (*Mejia*) In *Mejia,* the plaintiff went to the emergency room of a

local hospital experiencing neck pain. (*Id.* at p. 1450.) The X-ray technician misread the plaintiff's X-ray and failed to diagnose that she had a broken neck and, as a result, she was discharged. (*Id.* at p. 1451.) The next morning, the plaintiff woke up paralyzed. (*Ibid.*) The plaintiff sued the hospital, the emergency room physician, and the radiologist, who was employed by an independent contractor to the hospital. (*Ibid.*) The trial court granted nonsuit in favor of the hospital at the close of the plaintiff's case based on the conclusion that the radiologist was not the ostensible agent of the hospital. (*Ibid.*) The appellate court reversed. (*Id.* at p. 1461.)

The *Mejia* court explained the two Civil Code sections identified above "require proof of three elements: '"[First] [t]he person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person in relying on the agent's apparent authority must not be guilty of negligence."' [Citation.] Of course, at heart, these three elements are the same as the two elements discussed above: (1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff." (*Mejia*, *supra*, 99 Cal.App.4th at pp. 1456-1457.)

The *Mejia* court analyzed the national trend on the concept of hospital liability for physician conduct. The court noted the first element of ostensible agency is generally "satisfied

when the hospital 'holds itself out' to the public as a provider of care. [Citations.] In order to prove this element, it is not necessary to show an express representation by the hospital. [Citations.] Instead, a hospital is generally deemed to have held itself out as the provider of care, unless it gave the patient contrary notice. [Citations.] Many courts have even concluded that prior notice may not be sufficient to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information." (*Mejia, supra,* 99 Cal.App.4th at pp. 1453-1454.)

On the second issue of reliance, the court stated "reliance, is established when the plaintiff 'looks to' the hospital for services, rather than to an individual physician. [Citations.] However, reliance need not be proven by direct testimony. [Citations.] In fact, many courts presume reliance, absent evidence that the plaintiff knew or should have known the physician was not an agent of the hospital. [Citations.]" (*Mejia, supra,* 99 Cal.App.4th at p. 1454.)

The court concluded, "As should be apparent to an astute observer, there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal

physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician--i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician--ostensible agency is readily inferred." (*Mejia, supra,* 99 Cal.App.4th at pp. 1454-1455.)

"When this standard is applied to the case law governing ostensible agency in the hospital context, it appears difficult, if not impossible, for a hospital to ever obtain a nonsuit based on the lack of ostensible agency. Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. *Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact.*" (*Mejia, supra,* 99 Cal.App.4th at p. 1458, italics added.)

IV

The Hospital Defendants' Motion Did Not Address
Let Alone Negate Ostensible Authority

Here, the hospital defendants argued and the trial court found that the Tadlocks failed to establish a triable issue of fact that they relied on the ostensible agency of Dr. Frueh. The hospital defendants based this contention on the argument that the Tadlocks failed to affirmatively state they relied on the ostensible agency of Dr. Frueh, and that the hospital

defendants put the Tadlocks on notice that Dr. Frueh was not their agent by virtue of the consent form. This argument in the trial court, as well as before us, puts the cart before the horse. Before the Tadlocks had an obligation to produce evidence to establish a triable issue of fact as to the question of ostensible agency, the hospital defendants were obligated to raise that issue and produce evidence to establish that the Tadlocks could not prove some element required for ostensible agency.

In their separate statement of material facts, the hospital defendants merely stated that the allegedly negligent physicians were not their employees. The fact that the hospital did not employ the physicians, however, does nothing to negate ostensible agency. For example, in *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 745-746, Division Six of the Court of Appeal, Second Appellate District, concluded a franchisee real estate broker was not the actual agent of its franchisor, Coldwell Banker. Actual agency requires that the principal has complete or substantial control over the agent. (*Id.* at pp. 745-746.) In that case, there was no evidence of complete or substantial control of the franchisee by the franchisor, thus there was no actual agency. (*Id.* at p. 746.) In the same opinion, however, the court concluded that triable issues of fact remained as to whether the franchisee broker was the ostensible agent of the franchisor. (*Id.* at pp. 747-748.) The test for the ostensible agent focuses on a different set of facts than the test for actual agency, i.e., it

focuses on whether: (1) the person dealing with the agent did so with belief in the agent’s authority; (2) this belief was reasonable and generated by some act or neglect of the principal sought to be charged; and (3) the person relying on the agent’s apparent authority was not guilty of negligence. (*Id.* at p. 747.) Thus, the fact that a person is not an actual agent or employee does not demonstrate he or she is not an ostensible agent.

