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From Hannola to Albain: The Rise and Fall of Ohio's Hospital Agency by Estoppel Doctrine

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FROM HANNOLA TO ALBAIN: THE RISE AND FALL OF OHIO'S HOSPITAL AGENCY BY ESTOPPEL DOCTRINE

I. INTRODUCTION	635
II. THE CHARITABLE IMMUNITY DOCTRINE AND ITS REPUDIATION	636
III. THE LEGAL DOCTRINES OF AGENCY BY ESTOPPEL AND OSTENSIBLE AGENCY	638
A. <i>Public Policy Justifications Behind Hospital Agency By Estoppel</i>	639
B. <i>Agency By Estoppel</i>	642
C. <i>Ostensible Agency</i>	646
IV. VICARIOUS HOSPITAL LIABILITY IN OHIO	648
A. <i>A History of Vicarious Hospital Liability in Ohio</i>	648
B. <i>Hannola v. City of Lakewood</i>	649
C. <i>Albain v. Flower Hospital</i>	656
V. CONCLUSION	661

I. INTRODUCTION

The role of the hospital in the field of medicine has evolved significantly in recent decades. Modern hospitals no longer merely house patients while physicians practice medicine therein. They now provide a panoply of sophisticated and high-quality medical services which require the skill and expertise of many highly-trained professionals. Like any business enterprise competing for market share, hospitals actively promote these services by cultivating a reputation which portrays them as 24-hour full-service medical institutions.¹

What was once a clear line of demarcation concerning employment status of the treating professional has been considerably blurred. Patients now look to the hospital for emergency medical treatment, and typically receive care from a series of medical professionals whose employment relationships with the hospital are unknown.² This does not pose a problem until a patient is injured by the substandard care of an independent physician who was selected by the hospital to treat the patient, and the hospital is joined as a defendant in the ensuing lawsuit. In such a situation, hospitals, contrary to the public image they have fostered, privately distance themselves as far as possible from the acts of the negligent physician.³ In such instances, courts have intervened in recent years and

¹ See *infra* notes 97-99 and accompanying text.

² See *Ybarra v. Spangard*, 154 P.2d 687, 690 (Cal. 1944).

³ See Jeffrey S. Leonard, Note, *Independent Duty of a Hospital to Prevent Physicians' Malpractice*, 15 ARIZ.L.REV. 953, 953 (1973).

expanded the scope of vicarious hospital liability to forbid hospitals from holding out medical services to the public, while privately placing secret limitations on tort liability that bind the unknowing patient.

This Note will begin with a brief history of vicarious hospital liability. Next, it will examine the elements of two doctrines which are being used to impute such liability to hospitals - agency by estoppel and ostensible agency, also known as apparent agency - and determine how each has been applied by courts across the nation to the hospital in general and the hospital emergency room in particular. Building upon this discussion, the focus will shift to Ohio case law. In particular, there are two seminal cases which represent Ohio's acceptance of hospital agency by estoppel and its subsequent abrogation respectively: *Hannola v. City of Lakewood*⁴ and *Albain v. Flower Hospital*.⁵ This Note will explore *Hannola* and examine how it comports with the core of reasoning concerning agency by estoppel. Next, *Albain* will be scrutinized in order to discern why it departed so drastically from the consensus of jurisdictions on this issue, and whether its conclusion was justified.

II. THE CHARITABLE IMMUNITY DOCTRINE AND ITS REPUDIATION

Historically, hospitals were shielded from tort liability at common law by the Charitable Immunity Doctrine,⁶ which originated in mid-19th century England.⁷ The Charitable Immunity Doctrine barred the application of liability under *respondeat superior*⁸ to hospitals for the negligent

⁴ 426 N.E.2d 1187 (Ohio Ct. App. 1980).

⁵ 553 N.E.2d 1038 (Ohio 1990).

⁶ See, e.g., *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92 (N.Y. 1914) (hospitals were not liable for the torts of salaried medical professionals). The Charitable Immunity Doctrine has also been referred to as "professional skill" immunity. See *Themins v. Emanuel Lutheran Charity Bd.*, 637 P.2d 155, 158 (Or. Ct. App. 1981).

⁷ See *The Feoffees of Heriot's Hosp. v. Ross*, 12 Clark Fin. 507, 8 Eng. Rep. 1508 (1846).

⁸ *Respondeat superior* is Latin for the maxim, "let the master answer." BLACK'S LAW DICTIONARY 1179 (6th ed. 1979). The legal doctrine of *respondeat superior* holds a master liable for the torts of his servant committed within the scope of employment. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958). The test to determine liability is whether the employer had the right to control the physical conduct of the employee's work; if so, liability follows. See *Councell v. Douglas*, 126 N.E.2d 597, 599 (Ohio 1955); RESTATEMENT (SECOND) OF AGENCY § 219. A major exception to this rule involves the employer-independent contractor relationship, which states that an employer is not liable for the torts committed by an independent contractor. See *Councell*, 126 N.E.2d at 599; RESTATEMENT (SECOND) OF TORTS § 409 (1958). However, there are three major exceptions to the independent contractor rule as well. See RESTATEMENT (SECOND) OF TORTS § 411. An employer cannot avoid liability for the tortious conduct of independent contractor under the following circumstances: (1) when the independent contractor is performing certain non-delegable duties as prescribed by law, *id.* at § 416; (2) negligent hiring and retention of independent contractors, *id.* at § 411; and (3) through agency by estoppel and ostensible agency, *Johnson v. Wagner Provision*

acts of its paid employees, thus preventing any pecuniary recovery by injured patients.

There were many policy reasons behind this doctrine. Some of the more prominent included: (1) hospitals did not actively treat patients; they merely housed patients while doctors provided medical services;⁹ (2) hospitals were predominantly non-profit institutions, so it was improper to apply *respondeat superior* because they derived no benefit from the physicians' services;¹⁰ (3) because hospitals relied heavily on donations and volunteer help, any exposure to tort liability would threaten their economic well-being;¹¹ and (4) under the theory of "implied waiver," recipients of donated medical services from the hospital impliedly waived their right to recover damages upon acceptance thereof.¹²

Hospitals' immunity from tort liability however was not absolute. The courts created a distinction between the performance of administrative acts and medical acts by hospital employees.¹³ Liability was imposed for negligence involving purely administrative acts under the rationale that such acts involved the daily operation of the hospital, and not the actual practice of medicine. Personnel who performed such acts were treated as servants of the hospital, thus triggering liability under the doctrine of *respondeat superior*.¹⁴

Both the Charitable Immunity Doctrine and the administrative medical act dichotomy have been abolished in the majority of states across

Co., 49 N.E.2d 925 (Ohio 1943); *Rubbo v. Hughes Provision Co.*, 34 N.E.2d 202 (Ohio 1941); RESTATEMENT (SECOND) OF AGENCY § 267 (agency by estoppel); RESTATEMENT (SECOND) OF TORTS § 429 (ostensible agency). Independent staff physicians are considered to be independent contractors. See RESTATEMENT (SECOND) OF AGENCY § 233, *Comt. a.*

⁹ Note, *Theories For Imposing Liability Upon Hospitals For Medical Malpractice: Ostensible Agency and Corporate Liability*, 11 WM. MITCHELL L. REV. 561, 563-64 (1985) [hereinafter Note, *Theories For Imposing Liability*].

¹⁰ See, e.g., *Taylor v. Protestant Hosp. Ass'n*, 96 N.E. 1089, 1090 (Ohio 1911), overruled by *Avellone v. St. John's Hosp.* 135 N.E.2d 410 (Ohio 1956).

¹¹ See, e.g., *Schloendorff v. Society of New York Hosp.* 105 N.E. at 92 (N.Y. 1914), overruled by *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957). See also William H. Payne, *Recent Developments Affecting A Hospital's Liability for Negligence of Physicians*, 18 S. TEX. L.J. 389, 390 (1977); Note, *Theories For Imposing Liability*, *supra* note 9, at 561 n.9.

¹² See, e.g., *Wilcox v. Idaho Falls Latter Day Saints Hosp.*, 82 P.2d 849 (Idaho 1938), overruled by *Wheat v. Idaho Falls Latter Day Saints Hosp.* 297 P.2d 1041 (Idaho 1956); *St. Vincent's Hosp. v. Stine*, 144 N.E. 537 (Ind. 1924); *Forrest v. Red Cross Hosp.*, 265 S.W.2d 80 (Ky. 1954); *Schloendorff*, 105 N.E. at 93.

The theory of implied waiver is seriously flawed. First, patients never consent to negligent medical treatment. Second, most patients pay for medical treatment at non-profit hospitals, so in reality they are not receiving charitable services. See Leonard, *supra* note 3, at 955 n.9.

¹³ See Payne, *supra* note 11, at 396; Gregory T. Perkes, Note, *Medical Malpractice - Ostensible Agency and Corporate Negligence*, 17 ST. MARY'S L.J. 551, 554 (1986).

¹⁴ See, e.g., *Jones v. City of New York Hosp.*, 134 N.Y.S.2d 779, 781 (N.Y. App. Div. 1954), *rev'd on other grounds*, 143 N.Y.S.2d 628 (N.Y. App. Div. 1955) (hospitals are not liable for the medical malpractice performed by any physician, but are responsible for all administrative acts).

the country.¹⁵ Hospitals are now subject to vicarious liability under a number of doctrines, including *respondeat superior*, non-delegable duties and agency by estoppel. This trend reflects a judicial response to the social and economic realities of the evolution hospitals have undergone in the last thirty years. The genesis of this change is seen most notably in the landmark case *Bing v. Thunig*.¹⁶ Modern hospitals are now institutions which provide high-quality medical services, and are in a position to adequately protect themselves from tort liability with liability insurance.¹⁷ This has led to a shift away from the traditional family doctor and the house call, and toward the full-service hospital.¹⁸

III. THE LEGAL DOCTRINES OF AGENCY BY ESTOPPEL AND OSTENSIBLE AGENCY

This section will examine two exceptions to the independent contractor rule - the doctrines of agency by estoppel and ostensible agency - which have been adopted by courts in recent years to hold hospitals liable in tort actions for the negligence of their staff physicians. Included in this analysis will be a general explanation of the two doctrines, the public

¹⁵ See Payne, *supra* note 11, at 390.

¹⁶ 143 N.E.2d 3, (N.Y. 1957) (repudiated both the Charitable Immunity Doctrine and the administrative/medical act dichotomy). This famous quote from *Bing* perhaps best described the alchemy of the modern hospital.

