

Popovich v. Allina Health – Sea Change, Ripple, or Something In-Between?

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In July 2020, the Minnesota Supreme Court in *Popovich v. Allina Health*, 946 N.W.2d 885 (Minn. 2020), departed from 30 years of precedent regarding vicarious liability for hospitals. Before *Popovich*, a hospital could not be held vicariously liable for the negligence of independent contractors. After *Popovich*, a hospital can be held liable under a theory of apparent authority for the professional negligence of independent contractors in the hospital's emergency room if: (1) the hospital held itself out as the provider of the services in question; and (2) the patient looked to the hospital for care and relied on the hospital to select the individuals that provided services.

Although *Popovich* involved emergency care, the decision was expected to have wide-ranging impacts on healthcare providers. Among other things, *Popovich* was expected to impact professional service agreements between hospitals and independent physician groups. It was expected to impact contract provisions related to liability insurance and indemnification. It was expected to impact the manner in which certain services were marketed to the public.



Many of these expectations have come to fruition. And there can be no dispute that *Popovich*'s application of apparent authority principles to healthcare providers has allowed some claims to proceed that, previously, would have been dismissed early in litigation or not brought at all. But interestingly, in the four years since the Minnesota Supreme Court issued its decision, the handful of Minnesota courts tasked with applying *Popovich* have dismissed the vicarious liability claims before them because the reliance element had not been satisfied.

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For example, in *Rock v. Abdullah*, 2022 Minn. App. Unpub. LEXIS 457 (Minn. Ct. App. July 18, 2022), the Minnesota Court of Appeals determined that a hospital could not be held vicariously liable for the alleged negligence of a non-employee physician with surgical privileges there. The court's decision was based on the second element of *Popovich*: reliance. Because plaintiff did not rely on the hospital to select the physician that performed the plastic surgery, but instead made that selection herself and in advance of surgery, the hospital was not liable under a theory of apparent authority.

In so holding, the *Rock v. Abdullah* court recognized that reliance is a context-specific standard. In *Popovich*, the care at issue took place in the emergency room, a situation in which most people do not select the medical professionals that treat them. By contrast, in *Rock v. Abdullah*, plaintiff had several visits with the physician before the treatment at issue. The mere fact that the physician may have been “affiliated” in some manner with the hospital did not satisfy the reliance standard.

As another example, the Minnesota Court of Appeals, in *Lund v. Calhoun Orange, Inc.*, 2023 Minn. App. Unpub. LEXIS 933 (Minn. Ct. App. Dec. 4, 2023), considered whether Ultimate Fitness could be held vicariously liable for the emergency medical care provided by one of its subsidiary fitness studios. The court framed the sole question before it as “whether knowledge alone satisfies the reliance prong” of *Popovich*.



The court reviewed pre-*Popovich* case law, including precedent from over a century ago, and concluded that knowledge alone did not satisfy the reliance standard: “Each [pre-*Popovich*] case defined knowledge as a prerequisite to reliance rather than defining the terms as interchangeable. The district court correctly determined that ‘apparent authority reliance

requires more than simply whether or not plaintiff was aware of the representations of authority by the principal.” Because there was no evidence that plaintiff relied on Ultimate Fitness’s representations of authority when choosing the specific fitness studio at issue, the court affirmed dismissal of the apparent authority claim.

As a final example, in *Doe v. Meany*, 2023 Minn. Dist. LEXIS 5370 (Minn. Dist. Ct. May 31, 2023), the Hennepin County District Court granted summary judgment to defendant on plaintiff’s vicarious liability claim. Plaintiff sued defendant (a psychiatry practice) under a theory of apparent authority for the misconduct of an independent contractor who practiced at defendant’s business.

The court dismissed the case on reliance grounds. Plaintiff had identified no facts indicating that she relied on defendant to provide the independent contractor as her psychiatrist. Instead, plaintiff herself conducted a Google search, identified the psychiatrist, and scheduled an appointment directly with him. In those circumstances,

plaintiff's purported knowledge of an affiliation between defendant and the independent contractor was insufficient to satisfy the reliance standard from *Popovich*.

As shown by these examples, *Popovich* has expanded the types of vicarious liability claims that may survive early dispositive motion practice. However, when these claims reach the summary judgment stage of litigation, and when evidence is required to demonstrate reliance, post-*Popovich* courts have expressed a willingness to hold plaintiffs to their burden. There must be specific



evidence showing that plaintiff relied on the healthcare provider to select the independent contractor that ultimately provided the services in question. Absent such evidence, Minnesota courts have granted summary judgment and affirmed those decisions on appeal.

To reduce the risk of apparent authority liability, healthcare providers should carefully consider their professional service agreements with independent contractor physicians, including indemnification obligations, insurance coverage, and scheduling practices. The reliance element from *Popovich* is more likely to be satisfied if providers are matching patients with physicians—a common occurrence in emergency care situations—as opposed to patients driving that process.