Here, the hospital defendants’ claim they did not employ Dr. Frueh failed to shift the burden to the Tadlocks to establish a triable issue of fact on the question of ostensible agency. Just as a declaration that a person was not driving a Chevy is insufficient to prove a person was not driving a Ford, so here, the hospital defendant’s declaration Dr. Frueh was not their employee was insufficient to demonstrate he was not their ostensible agent.

V

The Trial Court’s Decision May Not Be Sustained On Other Grounds

The hospital defendants attempt to sustain the trial court’s judgment by relying on the doctrine that a trial court may grant a motion for summary judgment based on an issue not tendered by the moving party if the court gives the party notice and an opportunity to present additional evidence on the subject. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59.) In *Juge*, the plaintiff was injured when he lost control of his bicycle as he rode on a county bike trail. (*Id.* at p. 63.)

He sued the county for negligence and premises liability. (*Ibid.*) The county brought a motion for summary judgment based on its immunity for the design of the path and based upon the assertion that it was not required to use the design criteria contained in a statute enacted after the bike trail was constructed. (*Id.* at pp. 63-64.) In its separate statement of undisputed facts, the county set forth that the plaintiff was traveling less than 12 miles per hour and that the design of the path was safe and proper at that speed. (*Id.* at p. 64.) The plaintiff did not contest the speed of the bicycle, but provided a declaration that the curve was not designed properly for a bicycle traveling at 20 miles per hour. (*Ibid.*) The trial court granted the motion based on the lack of causation, concluding that it was undisputed that the bike was traveling at 12 miles per hour or less and that the curve design was safe for that speed. (*Ibid.*)

We affirmed the trial court's judgment. (*Juge v. County of Sacramento, supra,* 12 Cal.App.4th at p. 73.) We started with the proposition that "section 437c requires the party seeking summary judgment to state with specificity in its moving papers each of the grounds of law upon which the moving party is relying in contending the action has no merit or there is no defense to the action. If the parties' separate statements of material facts and evidence in support thereof include an undisputed material fact which is dispositive of the action, but the moving party has overlooked the legal significance of that fact and has neglected to cite the applicable ground of law as a

basis for summary judgment, the trial court need not address the issue." (*Id.* at p. 68.) However, we further stated that it would "elevate form over substance" if we were to "require the trial court to close its eyes to an unmeritorious claim simply because the operative ground entitling the moving party to summary judgment was not specifically tendered by that party." (*Id.* at p. 69.) Thus, we concluded "the trial court has the inherent power to grant summary judgment on a ground not explicitly tendered by the moving party when the parties' *separate statements of material facts and the evidence in support thereof* demonstrate the absence of a triable issue of material fact put in issue by the pleadings and negate the opponent's claim as a matter of law." (*Id.* at p. 70, italics added.)

As we have already pointed out, on the question of ostensible agency, the question of notice is critical. A hospital is presumed to have cloaked its doctors with ostensible agency when it does not provide notice to its patients that the doctors are not ostensible agents. (*Mejia, supra,* 99 Cal.App.4th at p. 1454.) Further, absent evidence the patient should have known the doctor was not an agent of the hospital, the patient is presumed to have relied on the hospital's agency representation because he went there for treatment. (*Ibid.*) Moreover, unless the evidence is susceptible to only a single inference, the question of agency remains one of fact for the jury. (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 167.)

Here, none of the facts recited in the separate statements of either party addressed the issue of notice to the Tadlocks. The hospital defendants' separate statement of undisputed facts merely stated Dr. Frueh was not an employee of Mercy San Juan Hospital. We have already explained why this was insufficient to shift the burden to the Tadlocks.

To this lone insufficient fact, the Tadlocks statement of disputed facts adds the following: (1) Tadlock went to Mercy San Juan Hospital for treatment; (2) Dr. Frueh worked exclusively at Mercy San Juan Hospital; (3) Dr. Frueh had some supervisory duties of another section of the hospital; (4) the medical records have the hospital's name on them; and (5) Dr. Frueh's identification badge has Mercy San Juan Hospital and not the name of his true employer. Even when these facts are considered, the hospital defendants have not managed to shift the burden to the Tadlocks on the question of ostensible agency.