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals . . . do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or their employees will act on their own responsibility.

Hospitals should . . . shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of *respondeat superior*. The test should be . . . whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent act one of its employees and, if he was, was he acting within the scope of his employment.

Id. at 8. *Accord* Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433 (Mich. 1978); Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, 158 (Or. Ct. App. 1981); Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 974-75 (Wash. Ct. App. 1978).

¹⁷ See Moore v. Bd. of Trustees, 495 P.2d 605, 608 (Nev. 1972) (hospitals are becoming community centers in response to public demand) *cert. denied*, 409 U.S. 879 (1972). See also Leonard, *supra* note 3, at 953.

¹⁸ See Keith B. Hunter, Comment, *Medical Malpractice By Emergency Physicians and Potential Hospital Liability*, 75 KY.L.J. 633, 635 (1986).

policy reasons behind their application to the hospital setting, and an exploration of the individual elements of each doctrine. Last, the doctrines of agency by estoppel and ostensible agency will be compared and contrasted in order to determine precisely how they have been so confused by the courts and thus used so interchangeably.¹⁹

A. Public Policy Justifications of Hospital Agency By Estoppel

Pursuant to this legal trend toward vicarious hospital liability, courts have extended tort liability to situations in which independent physicians were held out by the hospital as its agents or employees to patients who sought treatment from the hospital. Specifically, two very similar and often indistinguishable doctrines - agency by estoppel and ostensible agency - have been used to impute tort liability upon a hospital despite the fact that it had no right to control the actions of the independent physician.²⁰

The emergency room, in particular, has been a primary source of exposure to vicarious hospital liability under agency by estoppel, although it has been applied to other areas of the hospital as well.²¹ This is due to the fact that the emergency room represents a vital link between the community and the hospital, and offers essential and often life-saving medical services.²² When hospitals hold themselves out as providers of

¹⁹ See, e.g., *Jackson v. Power*, 743 P.2d 1376, (Alaska 1987). The court stated, "Although courts and commentators often use these terms interchangeably, they are not theoretically identical." *Id.* at 1380. See also Diane M. Janulis & Alan D. Hornstein, *Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 NEB. L. REV. 689, 696-97 (1985); David A. Beal, Note, *Judicial Recognition of Hospital Independent Duty of Care to Patients: Hannola v. City of Lakewood*, 30 CLEVE. ST. L. REV. 711, 722-23 n.74 (1981).

²⁰ The doctrines of agency by estoppel and ostensible agency are exceptions to the independent contractor rule whereby a principle is liable for independent contractors it holds out as its own agents or employees. See *supra* note 8.

²¹ See, e.g., *Jackson*, 743 P.2d at 1377. Agency by estoppel and ostensible agency have been applied to a panoply of hospital independent contractors, including anesthesiologists, surgeons, pathologists, psychiatrists, radiologists, and cardiologists. See, e.g., *Gregg v. Nat'l. Medical Health Care Serv.*, 699 P.2d 925, 927-28 (Ariz. Ct. App. 1985) (negligence of cardiologist who failed to diagnose the extent of a patient's complications charged to the hospital); *Quintal v. Laurel Grove Hosp.*, 397 P.2d 161 (Cal. 1964); *Seneris v. Haas*, 291 P.2d 915 (Cal. 1955) (cases where hospitals were held vicariously liable for the negligence of an independent anesthesiologist); *Howard v. Park*, 195 N.W.2d 39 (Mich. Ct. App. 1972) (hospital liability for the malpractice of an independent surgeon); *Lundberg v. Bay View Hosp.*, 191 N.E.2d 821 (Ohio 1963) (hospital liable for negligence of an independent pathologist), *overruled on other grounds* by *Oliver v. Kaiser Community Health Found.*, 449 N.E.2d 438 (Ohio 1983); *Simmons v. St. Clair Memorial Hosp.*, 481 A.2d 870, 877 (Pa. Super. Ct. 1984) (hospital which held out an emergency psychiatrist held liable for a patient who committed suicide in the hospital); *Beeck v. Tucson Gen. Hosp.*, 500 P.2d 1153, 1158-59 (Ariz. Ct. App. 1972) (liability imputed to the hospital for a radiologist's negligence).

²² "The emergency department, recognized as one of the hospital's more complex, crucial, and changeable services, is now regarded as a major rather than an ancillary service." Steven E. Pegalis & Harvey F. Wachsman, *Emergency Room Negligence*, TRIAL, May 1980, at 50.

such important services while in reality secretly contracting them out, the courts have determined that it is against public policy to allow hospitals to escape tort liability.²³

The public policy justifications behind the imposition of agency by estoppel and ostensible agency focus on the economics of the hospital as a business entity, but also reflect an attempt to abate the increase of incidents of medical malpractice in recent years.²⁴ First, there is a public policy consideration known as the enterprise liability theory, which involves the proper allocation of risks in operating a business.²⁵ This theory of enterprise liability employs the premise that a business must bear those costs of production attributable to the operation thereof. Otherwise, the enterprise would receive a de facto public subsidy by passing off part of the risks inherent to that particular business to the public.

Hospitals benefit from the appearance of being "full-service" providers of medical care, an integral part of which is the operation of an emergency room. Many patients requiring long-term care come to the hospital through emergency room doors.²⁶ Thus, the presence of an emergency room enhances other departments of the hospital. In addition, there are tax-exemptions available to the hospital for the operation of an emergency room which serve to minimize the losses realized by treating the uninsured.²⁷ Since hospitals derive benefits from an emergency room, it is deemed fair that hospitals bear all the inherent risks in its operation, and not be permitted to contract away the inevitable tort liability.

A second foundation for liability originates from the rationale for the application of vicarious liability in general. Specifically, when two innocent parties incur a loss at the hands of a third party, the loss should fall on the party who created the circumstances which led to it.²⁸ This

²³ See Hunter, *supra* note 18, at 635. As hospitals have modernized, they have contracted out specialized services with outside professionals.

²⁴ See Note, *Theories For Imposing Liability*, *supra* note 9, at 562 n.7.

²⁵ RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (Cmt. to subsection 1); W. PROSSER, PROSSER & KEETON ON TORTS 499, 500 (5th ed. 1984); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, (1961); See also Claire G. Combs, Note, *Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency in Ohio*, 56 U. CIN. L. REV. 711, 717 (1987).

²⁶ See Hunter, *supra* note 18, at 634 n.9. The percentage of a hospital's total admissions which arrive through the emergency room varies, depending on the nature and demographic location of the hospital. In inner-city hospitals about 90% of all admissions arrive through the emergency room. For private hospitals with elective admission, the emergency room accounts for approximately 20% of all admissions.

²⁷ See Rev. Rul. 69-545, 1969-2 C.B. 501(c)(3). See also Nancy R. Levin, *Hospital's Liability for Independent Emergency Room Service*, 22 SANTA CLARA L. REV. 791, 792 (1982).

²⁸ See Fullerton v. Sturges, 4 Ohio St. 529 (1855). "[T]he rule is founded . . . which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury." *Id.* at 535. See also 3 OHIO JUR.3D, Agency § 55 (1978).

often occurs when the independent physician's insurance policy is inadequate to cover the malpractice claim. When the patient incurs an injury as a result of negligence by an independent physician, the hospital should absorb the loss rather than the patient because the hospital created the appearance of an agency relationship which contributed to the loss. The availability of the hospital as an additional defendant ensures that the plaintiff will be fully compensated. Because liability under *respondeat superior* is joint and several, the hospital has the right to seek indemnification from the negligent physician. An ancillary benefit of the indemnification process is that it deflects the underlying issue of compensation to the two culpable parties, i.e., the two defendants. The pressures surrounding the issue of loss-bearing require hospitals to closely scrutinize the conduct of their present physicians, and become increasingly circumspect about future physicians with whom they may contract.

A third reason for holding hospitals vicariously liable involves an attempt to reduce incidents of medical malpractice by creating an additional defendant as a source of compensation. Rather than minimizing occurrences of malpractice by denying a plaintiff the reasonable opportunity to recover, the legal system must ensure that less malpractice occurs in the hospital itself. Hospitals are in a unique position to control the quality of medical care which takes place in their institutions. Imposing direct independent liability on hospitals will serve as a deterrent and will force hospitals to assume a more active role in providing quality medical treatment.²⁹

Most of the criticism surrounding agency by estoppel and ostensible agency cites the "deep pockets" theory as the actual reason for the imposition of vicarious hospital liability.³⁰ This critique however misses the

²⁹ See Leonard, *supra* note 3, at 968. Changes likely to occur include the revision of hospital by-laws, closer scrutiny of the peer review system, and more active participation of the hospital's Board of Directors in medical matters. *Id.* at 968 n.73. But cf. OHIO REV. CODE § 4731.41 (1989):

No person shall practice medicine or surgery, or any of its branches without a certificate from the state medical board; no person shall advertise or announce himself as a practitioner of medicine or surgery or any of its branches, without a certificate from the board; no person not being a licensee shall open or conduct an office or other place for such practice without a certificate from the board; no person shall conduct an office in the name of some person who has a certificate to practice medicine or surgery, or any of its branches; and no person shall practice medicine or surgery, or any of its branches, after a certificate has been revoked, or, if suspended, during the time of such suspension.

Id. In this circumstance, the effect of the statute is to limit the degree to which hospitals may participate in the practice of medicine, and to force them to defer to the private physician regarding purely medical decisions. See Ruth B. Dangel, Comment, *Hospital Liability for Physician Malpractice: The Impact of Hannola v. City of Lakewood*, 47 OHIO ST. L.J. 1077, 1083 (1986).

³⁰ See H. Ward Classen, *Hospital Liability For Independent Contractors: Where Do We Go From Here?*, 40 ARK. L. REV. 469, 495 (1987); Combs, *supra* note 25, at 717.

underlying public policy behind exposing hospitals to liability. Critics are quick to blame the problem of skyrocketing liability insurance on the legal mechanism, which merely allocates liability to the culpable physician or institution.³¹ Instead of merely passing on these increased costs to the consumer and reacting in horror as malpractice awards soar,³² hospitals should take the necessary steps to reduce substandard care when their names begin to appear on case captions of the complaints filed by the injured patients.

B. Agency By Estoppel

The doctrine of agency by estoppel is an exception to the independent contractor rule. It holds hospitals liable for the negligence of independent staff physicians who work therein, despite the fact that the hospital had no right to control the mode and manner of their conduct.³³ Under the doctrine of agency by estoppel, if a hospital represents to a patient that an independent physician is its agent, and the patient relies on such representations to her detriment, the hospital is estopped from denying that the independent physician is its agent.³⁴

A source upon which courts often rely for the elements of agency by estoppel is the Restatement of Agency, § 267 which sets forth that:

One who *represents* that another is his servant or other agent and thereby causes a third person justifiably to *rely* upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.³⁵

³¹ See Combs, *supra* note 25, at 723; Comment, Dangel, *supra* note 29, at 1085.

³² See Classen, *supra* note 30, at 469 n.2.

³³ See *supra* note 8.

³⁴ See *infra* note 35.

³⁵ RESTATEMENT (SECOND) OF AGENCY, § 267 (1958) (emphasis added). The following cases involve vicarious hospital liability and cite § 267 with approval: Jackson v. Power, 743 P.2d 1376, 1380 (Alaska 1987); Street v. Washington Hosp. Ctr., 558 A.2d 690, 692 (D.C. 1989); Irving v. Doctors Hosp. of Lake Worth, Inc., 415 So.2d 55, 58 (Fla. 1982); Richmond County Hosp. Auth. v. Brown, 361 S.E.2d 164, 166 (1987); Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 257 (Ky. 1985); Williams v. St. Claire Medical Ctr., 657 S.W.2d 590, 595 (Ky. 1983); Mehlmán v. Powell, 378 A.2d 1121, (Md. 1977); Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, 159 (Or. Ct. App. 1981); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970 (Wash. Ct. App. 1978); Pamperin v. Trinity Memorial Hosp., 423 N.W.2d 848, 855 (Wis. 1988) (cited §§ 429 & 267 with approval and then applied a common law test which contains the element of reliance). Cf. Vanaman v. Molford Memorial Hosp., Inc., 272 A.2d 718, 722 (Del. 1970) (approving Restatement § 267 and acknowledged the "holding out" theory, but finding that the facts were insufficient to support the conclusion). But see Albain v. Flower Hosp., 553 N.E.2d 1038 (Ohio 1990) (Albain is an aberrational decision which is discussed in detail *infra*, notes 125-160 and accompanying text).

The two primary elements of agency by estoppel most often applied by courts to the hospital emergency room setting are: (1) a representation by the hospital that the independent physician is an agent of the hospital, (2) which causes a patient to rely to her detriment on the apparent agency.³⁶

The majority of courts have not interpreted the first element so narrowly as to mean that the hospital must make an affirmative or express representation to an emergency room patient that her treating doctor is an employee of the hospital.³⁷ Rather, courts have uniformly decided that a "holding out" of the physician by the hospital suffices as a representation. Also, this representation may be made to the public at large.³⁸

In accordance with this interpretation, several factors common to the emergency room setting have been recognized by many courts to determine whether such a holding out has actually occurred. Virtually every jurisdiction looks to see whether the patient looked to the hospital for treatment rather than her personal physician.³⁹ Some of the other prominent factors include: (1) whether the hospital furnished everything necessary for medical treatment except for the physician's actual services;⁴⁰ (2) whether the treatment occurred in the hospital;⁴¹ (3) whether the

³⁶ See, e.g., *Capan v. Divine Providence Hosp.*, 430 A.2d 647, 650 (Pa. Super. Ct. 1980).

³⁷ See *Themins*, 637 P.2d at 159. "An express invitation was not required." *Id.* See also *Paintsville*, 683 S.W.2d at 256:

[T]he cases applying the principle of ostensible agency to the hospital/emergency room physician situation, without exception, do not require an express representation to the patient that the treating physician is an employee of the hospital, nor do they require direct testimony as to reliance. *A general representation to the public is implied from the circumstances.* (emphasis added).

See also *Pamperin*, 423 N.W.2d at 856. It is important to note here that *Paintsville* mislabeled the doctrine it was utilizing as "ostensible agency." Because it cited to Restatement § 267 and required a reliance element, *Paintsville* was applying agency by estoppel. See *Paintsville*, 683 S.W.2d at 257.

³⁸ See, e.g., *Adamski*, 579 P.2d at 979. A holding out occurs "when the hospital acts or omits to act in some way which leads the patient to a reasonable belief he is being treated by the hospital or one of its employees." *Id.*

³⁹ The important distinction is whether or not there was a pre-existing physician-patient relationship. If not, the patient has no knowledge of the status of her treating physician, and is justified in assuming the physician is an agent of the hospital. See *Jackson* 743 P.2d at 1380; *Vanaman*, 272 A.2d at 721; *Street*, 558 A.2d 690, 692; *Richmond*, 361 S.E.2d at 166; *Paintsville*, 683 S.W.2d at 258; *Williams*, 657 S.W.2d at 596; *Mehlman*, 378 A.2d at 1124; *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 433 (Mich. 1978); *Howard v. Park*, 501, 195 N.W.2d 39, 41 (1972); *Hardy v. Brantley*, 471 So.2d 358, 371 (Miss. 1985); *Weldon v. Seminole Mun. Hosp.*, 709 P.2d 1058, 1060 (Okla. 1985); *Smith v. St. Francis Hosp.*, 676 P.2d 279, 282 (Okla. 1985); *Capan*, 430 A.2d at 649; *Adamski*, 579 P.2d at 975; *Pamperin*, 423 N.W.2d at 857. See also *Combs*, *supra* note 25, at 715; *Perkes*, *supra* note 13, at 561.

⁴⁰ This occurs often in emergency room settings. The assumption is that if the hospital provides the facility and all necessary drugs, equipment and support personnel, it must be providing the physician as well. See *Quintal v. Laurel Grove Hosp.*, 397 P.2d 161, 169 (Cal. 1964).

⁴¹ See *Mehlman*, 378 A.2d at 1124; *Howard*, 195 N.W.2d at 41; *Adamski*, 579 P.2d at 978 (citing *Howard*).

hospital provided the physician with an office at the hospital;⁴² (4) whether the hospital chose for and supplied to the patient the treating independent physician;⁴³ and (5) whether the hospital itself billed the patient for the physician's services.⁴⁴ The existence of any number of these factors amounts to a "general representation to the public,"⁴⁵ an open invitation,⁴⁶ or a representation by implication, and fulfills the first element of agency by estoppel.

To satisfy the second element of agency by estoppel - that the patient justifiably relied to her detriment on the appearance of an apparent agency - the courts have developed various observations which comport with the public's reasonable beliefs and expectations concerning emergency room physicians and their relationship to the hospital. The following assumptions amount to objective standards by which the courts scrutinize whether the reliance of the individual patient was reasonable and justified.⁴⁷ The ultimate import of these assumptions is that detrimental reliance is often inferred from the actions and statements of the patient.⁴⁸ First, the public is generally uninformed of the employment status of emergency room professionals and it presupposes that such professionals are agents or employees of the hospital.⁴⁹ One court even went so far as to take judicial notice of this fact.⁵⁰ Second, courts impose no legal duty upon emergency room patients to inquire about or to be aware of this contractual relationship between the physician and the hospital.⁵¹ In fact, many courts have stated that "[i]t would be absurd to require such a patient to be familiar with the law of respondeat superior and so to inquire of each person who treated him whether he is an employee of the hospital

⁴² The logical assumption is that if the physician has an office at the hospital, he is employed by the hospital. See, e.g., *Street*, 558 A.2d 690, 692. See also *Funk v. Hancock*, 498 N.E.2d 490 (Ohio Ct. App. 1985) (listed as a controlling factor the fact that the doctor was on the Board of Directors at the hospital).

⁴³ See *Jackson* 743 P.2d at 1380; *Grewe*, 273 N.W.2d at 433; *Howard*, 195 N.W.2d at 41; *Hardy*, 471 So.2d at 371; *Adamski*, 579 P.2d at 978 (citing *Howard*).

⁴⁴ If the patient receives a bill on the hospital's letterhead, it is a reasonable assumption that the physician is the hospital's agent. See *Quintal*, 397 P.2d at 169; *Howard*, 195 N.W.2d at 41; *Adamski*, 579 P.2d at 978 (citing *Howard*).

⁴⁵ See, e.g., *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

⁴⁶ See RESTATEMENT (SECOND) OF AGENCY § 267 Cmt. A (1957).

⁴⁷ See, e.g., *Richmond County Hosp. Auth. v. Brown*, 361 S.E.2d 164, 166 (Ga. 1987).

⁴⁸ See *Street v. Washington Hosp. Ctr.*, 558 A.2d 690, 692 (D.C. 1989), 692 (general representation is implied from the circumstances). See also *Paintsville*, 683 S.W.2d at 256.

⁴⁹ See *Mduba v. Benedictine Hosp.*, 384 N.Y.S.2d 527, 529 (N.Y. App. Div. 1976); *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 433 (Mich. 1978) (citing *Bing*); *Arthur v. St. Peters Hosp.*, 405 A.2d 443, 447 (N.J. Super. Ct. Low Div. 1979); *Paintsville*, 683 S.W.2d at 258.

⁵⁰ See *Arthur*, 405 A.2d at 447. "This court may take judicial notice that generally people who seek medical help through the emergency room facilities of modern-day hospitals are unaware of the status of the various professionals working there." *Id.* (footnote omitted).

⁵¹ See *Seneris v. Haas*, 291 P.2d 915, 927 (Cal. 1955); *Howard v. Park*, 195 N.W.2d 39; *Themis v. Emanuel Lutheran Charity Bd.*, 637 P.2d 155, 159 (citing *Seneris*). See also *Combs*, *supra* note 25, at 715; *Payne*, *supra* note 13, at 561.

or an independent contractor."⁵² Third, patients who seek emergency medical treatment look to the hospital and not the independent physician for care.⁵³ This expectation reflects the public's recognition of the increased role hospitals have assumed in the medical industry.⁵⁴ Given these assumptions by the public concerning emergency room professionals and their treatment, it is almost axiomatic that the courts infer that a patient justifiably relied to her detriment and impose liability.⁵⁵ Accordingly, most plaintiffs prevail by pleading and proving their ignorance of the complex relationships between the myriad of professionals from whom they have received medical care and the hospital, the entity to which the patient looked for such care.⁵⁶

Courts have found further justification for their interpretations of the elements of agency by estoppel and their subsequent applications to the hospital emergency room setting in Illustration 1 to Restatement § 267, which sets forth as follows:⁵⁷

P, a taxi-cab company, purporting to be the master of the drivers of the cabs, in fact enters into an arrangement with the drivers by which the drivers operate independently. A driver negligently injures T, a passenger, and also B, a person upon the street. P is not liable to B. If it is found that T relied upon P as one furnishing safe drivers, P is subject to liability in an action of tort.⁵⁸

Hence, the taxicab company, by merely holding out its taxicabs to the public, has created the impression to its passengers that the independent drivers are its agents. A passenger detrimentally relies on this representation by soliciting a ride with the company and subsequently receiving an injury through the driver's negligence. The hospital emergency room setting is extremely analogous. Hospitals purport to the public that they

⁵² *Capan v. Divine Providence Hosp.*, 430 A.2d 647, 649 (Pa. Super. Ct. 1980) (citations omitted). See also *Seneris*, 291 P.2d at 927; *Howard*, 195 N.W.2d at 41-42; *Adamski v. Tacoma Gen. Hosp.*, 579 P.2d 970, 978 (Wash. Ct. App. 1978).