Finally, we come to the "Conditions Of Admission Or Treatment" form.[3] That form contains a statement that "all

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[3] Because the notice imparted by this sentence is not referenced in either parties' separate statement, the trial court was empowered to ignore it or to consider it in its discretion. (*Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1480-1481.) Here, the court considered this document and found it to be dispositive. We question whether the trial court should have undertaken to examine this document in light of the fact that the hospital defendants did not raise the issue of ostensible agency in their moving papers. However, because we conclude the document, standing alone, does not conclusively demonstrate the Tadlocks should have been on notice, we express

physicians and surgeons furnishing services to the patient, including the Radiologist, Pathologist, Anesthesiologist and the like, are independent contractors and are NOT employees or agents of the hospital." Neither party has provided us with any evidence as to when or how that form was signed, whether the Tadlocks read it, or how much pain Tadlock was in when it was presented to him. In fact, on this record, we do not even know if that document contains Tadlock's signature. Further, the document could have been signed before he was admitted, after he was admitted, or concurrently with his admission. All we know for certain is that document is in Tadlock's "medical records." Viewing the document in the light most favorable to the nonmoving parties, we conclude the mere existence of this document, in and of itself (or combined with the other evidence in this case), is not sufficient to "conclusively indicate[] that [Tadlock] should have known that the treating physician was not the hospital's agent." (*Mejia, supra,* 99 Cal.App.4th at p. 1458.) Thus, hospital defendants failed to negate an element of ostensible agency and "the issue of ostensible agency must be left to the trier of fact." (*Ibid.*)

We reach this conclusion for two additional reasons. First, we note "[m]any courts have even concluded that prior notice may not be sufficient to avoid liability in an emergency room context, where an injured patient in need of immediate

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no opinion as to whether the consideration of this document constituted an abuse of discretion.

medical care cannot be expected to understand or act upon that information. [Citations.]" (*Mejia, supra,* 99 Cal.App.4th at p. 1454.) Agreements concerning the provision of medical treatment are within the category of agreements affecting the public interest. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101.) The courts have carefully scrutinized those agreements and have struck down those that seek to relieve the hospital of liability for the negligence of its employees on the ground that they violate public policy. (*Id.* at pp. 98-102.) As explained by *Tunkl,* "In insisting that the patient accept the provision of waiver in the contract, the hospital certainly exercises a decisive advantage in bargaining. The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital. The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract. As a result, we cannot but conclude that the instant agreement manifested the characteristics of the so-called adhesion contract. Finally, when the patient signed the contract, he completely placed himself in the control of the hospital; he subjected himself to the risk of its carelessness." (*Id.* at p. 102.)

While the "notice" in the consent form the hospital defendants point to here is not a release from their own negligence, the same concerns apply here where the hospital seeks to absolve itself from liability for the actions of the

people manning its emergency room. Our concerns in this regard are most acute in the emergency room context where patients often arrive in pain and cannot reasonably be expected to carefully read and digest a boilerplate admission form and distill from it the kernel of knowledge that the physician who treats them at the hospital is not the hospital's agent.

Second, the nature of this form demonstrates that it did not conclusively impart notice to Tadlock. It is a typical boilerplate form that contains a significant amount of information in small type. *Kaplan v. Coldwell Banker Residential Affiliates, Inc., supra,* 59 Cal.App.4th at page 744, is instructive on this point. There, the plaintiff was a judge and sophisticated in matters of real estate. (*Ibid.*) He hired a Coldwell Banker franchisee but did not notice the disclaimer language printed in small type that the franchisee was an "'independently owned and operated member of Coldwell Banker Residential Affiliates, Inc.'" (*Id.* at p. 744.) The judge sued the franchisee and the franchisor for fraud. (*Ibid.*) In concluding a triable issue of fact existed on the issue of ostensible agency, the court stated, "Appellant, a sophisticated real estate investor and superior court judge, did not notice the small print disclaimer language. Instead, he relied on the large print and believed that he was dealing with Coldwell Banker, i.e., that Coldwell Banker 'stood behind' [the broker]. An ordinary reasonable person might also think that [the broker] was an ostensible agent of Coldwell Banker. We obviously express no opinion on whether a trier of fact will so conclude

or whether appellant was himself negligent." (*Id.* at pp. 747-748.) If a triable issue of fact exists when a judge fails to appreciate a small-type disclaimer in the context of a real estate transaction, then a triable issue of fact must exist when a patient, who is in pain, presents himself to the emergency room and signs a document that contains provisions in small type and in legal language about the agency and employment of the physicians who work there.

CONCLUSION

The hospital defendants failed to meet their burden of producing admissible evidence to negate the question of Dr. Frueh's ostensible agency. Because the hospital defendants failed in that endeavor, the trial court erred in shifting the burden of proof to the Tadlocks and in granting the motion. Our opinion should not be read to hold that proper notice disclaiming the agency of a physician can never be imparted to a patient who enters a hospital emergency room. Nor do we hold that a jury cannot conclude that Tadlock actually received notice in this case. We merely hold that a single signed document containing numerous boilerplate provisions does not establish notice as a matter of law. It is the jury that must ultimately resolve this question.

DISPOSITION

The judgment is reversed. The Tadlocks shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a).)

ROBIE, J.

We concur:

DAVIS, Acting P.J.

HULL, J.