⁵³ See *Jackson v. Power*, 743 P.2d 1376, 1380 (Alaska 1987) (citations omitted); *Richmond County Hosp. Auth. v. Brown*, 361 S.E.2d 164, 166 (Ga. 1987); *Edmonds v. Chamberlain Memorial Hosp.*, 629 S.W.2d 28, 31 (Tenn. Ct. App. 1981).

⁵⁴ See *Capan*, 430 A.2d at 649; *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957). See also *supra* notes 16 & 22 and accompanying text.

⁵⁵ See *supra* note 48.

⁵⁶ See *supra* note 39.

⁵⁷ See *Richmond County Hosp. Auth. v. Brown*, 361 S.E.2d 164, 166 (Ga. 1987) (cited with approval the Restatement illustration of the taxicab company).

⁵⁸ RESTATEMENT (SECOND) OF AGENCY § 267, illus. 1 (1958). See *Richmond*, 361 S.E.2d at 166. See also RESTATEMENT (SECOND) OF AGENCY § 267, cmt. a. "The rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an invitation from the defendant to enter into such relations with such servant." *Id.* In the hospital setting, hospitals extend ongoing and continuous invitation to the public to submit themselves to the care and protection of their emergency rooms.

are full-service institutions, an essential part of which is the operation of emergency room services. The public, relying on this representation, looks to the emergency room for treatment and is furnished with an independent physician by the hospital. If the patient is negligently injured, it can be found that she relied upon the hospital to provide her with a competent employee. In such a situation, it makes sense to hold the hospital liable for creating the appearance of an apparent agency.

C. Ostensible Agency

Ostensible agency is a common law doctrine which imputes an agency relationship to a principal who, through an act or omission, causes a third party to reasonably believe that an independent contractor is the agent of the principal.⁵⁹ Ostensible agency is "steeped in principles of estoppel"⁶⁰ and is often used in estoppel situations, even though it requires a less stringent standard than that of agency by estoppel in that detrimental reliance by the third party is not necessary to create ostensible agency.

The landmark case with respect to ostensible agency is *Hill v. Citizens National Trust & Savings Bank of Los Angeles*⁶¹ which provides the following elements of ostensible agency:

- (1) The person dealing with the agent must do so with the belief in the agent's authority and this belief must be reasonable; (2) such belief must be generated by some act or neglect of the principal sought to be charged; and (3) the third person relying on the agent's apparent authority must not be guilty of negligence.⁶²

Another popular source looked to by the courts for the elements of ostensible agency is Restatement (Second) of Torts § 429 which sets forth that:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the

⁵⁹ See *infra* note 62.

⁶⁰ *Stewart v. Midani*, 525 F. Supp. 843, 850 (N.D.Ga. 1981).

⁶¹ 69 P.2d 853, 855 (Cal. 1937). See also *Quintal v. Laurel Grove Hosp.*, 397 P.2d 161, 169 (Cal. 1964); *Seneris v. Haas*, 291 P.2d 915, 927 (Cal. 1955); *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 434 (Mich. 1978); *Adamski v. Tacoma Gen. Hosp.*, 579 P.2d 970, 978 (Wash. Ct. App. 1978). These cases cite the elements of *Hill* with approval. See also *Stanhope v. Los Angeles College of Chiropractic*, 128 P.2d 705, 708 (Cal. Ct. App. 1942) (courts occasionally cite this case as a source for *Hill's* elements of ostensible agency).

⁶² *Hill*, 69 P.2d at 855.

negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.⁶³

In the context of hospital emergency rooms, the courts have recognized the elements of ostensible agency as (1) an omission which causes (2) a reasonable belief that an agency relationship exists.⁶⁴ To satisfy the first element, the courts examine the conduct of the hospital to look for a holding out, and invariably use an analysis identical to that of the first element of agency by estoppel. Furthermore, the courts apply the same factors common to the emergency room which demonstrate a holding out at the same conclusion.⁶⁵

The second element of ostensible agency demands that the emergency room patient form a justifiable belief based on the acts or omissions of the hospital that her treating physician was an agent of the hospital. It calls for a lower standard for liability than its counterpart in agency by estoppel because it does not require a nexus between the two elements; i.e., the patient is not required to change her position in reliance on the conduct of the hospital. Accordingly, a patient's reasonable beliefs are often inferred by the courts by applying expectations of the public's reasonable beliefs to each factual setting.⁶⁶

It is the identity between the elements of agency by estoppel and ostensible agency and the applications thereof which has led courts to confuse the two doctrines, and to employ them virtually interchangeably.⁶⁷

⁶³ RESTATEMENT (SECOND) OF TORTS § 429 (1958). Many state supreme and appellate courts have cited to § 429 for the elements of ostensible agency. See *Jackson v. Power*, 743 P.2d 1376, 1380 (Alaska 1987); *Irving v. Doctors Hosp. of Lake Worth, Inc.*, 415 So.2d 55, 58 (Fla. 1982); *Hardy v. Brantley*, 471 So.2d 358, 370 (Mis. 1985); *Arthur v. St. Peters Hosp.*, 405 A.2d 443, 446; *Mduba v. Benedictine Hosp.*, 384 N.Y.S.2d 527, 529 (N.Y. App. Div. 1976); *Smith v. St. Francis Hosp.*, 676 P.2d 279, 282; *Capan v. Divine Providence Hosp.*, 430 A.2d 647, 648 (Pa. Super. Ct. 1980); *Pamperin v. Trinity Hosp.*, 423 N.W.2d 848, 855 (Wash. 1988).

⁶⁴ See, e.g., *Adamski*, 579 P.2d at 979.

⁶⁵ See *supra* notes 39-44 and accompanying text. Note that the first element of ostensible agency calls for a lower standard for liability than its agency by estoppel counterpart. Whereas agency by estoppel demands some representation, ostensible agency calls for any act or omission. Thus, by merely omitting some key facts which the public in general or the patient in particular should have known, the hospital may incur liability.

⁶⁶ Courts employ the same assumptions as to the public's perceptions of and duties to hospital emergency rooms. See *supra* notes 49-53 and accompanying text.

⁶⁷ The principal difference between ostensible agency and agency by estoppel involves whether there is a nexus between the conduct of the hospital and that of the patient. See *Janulis & Hornstein, supra* note 19, at 670. With ostensible agency, the primary focus is on the conduct of hospital: did the hospital's actions create an apparent agency. The patient need only formulate a reasonable belief based on such an agency. In contrast, agency by estoppel requires a connection between the representations of the hospital and the reliance of the patient; i.e., did the patient actually change his position based on the conduct of the hospital.

Inevitably, the majority of jurisdictions arrive at identical results with either doctrine, making the blur between the two doctrines more of a legal technicality than a critical judicial oversight.⁶⁸

IV. VICARIOUS HOSPITAL LIABILITY IN OHIO

In 1981, Ohio courts joined the growing number of jurisdictions which have utilized agency by estoppel in the hospital emergency room context. In a decision squarely in line with the majority of jurisdictions, an Ohio appellate court in *Hannola v. City of Lakewood*⁶⁹ found that agency by estoppel was applicable in this context. This case promulgated a nine-year line of concurring cases from nearly every Ohio appellate division until the Ohio Supreme Court interceded in 1990 with a heretofore unprecedented interpretation of hospital agency by estoppel in *Albain v. Flower Hospital*.⁷⁰ This section will explore the evolution of vicarious hospital liability in Ohio with a focus on the two cases which most significantly impacted Ohio's application of agency by estoppel to the hospital-physician relationship.

A. A History Of Vicarious Hospital Liability In Ohio

Before 1956, the Charitable Immunity Doctrine was alive, but hardly well, in Ohio. It previously had been eroded by a number of cases, the result of which left hospitals with only partial immunity.⁷¹ In 1956, the Charitable Immunity Doctrine was completely abrogated by the Ohio Supreme Court in *Avellone v. St. John's Hospital*.⁷² The court in *Avellone*

Id. Identical conclusions are reached with either doctrine because when a patient has submitted herself for emergency room treatment based on a holding out of the hospital, courts infer reasonable reliance, which presupposes that a reasonable belief existed. The same conclusions are reached because the analysis of agency by estoppel must travel through that of ostensible agency.

⁶⁸ Many jurisdictions have applied the elements of agency by estoppel under the auspices of ostensible agency or apparent agency. *E.g.*, *Pamperin v. Trinity Hosp.*, 423 N.W.2d 848 (Wisc. 1988). Thus, they are unwittingly applying the stricter estoppel standard, but nevertheless imposing liability.

⁶⁹ 426 N.E.2d 1187 (Ohio Ct. App. 1980).

⁷⁰ 553 N.E.2d 1038 (Ohio 1990).

⁷¹ See *Taylor v. Protestant Hosp. Ass'n*, 96 N.E. 1089 (Ohio 1911) (granted complete charitable immunity to non-profit hospitals). *But see* *Sisters of Charity of Cincinnati v. Duvelius*, 173 N.E. 737 (Ohio 1930) (liability imposed on a non-profit hospital for the negligence of the hospital's elevator operator); *Taylor v. Flower Deaconess Home and Hosp.*, 135 N.E. 287 (Ohio 1922) (liability imposed on a non-profit hospital for failure to use ordinary care in the selection of its servants).

⁷² 135 N.E.2d 410 (Ohio 1956). *Avellone* overruled the following cases: *Taylor*, 96 N.E. 1089; *Rudy v. Lakeside Hosp.*, 155 N.E. 126 (Ohio 1926); *Lakeside Hosp. v. Kovar*, 2 N.E.2d 857 (Ohio 1936) (in part). *See also* *Klema v. St. Elizabeth's Hosp. of Youngstown*, 166 N.E.2d 765 (Ohio 1960) (a non-profit hospital is liable for the negligence of its employees, regardless of whether said acts are admin-

held that a non-profit hospital is liable for the torts of its servants under the doctrine of *respondeat superior*.⁷³ *Avellone* paved the way for cases like *Lundberg v. Bay View Hospital*,⁷⁴ which represents the first Ohio case to apply principles of estoppel to the hospital context. Specifically, *Lundberg* held that a hospital was estopped from denying responsibility for the negligent acts of a pathologist where the hospital "by its conduct" represented that the physician was its employee.⁷⁵

B. *Hannola v. City of Lakewood*

In *Hannola v. City of Lakewood*,⁷⁶ the Ohio Court of Appeals for the Eighth Appellate District held that a genuine issue of material fact existed as to whether a hospital was vicariously liable for the medical malpractice of an independent physician which occurred in the hospital's emergency room. The *Hannola* court applied three legal theories to find that liability may exist: *respondeat superior*, non-delegable duty, and agency by estoppel. Because this Note does not challenge any other theories of vicarious hospital liability, this analysis will focus exclusively on *Hannola's* application of the doctrine of agency by estoppel.

Hannola involved a case of emergency room negligence not unlike other cases from the majority of jurisdictions which have adopted agency by estoppel.⁷⁷ In *Hannola*, the patient arrived at Lakewood Hospital requiring emergency room treatment and died allegedly as a result of negligence which occurred at the hands of a physician-employee of West Shore Medical Care Foundation.⁷⁸ The executrix of the decedent's estate brought an action against the hospital and the City of Lakewood in addition to the physician, alleging that Lakewood Hospital had created an appearance that the physician was an agent of the hospital and that the decedent

istrative or medical). See also OHIO REV. CODE § 2743.02(2)(B) (1989) (legislative codification of the repudiation of the Charitable Immunity Doctrine insofar as all government hospitals are concerned). The code states:

The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents from them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter.

Id.

⁷³ *Avellone*, 135 N.E.2d at 414. The *Avellone* court examined three theories upon which Ohio had historically relied to grant charitable immunity to hospitals: (1) the trust fund theory; (2) the implied waiver theory; and (3) a general public policy theory. *Id.* at 413. See also *supra* notes 9-12 and accompanying text. Next, the court, by recognizing the legal, societal and economic realities of the changing role of hospitals, distinguished each theory. *Id.* at 414-17. See also *supra* note 16 and accompanying text.

⁷⁴ 191 N.E.2d 821 (Ohio 1963).

⁷⁵ *Id.* at 823.

⁷⁶ 426 N.E.2d 1187 (Ohio Ct. App. 1980).

⁷⁷ See *supra* note 35.

⁷⁸ *Hannola*, 426 N.E.2d at 1188. West Shore Medical Care Foundation was an independent professional organization with whom the City of Lakewood had contracted to furnish emergency room services at the hospital. *Id.*

relied on such an appearance.⁷⁹ Lakewood Hospital and the City of Lakewood filed motions for summary judgment, claiming that they were not liable for the doctor's negligence because he was an independent contractor.⁸⁰ The lower court granted the defendants' motion for summary judgment, and the plaintiff appealed.⁸¹

In finding that issues of fact existed as to whether the independent physician was the apparent agent of Lakewood Hospital, the *Hannola* Court stated that the hospital "held itself out" as a full-service institute, an essential component of which was the emergency room, and that the public was not informed otherwise.⁸² It was the patient's lack of knowledge, combined with his submission for treatment by the physician furnished by the hospital, which formed the basis of the reliance. *Hannola* properly observed that the public assumes that an emergency room is part of a hospital, when in reality, frequently such is not the case.⁸³ The emergency room in this case was actually West Shore Medical Care Foundation, not Lakewood Hospital.

In its decision, the *Hannola* Court examined Ohio's common-law standards of agency by estoppel found in a line of cases involving the mercantile trade;⁸⁴ specifically, *Rubbo v. Hughes Provision Co.*⁸⁵ and *Johnson v. Wagner Provision Co.*⁸⁶ In *Rubbo*, the Ohio Supreme Court held that agency by estoppel exists where a proprietor advertises goods for sale at his store, a customer relying on the advertisement purchases said goods, and is injured thereby only to find that the store was leased to another.⁸⁷ In such a case, the proprietor is estopped to deny that the lessor is not his agent.⁸⁸

Rubbo, quoting *Globe Indemnity Co. v. Wassman*,⁸⁹ explicitly qualified the representation element by stating that:

Representations need not be made to the plaintiff directly, but that "it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby."⁹⁰

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1189.

⁸² *Id.* at 1190.

⁸³ *Hannola*, 426 N.E.2d 1187, 1190 (Ohio Ct. App. 1980).

⁸⁴ It is interesting to note that the court applied only existing Ohio law, and did not look to the RESTATEMENT (SECOND) OF AGENCY, § 267 (1957) for agency by estoppel standards. *But see* *Albain v. Flower Hosp.*, 553 N.E.2d 1038 (Ohio 1990) (The *Albain* court used § 267 in conjunction with Ohio case law.).

⁸⁵ 34 N.E.2d 202 (Ohio 1941).

⁸⁶ 49 N.E.2d 925 (Ohio 1943).

⁸⁷ *Rubbo*, 34 N.E.2d at 203.

⁸⁸ *Id.*

⁸⁹ 165 N.E. 579 (Ohio 1929) (statements made at a public meeting are representations if they induce a change of position by the claimants).

⁹⁰ *Rubbo*, 34 N.E.2d at 205 (emphasis by *Rubbo*). This quote was originally made by Judge Quain of the Queens' Bench in *Swift v. Winterbotham*, 8 L.R., Q.B. 244 (1872/1873).

Thus, *Rubbo* allows for general representations made by the principal which were directed to the public, rather than requiring specific representations, or representations to the particular plaintiff. In *Johnson*, the Ohio Supreme Court applied a similar standard to that of *Rubbo* by stating that a customer's reliance may be induced by an advertisement. *Johnson* also distinguished ostensible agency.⁹¹ "The doctrine of agency by estoppel . . . rests upon the theory that one has been led to rely upon the appearance of agency to his detriment. It is not applicable where there is no showing of induced reliance upon an ostensible agency."⁹²

Hannola interpreted *Rubbo* and *Johnson* to find that the hospital's holding out to the public of emergency room services satisfied the first element of agency by estoppel.⁹³ Specifically, the *Hannola* Court stated that "[b]y calling itself a 'hospital' and by being a full-service hospital including an emergency room as part of its facilities, an institution makes a special statement to the public when it opens its emergency room to provide emergency care for the public."⁹⁴

Hannola also stated that the hospital created the appearance to the public that an agency relationship existed.⁹⁵ When this fact is coupled with a patient's lack of meaningful choice, which is limited to the most proximate hospital, and the facility's selection of the treating physician, induced reliance by the patient is present, therefore satisfying *Johnson*.

It is important to note that the standard contained in *Rubbo* is more narrow than that of *Hannola*. Although the same principal elements of representation and reliance are present in the former cases, the representations by the principal in *Rubbo* were express in that there were advertising campaigns directed to the public. *Hannola* involved the creation of the appearance of an agency through an open invitation to the public and by providing everything except the actual services.⁹⁶

Hannola's interpretation of agency by estoppel cannot be viewed as over-expansive, however. The advertising characteristics of the mercantile and hospital industries are easily distinguishable. While both industries make public statements to attract business, the two entities employ different means to achieve their results. The nature of the hospital emergency room is such that massive advertising campaigns simply are not necessary.

First, there is virtually no competition for emergency room services. The existence of such medical services is structured according to regional or territorial demands which directly relate to proximity to the hospital. In spite of this, hospitals strive to maintain a degree of visibility within

⁹¹ *Johnson v. Wagner Provision Co.*, 49 N.E.2d 925, 928 (Ohio 1943).

⁹² *Id.* at 926.

⁹³ *Hannola v. City of Lakewood*, 426 N.E.2d 1187, 1190 (Ohio Ct. App. 1980).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *supra* note 40 and accompanying text.

a community.⁹⁷ For example, private hospitals cultivate their reputations for high quality medical services by actually advertising their services.⁹⁸ Non-profit hospitals also achieve a degree of visibility in the community through events like fundraising drives, public service campaigns, and community relations programs.⁹⁹ All these acts serve as public statements which enhance the hospital's reputation for high-quality emergency room treatment, but are hardly of the nature and degree utilized in the mercantile industry.

Second, the emergency room patient often does not have a choice of hospitals; the closest facility is often the most desirable. *Hannola* found this fact to be an important public policy concern.¹⁰⁰ In contrast, the consumer of a mercantile concern has an opportunity to choose from many enterprises. In both scenarios, the hospital patient and store consumer have been induced to rely on the presence of an agency relationship. In the latter, the consumer's reliance led her to patronize the particular store and to her injury. In the former, because the public has no meaningful choice concerning emergency room treatment, a patient must rely on the hospital to furnish a physician. Accordingly, it becomes all the more imperative that hospitals are what they purport to be, and not be allowed to secretly isolate themselves from liability. The fact that the patient would not have sought treatment from another hospital is not important; what is significant is the fact that the patient sought and expected treatment from an employee of the hospital, not an independent physician. What is more, the hospital patient is possibly staking her life on this appearance of agency created by the hospital. Therefore, the reliance standard of *Hannola* is well within the ambit of *Rubbo*, considering its context.

The court in *Hannola* also distinguished itself from a case decided by the Ohio Supreme Court which addressed vicarious hospital liability and the issue of agency by estoppel.¹⁰¹ *Cooper v. Sisters of Charity of Cincinnati, Inc.*¹⁰² In *Cooper*, the court dismissed the case against all defendants, including the hospital, on their motion for a directed verdict because proximate cause was not demonstrated by the plaintiff.¹⁰³ Specifically, the plaintiff did not present sufficient evidence to demonstrate that the patient probably would have survived had the treating physician properly diagnosed his condition.¹⁰⁴ Thus, the agency by estoppel issue was pre-

⁹⁷ See, e.g., *Hardy v. Brantley*, 471 So.2d 358, 371 (Miss. 1985). "We notice a marked increase in advertisement and other forms of solicitations of patients as hospitals compete for the health-care dollar." *Id.* See also *Leonard*, *supra* note 3, at 967.

⁹⁸ *Leonard*, *supra* note 3, at 967.

⁹⁹ *Id.*

¹⁰⁰ *Hannola v. City of Lakewood*, 426 N.E. 2d 1187, 1190 (Ohio Ct. App. 1980).

¹⁰¹ *Id.* at 1192-93 n.2.

¹⁰² 272 N.E.2d 97 (Ohio 1971).

¹⁰³ *Cooper*, 272 N.E.2d at 104.

¹⁰⁴ *Id.*

empted and became moot because there was no liability. Accordingly, *Cooper* did not perform a protracted analysis of the issue, although it did acknowledge the doctrine of agency by estoppel at the end of the case in dicta: "[T]he practice of medicine by a licensed physician in a hospital is not sufficient to create an agency by estoppel, as alleged by appellant. Nowhere is 'induced reliance' shown by appellant, as required by *Johnson v. Wagner Provision Co.* . . . to establish such a relationship."¹⁰⁵

Hannola set forth two grounds which demonstrated that it was not an impermissible departure from *Cooper*.¹⁰⁶ First, there was a procedural distinction between the two cases in that *Cooper* involved a motion for a directed verdict and *Hannola* a motion for summary judgment. Although *Hannola* did not explicitly point this out, the standards for motions for a directed verdict and summary judgment are identical: there must be an absence of any genuine issue of material fact.¹⁰⁷ After review of the record, *Hannola* determined that "there remain significant issues of fact to be determined on the issue of . . . induced reliance . . ."¹⁰⁸ However, in *Cooper*, the plaintiff made no showing in accordance with the induced reliance standard of *Johnson*. Although the same theory of liability was used - agency by estoppel - it is wrong to presuppose that the plaintiffs in each case relied upon and pleaded identical facts. Hence, the conclusion in *Cooper* that induced reliance can *never* be shown by a hospital is a non-sequitur, and there is no conflict between *Hannola* and *Cooper*: a plaintiff must make a showing that she was induced to rely on the holding out by the hospital in order to establish that a genuine issue of material fact exists as to agency by estoppel.¹⁰⁹

Second, *Hannola* observed that *Cooper* did not consider all pertinent public policy issues; specifically, that patients were induced to rely on the reputation of full-service hospitals which had emergency rooms on the premises.¹¹⁰ This argument flows logically from *Hannola*'s first distinc-

¹⁰⁵ *Id.* See also *Freeman v. Holzer Medical Ctr.*, No. 88-CA-22, 1989 Ohio App. LEXIS 3834 (Ohio Ct. App. Sept. 27, 1989); *Griffin v. Matthews*, 522 N.E.2d 1100, 1102 (Ohio Ct. App. 1987); *Funk v. Hancock*, 498 N.E.2d 490, 494 (Ohio Ct. App. 1985); *Stratso v. Song*, 477 N.E.2d 1176, 1186 (Ohio Ct. App. 1984); *Hannola v. City of Lakewood*, 426 N.E.2d 1187, 1193, n.2 (Ohio Ct. App. 1980). These cases observed that because the Supreme Court's argument did not proceed past the proximate cause argument, the agency by estoppel argument in *Cooper* was mere dicta. Even so, the courts still looked for induced reliance when examining the records in summary judgment proceedings concerning claims of agency by estoppel. See *Hannola*, 426 N.E.2d at 1189; *Funk*, 498 N.E.2d at 495.

¹⁰⁶ *Hannola*, 426 N.E.2d at 1193 n.2.

¹⁰⁷ See *Celotex v. Catrett*, 477 U.S. 317, 322 (1986) (as cited in *Combs*, *supra* note 25, at 723).

¹⁰⁸ *Hannola*, 426 N.E.2d at 1193.

¹⁰⁹ See, e.g., *Freeman* 1989 Ohio App. LEXIS 3834, at *6 (the plaintiff presented evidence which tended to prove induced reliance). But see, e.g., *Combs*, *supra* note 25, at 723 (wrongly assumed that *Cooper* stood for the proposition that a showing of induced reliance could never be made rather than fact that the plaintiff merely did not establish a genuine issue of material fact as to induced reliance).

¹¹⁰ *Hannola*, 426 N.E.2d at 1193.

tion: because *Cooper* dismissed the case on the proximate issue and only stated in dicta that the plaintiff did not show induced reliance, it was never obligated to address the public policy arguments.

Another important fact which further distances *Hannola* from *Cooper* is that the Ohio Supreme Court overruled all petitions to certify the record in *Hannola*, and thereby gave it tacit approval.¹¹¹ If the Court had felt there was any conflict between the two cases, it had ample opportunity to review the record of *Hannola* and overrule it. But because the court remained silent, the only logical inference is that the court felt the two cases were compatible.

Lastly, it must be pointed out that *Hannola* concurred with the *Cooper* statement that "the mere practice of medicine by a licensed physician in a hospital is not sufficient to create an agency by estoppel."¹¹² This is axiomatic. Hospitals, pursuant to the general rule concerning independent contractors, are not held vicariously liable for the negligence of any independent physician.¹¹³ But because of the unique circumstances surrounding the operation of an emergency room, namely that there is no preexisting physician-patient relationship, hospitals often create an apparent agency with an independent contractor who injures a patient. Thus, liability should follow accordingly.¹¹⁴

Further solidifying *Hannola* is the line of cases from other Ohio courts of appeal which have adopted *Hannola's* application of agency by estoppel.¹¹⁵ One leading case is *Stratso v. Song*.¹¹⁶ *Stratso* approved of *Hannola*,

¹¹¹ See *Freeman* 1989 Ohio App. LEXIS 3834, at *5 (observed that the court also refused to certify the records of *Stratso* and *Funk*).

¹¹² *Hannola*, 426 N.E.2d at 1193.

¹¹³ See *supra* note 8.

¹¹⁴ See *supra* note 8.

¹¹⁵ See *Nicholson v. Landis*, No. 1404, 1990 Ohio App. LEXIS 1121 (Ohio Ct. App. Feb. 27, 1990); *Freeman v. Holzer Medical Center*, No. 88-CA-22, 1989 Ohio App. LEXIS 3834 (Ohio Ct. App. Sept. 27, 1989); *Mason v. Labig*, No. 87-CA-91, 1989 Ohio App. LEXIS 2596 (Ohio Ct. App. June 29, 1989); *Tompkins v. McGinnis*, No. CA-88-36, 1989 Ohio App. LEXIS 2746 (Ohio Ct. App. June 27, 1989); *Ferguson v. Allied Anesthesia, Inc.*, No. 88AP-483, 1989 Ohio App. LEXIS 1831 (Ohio Ct. App. May 16, 1989); *Whitlow v. Good Samaritan Hosp.*, 536 N.E.2d 659 (1987); *Goodman v. Mercy Hosp.*, No. 13-85-3 (3d App. Dist. Dec. 12, 1986); *Funk v. Hancock*, 498 N.E.2d 490, 490 (Ohio Ct. App. 1985); *Stratso v. Song*, 477 N.E.2d 1176 (Ohio Ct. App. 1984). Compare *Griffin v. Matthews*, 552 N.E.2d 1100, 1100 (Ohio Ct. App. 1987) (recognized agency by estoppel, but opined that no induced reliance was shown because plaintiff did not demonstrate a genuine issue of material fact in relying on the affidavit of the director of the paramedic services. The court felt that an affidavit from a paramedic who actually transferred the patient, or from any family member, would have created an issue of fact concerning induced reliance). But see *Smith v. Timken Mercy Medical Center*, No. CA-6006 (5th App. Dist. Feb. 8, 1983) (court held that *Hannola* did not apply, and refused to extend agency by estoppel to all physicians who were granted staff privileges. The court concurred with *Cooper* and *Hannola* in that "the mere practice of medicine by a licensed physician is not sufficient to create an agency by estoppel." *Smith*, slip op. at *5 (citing *Hannola*, 426 N.E.2d at 1190 n.2)).

¹¹⁶ 477 N.E.2d 1176 (Ohio Ct. App. 1984). *Stratso* involved the alleged negligence of an anesthesiologist which caused the patient to suffer brain damage and chronic hepatitis due to massive blood loss. *Id.* at 1180.

and then extended it outside the emergency room to hold that a hospital who induces a patient to rely on an independent contractor-anesthesiologist is estopped to deny that an agency relationship existed.¹¹⁷ *Stratso* also held that demonstrating induced reliance is a factual issue, which enables a plaintiff to withstand a motion for summary judgment on the reliance issue by submitting evidence as to her personal beliefs and statements concerning the hospital.¹¹⁸ Furthermore, the *Stratso* Court embraced *Hannola's* concept of induced reliance. In particular, the patient who looked to the hospital for medical care relied on the hospital's choice of anesthesia services because such services appeared to be furnished by the hospital.¹¹⁹

Another prominent Ohio appellate court case which acknowledged *Hannola* was *Funk v. Hancock*.¹²⁰ The *Funk* court expanded *Hannola* by holding that material facts existed as to whether a hospital may be held vicariously liable for the negligence of a consulting physician called in by the emergency room physician.¹²¹ The *Funk* Court found the following facts to be dispositive: (1) that the hospital provided the physician for the patient; and (2) that the physician maintained staff privileges at and served on the board of directors of the hospital.¹²²

In short, *Hannola's* interpretation of agency by estoppel in the context of hospital/emergency room malpractice falls squarely in line with the overwhelming majority of jurisdictions which have addressed the topic.¹²³ It recognizes the disparity between the public perception of the hospital emergency room fostered by hospitals, and the consequences to the individual patient of the secret contractual reality between the hospital and the emergency room. It also acknowledges that sound public policy should dictate that hospitals be barred from escaping vicarious liability through such hidden contractual relationships. Furthermore, in the line of cases in Ohio which confronted the issue of agency by estoppel, all but one appellate district have concurred with *Hannola*, despite the fact that they were not bound by *Hannola* and were free to decide otherwise.¹²⁴ When the majority of jurisdictions across the nation and *Hannola's* progeny are considered, there is but one possible conclusion: *Hannola* was decided consistently with the proper interpretation of the doctrine.

¹¹⁷ *Id.* at 1186. Applying agency by estoppel to areas of the hospital outside the emergency room, especially to the anesthesiologist, is not uncommon. See also *supra* note 21.

¹¹⁸ *Id.* at 1186.

¹¹⁹ *Id.* at 1187.

¹²⁰ 498 N.E.2d 490 (Ohio Ct. App. 1985). In *Funk*, the treating physician negligently cast a compound fracture of the patient's arm without debridement and sufficient follow-up treatment, which resulted in the arm being amputated. *Id.* at 492.

¹²¹ *Id.* at 495.

¹²² *Id.*

¹²³ See cases cited *supra* notes 35, 39 and 63.

¹²⁴ See *Smith v. Timken Mercy Medical Ctr.*, No. CA-6006, slip op. at 5 (5th App. Dist. Feb. 8, 1983).

C. Albain v. Flower Hospital

In *Albain v. Flower Hospital*,¹²⁵ the Ohio Supreme Court rejected *Hannola* and thereby significantly narrowed the application of agency by estoppel in the context of hospital emergency room relationships.¹²⁶ Specifically, *Albain* held that a plaintiff must prove that the hospital made express representations which led her to believe that an independent physician was an agent working under the hospital's authority, and that she justifiably relied to her detriment on such representations.¹²⁷ In addition, the court repudiated *Hannola's* application of the doctrine of *respondeat superior*,¹²⁸ and *Hannola's* imposition upon hospitals of a nondelegable duty to assure the absence of negligence in the medical treatment provided by its staff physicians.¹²⁹ *Albain* preserved the duty of a hospital to "exercise of due care in the granting of staff privileges, and the continuation of such privileges."¹³⁰ Again, the discussion of this case will be confined to the issue of agency by estoppel.

Albain involved a fact-pattern typical of many emergency room liability cases. An out-of-town patient who was eight months pregnant, Sharon Albain, was experiencing episodes of vaginal bleeding, and looked to Flower Hospital for emergency medical care.¹³¹ The hospital supplied her with an on-call independent physician, whose alleged negligent treatment resulted in the asphyxiation death of the patient's full-term fetus.¹³²

The plaintiff filed a wrongful death action against the hospital as well as the independent physician, claiming that the physician was the apparent agent of the hospital.¹³³ The trial court granted the hospital's motion for summary judgment, but the Ohio Court of Appeals reversed, stating that issues of material fact existed as to whether there was an agency relationship between the hospital and the independent physician.¹³⁴ The case came before the Ohio Supreme Court upon a motion to certify the record.

¹²⁵ 553 N.E.2d 1038 (Ohio 1990).

¹²⁶ *Id.* at 1044.

¹²⁷ *Albain*, 553 N.E.2d at 1049-50.

¹²⁸ *Id.* at 1044. Specifically, *Albain* rejected *Hannola's* theory that hospitals reserve the right to control the mode and manner of the physical acts of their staff physicians, and thus are liable under *respondeat superior*. See *supra* note 8.

¹²⁹ *Albain*, 553 N.E.2d at 1048. *Albain* referred to the application of this non-delegable duty as a "misdirected attempt to circumvent the necessity of proving agency by estoppel . . ." *Id.* at 1047. *Hannola* imposed this duty while also recognizing that "the mere practice of medicine in a hospital by a doctor . . . is not of itself sufficient to create an agency by estoppel." *Hannola v. City of Lakewood*, 426 N.E.2d 1187, 1193 n.2 (Ohio Ct. App. 1980). Arguably, these two notions are incompatible.

¹³⁰ *Albain*, 553 N.E.2d at 1046.

¹³¹ *Id.* at 1040.

¹³² *Id.* at 1041.

¹³³ *Id.* at 1041.

¹³⁴ *Id.* at 1042.

In its decision, the Ohio Supreme Court in *Albain* acknowledged the emergence across the country of the application of agency by estoppel to the hospital emergency room. It observed that most jurisdictions which have decided the issue have used as an underpinning either the Restatement (Second) of Torts § 429 or the Restatement (Second) of Agency § 267.¹³⁵ *Albain* chose to apply the stricter standard found in Restatement § 267, in addition to looking to the Ohio line of agency by estoppel cases: *Rubbo* and *Johnson*.¹³⁶

The *Albain* Court criticized *Hannola* for treating the language of *Cooper* like dicta by offering a rather attenuated interpretation of *Cooper*.¹³⁷ The specific passage in *Cooper* to which *Albain* referred stated that "the practice of medicine by a licensed physician in a hospital is not sufficient to create an agency by estoppel, as alleged by the appellant. Nowhere is 'induced reliance' shown by the appellant, as required by *Johnson v. Wagner Provision Co.* . . . to establish such a relationship."¹³⁸

Albain, in effect, reinterpreted *Cooper* so as to say that only under very rare circumstances can an agency by estoppel relationship be created in a hospital. One major flaw in this interpretation is that *Cooper* explicitly restricted the scope of its analysis to the allegations of the appellant by qualifying each sentence.¹³⁹ In particular, *Cooper* said that an agency by estoppel was not created *as alleged by the appellant* and the induced reliance was not shown *by the appellant*.¹⁴⁰ This implies that agency by estoppel is applicable to cases involving hospital emergency room negligence by independent physicians, but that it was not shown in this case.¹⁴¹ In essence, by reinterpreting *Cooper*, the court waylaid *Hannola*. By waiting nine years before overruling it, *Albain* allowed an entire line of appellate court cases to evolve, and then recognized a tenuous and result-oriented reading of *Cooper* to create a conflict with *Hannola*.

Next, *Albain* condemned *Hannola* for holding that induced reliance can be implied in virtually every case.¹⁴² In particular, *Albain* set forth that the pertinent statement in *Hannola* - "the mere existence of a hospital with emergency room facilities constitutes an inducement that all its physicians therein are acting under the hospital's control and direction"¹⁴³

¹³⁵ *Albain*, 553 N.E.2d at 1048. See *supra* notes 35 & 63 and accompanying text.

¹³⁶ *Albain*, 553 N.E.2d at 1049. See *supra* note 86 and accompanying text.

¹³⁷ *Albain*, 553 N.E.2d at 1049. *Cooper* devoted two sentences on the last page of the opinion to the issue of agency by estoppel. See *Cooper v. Sisters of Charity, Inc.*, 272 N.E.2d 97, 104 (Ohio 1971).

¹³⁸ *Cooper*, 272 N.E.2d at 104 (citation omitted).

¹³⁹ *Id.* *Cooper* has been distinguished from *Hannola* on many other grounds. See *supra* notes 106-114 and accompanying text.

¹⁴⁰ See *Stratso v. Song*, 477 N.E.2d 1176, 1186. "In *Cooper*, the patient personally consulted with the specific doctor involved. The question then became who did the patient select as a physician: the hospital, or the physician group which provided emergency-room services pursuant to the contract with the hospital." *Id.* at 1187.

¹⁴¹ See *Stratso*, 477 N.E.2d at 1187; *Funk v. Hancock*, 498 N.E.2d 490, 495 (Ohio Ct. App. 1985).

¹⁴² *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1049 (Ohio 1990).

¹⁴³ *Id.* at 1049.

- was inconsistent with the statement in *Cooper* that "the mere practice of medicine by a licensed physician in a hospital is insufficient to create an agency by estoppel."¹⁴⁴

The problem with this argument is twofold. First, it ignores the fact that the emergency room setting is a drastic departure from the typical hospital-independent physician situation where patients enter the hospital for medical treatment from their personal physician. In the latter situation, patients are fully apprised of the relationship between the hospital and their treating physician and, more importantly, they select the physician who performs the procedure. In contrast, the emergency room setting is unlike any other hospital function. Patients usually enter the emergency room looking to the hospital for treatment, and all appearances in the hospital confirm this.¹⁴⁵ Moreover, time and circumstances often preclude a patient from learning otherwise. In effect, *Albain* ignores the factors developed by the majority of courts which distinguish between the emergency room setting, and the private patient-physician relationship.

Second, this argument refuses to acknowledge the public's expectations and assumptions of hospital emergency room relationships applied by most state courts in this area.¹⁴⁶ These assumptions and duties comprise the objective standards by which an individual patient's subjective reliance is measured. The social reality is that the general public is not aware of the contractual relationship between the hospital and its emergency room physicians, and should not be obligated to so inquire.¹⁴⁷ Therefore, it is reasonable to imply inducement in the context of hospital emergency rooms where a plaintiff pleads and proves facts which fall under the rubric of the objective standard.

Finally, *Albain* provided the elements of agency by estoppel as they apply to hospital emergency rooms.¹⁴⁸ The court found that in order to hold a hospital vicariously liable for the torts of its independent emergency room physicians under agency by estoppel, a plaintiff must demonstrate that: "(1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital's authority;¹⁴⁹ and (2) the plaintiff was thereby induced to

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* notes 39-44 and accompanying text. (factors given by other state courts which lead people to rely on hospitals).

¹⁴⁶ See *supra* notes 49-53 and accompanying text.

¹⁴⁷ See *supra* notes 51 & 52 and accompanying text.

¹⁴⁸ *Albain*, 553 N.E.2d 1038, 1049 (Ohio 1990).

¹⁴⁹ *Albain* cited two cases as authority for the first element of agency by estoppel: *Johnson v. Wagner Provision Co.*, 49 N.E.2d 925 (Ohio 1943); and *Grewe v. Mt. Clemens General Hosp.*, 273 N.W.2d 429, 434 (Mich. 1978). The court's use of *Johnson* is not surprising in that it has long been a source for Ohio's standards for agency by estoppel. See *supra* note 91 and accompanying text.

However, the appearance of *Grewe* is somewhat mysterious in that *Grewe* is a landmark case which espouses an interpretation of hospital agency by estoppel which is completely antithetical to that of *Albain*. In *Grewe*, the Supreme Court of Michigan upheld a jury verdict based on facts substantially similar to those

rely upon the ostensible agency relationship."¹⁵⁰ *Albain* dichotomized the reliance element by stating that the issue is not whether the patient relied on the reputation of the hospital, but whether she relied on the representations of the hospital.¹⁵¹

in *Albain*. *Grewe*, at 431. A patient suffering from a dislocated shoulder sought medical treatment from the emergency room at Mt. Clemens General Hospital, and was negligently treated by the on-duty independent emergency room physician. *Id.*

The *Grewe* Court held that a hospital can be held liable under agency by estoppel where a patient looked to the hospital itself for treatment and the hospital represented to her that medical treatment would be provided by doctors working therein. *Id.* at 433. In *Grewe* the dispositive factor was that the hospital furnished the patient with the independent physician. *Id.* Thus, through its omissions, the hospital represented to the patient that the independent physician was an agent thereof.

By citing this case as an authority for the representation element, *Albain* seems to be giving back what it had just taken away from *Hannola*; i.e., by using *Grewe* as a reference, *Albain* approved of the exact scenario it had rejected in *Hannola* one paragraph *supra*! All that a hospital need do to satisfy the first element of agency by estoppel pursuant to *Grewe* is select and provide the treating physician to an emergency room patient who looked to it for treatment. This is exactly what happened in *Albain*. Sharon Albain, an out-of-town patient, looked to Flower Hospital for emergency medical treatment and was thereby provided a staff physician who negligently injured her. *Albain*, at 1040-41. This is supported in the record by her allegation that she believed upon her arrival to the hospital, "that Flower Hospital would provide me with a physician." *Id.* at 1050. The use of *Grewe* as authority for this first element of agency by estoppel may invariably lead to myriad of interpretations as the lower courts attempt to decipher *Albain*.

¹⁵⁰ *Albain*, at 1049.

¹⁵¹ *Id.* at 1049-50. The court further stated that reliance rarely exists in an emergency room situation, and elaborated:

Patients rarely, if ever, would elect to receive emergency medical care at a particular hospital based on the contractual arrangement between the hospital and staff physicians. Most probably, a hospital is typically chosen on the basis of the geographic proximity of the emergency room to the injury. * * * [A] person needing emergency care does not exercise deliberate and informed choice or "shop around" for emergency medical care services. Nor is the decision likely ever to be made based upon the employment structure contained within the hospital. More often than not, the receiving hospital is chosen by the driver of the emergency vehicle or private care conveyance and the primary concern of all involved is to get to the closest hospital as quickly as possible. The reputation of the hospital is likely only rarely considered; rather, its convenience is the greatest consideration in the patient's mind, assuming the patient is even conscious at the time.

Id. at 1050 n.12 citing *Pamperin v. Trinity Memorial Hosp.*, 423 N.W.2d 860, 860 (Wisc. 1988) (Steinmetz, J., dissenting).

It is important to point out that this quote is from the dissent to *Pamperin*. The *Pamperin* majority, in uniformity with virtually every jurisdiction in the nation deciding the issue, interpreted the reliance element to agency by estoppel as focusing on the patient's reliance on the hospital and its staff to provide medical services, not on the treatment of the individual physician. Generally, patients rely on the reputation of the hospital itself. *Pamperin*, 423 N.W.2d at 857.

Ironically, *Pamperin* quoted *Grewe* for the proposition that the paramount issue is whether the patient was looking to the hospital for medical treatment. *Pamperin*, 423 N.W.2d 857. See *supra* note 39. Perhaps in lieu of citing to *Grewe*, it might have been easier for the *Albain* Court to simply cite both the majority and dissenting opinions of *Pamperin*. However, clarifying these issues as such would have demonstrated both the *Albain* Court's confusion and the result-oriented nature of its decision.

The distinction of the reliance element amounts to a judicial fiction because the reputation of a hospital consists of various representations, actions and omissions made by the hospital which form the underpinning of the public's beliefs concerning the hospital. In essence, a hospital's reputation is a creation of its own public relations endeavors.¹⁵² Allowing a hospital to represent certain facts to the public and then secretly contract otherwise is contrary to any interpretation of agency by estoppel.¹⁵³ The effect of this is that emergency room patients are held to a higher standard by ignoring the reasonable objective beliefs of the public concerning the hospital emergency room.

Applying these elements to the facts of the case, *Albain* found that there was no genuine issue of material fact as to whether Sharon Albain relied on an apparent agency relationship between Flower Hospital and the independent physician.¹⁵⁴ Specifically, *Albain* found the following facts to be dispositive: (1) the plaintiff was transported to Flower Hospital by paramedics solely because of its close proximity;¹⁵⁵ (2) the plaintiff was under the impression that Flower Hospital would furnish her with a physician;¹⁵⁶ and (3) the treating physician never discussed her employment status with the patient.¹⁵⁷ Thus, it held that Flower Hospital made no representation to Sharon Albain which would induce her to believe that her treating physician was its apparent agent.

Albain's interpretation of the representation element is unprecedented and unduly restrictive. In order to satisfy this element the hospital would have to expressly inform the patient that the treating physician was an agent of the hospital. This element is virtually impossible to fulfill because a hospital would never make such a damaging and false statement.¹⁵⁸ Also, it refuses to recognize the reality that a hospital can induce reliance through creating the appearance of an agency, and then omitting key

¹⁵² See *supra* notes 97-99 and accompanying text.

¹⁵³ See cases cited *supra* notes 35, 39 and 63. These cases uniformly have held hospitals liable under agency by estoppel by using the "holding out" theory.

¹⁵⁴ *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1050 (Ohio 1990).

¹⁵⁵ *Id.* at 1050.

¹⁵⁶ *Id.* According to the court, the plaintiff in this case may have erred in pleading her allegations. Sharon Albain alleged that she thought "that Flower Hospital would provide me with a physician." *Id.* The court distinguished this statement by assuming that she "did not believe that a physician *who was an employee of the hospital* would be provided her." *Id.* (emphasis original). The court seems to be narrowly construing the evidence here in order to rebut the objective standards maintained by many courts; specifically, that patients looking to the hospital for medical care assume that the physician provided by the hospital is an agent of the hospital. See *supra* notes 39, 49-53 and accompanying text.

¹⁵⁷ *Albain*, 553 N.E.2d at 1050.

¹⁵⁸ The jurisdictions which have applied agency by estoppel have uniformly held that a hospital which supplies an emergency room physician to a patient who looked to the hospital for treatment is thereby holding the physician out as its agent. See *supra* note 39. This is precisely what occurred in *Albain*.

facts which would notify the patient otherwise.¹⁵⁹ No state court has ever interpreted agency by estoppel in this manner. In fact, this holding arguably contradicts the court's holding in *Rubbo* on the grounds that it does not allow for representations to the public, a point which has been well-settled for almost 120 years.¹⁶⁰

V. CONCLUSION

The core of logic that has emerged from the majority of states which have applied the doctrine of hospital agency by estoppel has held hospitals liable for holding out an independent physician to a patient who has looked to the hospital for medical treatment, assumed the physician is an agent of the hospital, and was not informed otherwise. Ohio concurred with this line of reasoning with its *Hannola* decision, which promulgated a line of concurring Ohio appellate decisions and stood for nine years until it was severely limited by *Albain*. *Albain* represents an aberrational decision. It cuts against other Ohio Supreme Court decisions on agency by estoppel in addition to a well-established line of cases from other states without any firm legal or public policy justifications.¹⁶¹

¹⁵⁹ See, e.g., *Adamski v. Tacoma Gen. Hosp.*, 579 P.2d 970, 979 (Wash. 1978). "A 'holding out' or representation may arise when the hospital acts or omits to act in some way which leads the patient to a reasonable belief he is being treated by the hospital by one of its employees." *Id.* (emphasis added) (citing *Quintal v. Laurel Grove Hosp.*, 397 P.2d 161 (Cal. 1964); *Seneris v. Haas*, 291 P.2d 915 (Cal. 1955); *Stanhope v. Los Angeles College of Chiropractic*, 128 P.2d 705 (Cal. Ct. App. 1942) and *Schagrin v. Wilmington Medical Ctr.*, 304 A.2d 61 (Del. 1973)).

¹⁶⁰ See *supra* note 90.

¹⁶¹ As of this writing, three Ohio appellate court cases have recently decided the hospital agency by estoppel issue pursuant to the holding of *Albain*: *Robinson v. Portage Radiological Assocs., Inc.*, Accelerated Case No., 91-P-2323, Ohio App. LEXIS 440 (Ohio Ct. App. Feb. 7, 1992); *Justice v. City of Columbus*, Case No. 91AP-675, Ohio App. LEXIS 5488 (Ohio Ct. App. Nov. 14, 1991); *Barry v. Youngstown Osetopathic Hosp.*, Case No. 90 CA 145, Ohio App. LEXIS 4070 (Ohio Ct. App. Aug. 27, 1991); *Latham v. The Ohio State University Hosp.*, No. 90AP-999, 1991 Ohio App. LEXIS 1391 (Ohio Ct. App. March 26, 1991); *Maddox v. Brentwood Hosp.*, No. 58239, 1991 Ohio App. LEXIS 1182 (Ohio Ct. App. March 21, 1991); and *O'Neil v. Mahoning County Agricultural Society*, No. 90CA-86, 1991 Ohio App. LEXIS 968 (Ohio Ct. App. March 12, 1991). These cases applied *Albain's* unduly restrictive standards to arrive at the same conclusion: a patient cannot prevail upon a claim of hospital agency by estoppel until and unless she pleads and proves facts which demonstrate that (1) the hospital made actual representations to her that the treating physician was its agent; and (2) the patient was thereby induced to rely upon this apparent agency.

In addition, the West Virginia Supreme Court of Appeals recently held in favor of the majority of jurisdictions on this issue in *Torrence v. Kusminsky*, 408 S.E.2d 684 (W. Va. 1991). The Court in essence confirmed the thesis of this Note by stating:

[T]he cases applying the principle of ostensible agency to the hospital/emergency room physician situation, without exception, *do not require express representation* to the patient that the treating physician is an employee of the hospital, nor do they require direct testimony as to reliance. A general representation to the public is implied from the circumstances. Without

A quote from *Hannola* states: "Public outrage, and possibly even an effect on admissions at a typical hospital, would surely follow a public announcement by the hospital that it regards all staff doctors as completely independent professionals, conducts no supervision of their performance, and takes no interest in their competence."¹⁶² Surely a similar public outrage would follow given a public announcement that the Ohio Supreme Court, by its decision in *Albain*, has further propagated this apathy toward the public's emergency medical needs.

DAVID J. WIGHAM

exception, evidence sufficient to invoke the doctrine has been inferred from circumstances similar to those shown in the present case, absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was performed (not afterwards).

Id. at 691 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)(emphasis added).

The *Torrence* Court also set forth a rather articulate rationale for holding a hospital liable for holding out emergency room physicians.

We find the application of ostensible agency particularly compelling when a patient seeks services from an emergency room. In such circumstances, there is often no time to arrange for the services of a private physician, and, in effect, the patient has no other choice but the emergency room. Frequently, the situation is tense, with the patient's family and friends in an emotional state. *To hold that the hospital, after offering emergency room services, should avoid any subsequent liability by claiming that those who render such assistance are not the hospital's employees defies the logical and reasonable expectations of those who seek such services.*

409 S.E.2d at 692 (emphasis added).

Ironically, *Torrence* mistakenly cited *Albain* as a case being in line with the overwhelming majority of courts which concur on this issue. *Id.* at 691. As this Note demonstrates, such is hardly the case.

¹⁶² *Hannola v. City of Lakewood*, 426 N.E. 2d 1187, 1191 (Ohio Ct. App. 1980) (quoting *Leonard*, *supra* note 3, at 967).