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Tort Law - Who's Really Who: Apportioning Liability of Independent Contractors Who Work for Hospitals That Qualify for Sovereign Immunity in a Rural State; Campbell County Memorial Hospital v. Pfiefle, 317 P.3d 573 (Wyo. 2014)

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Case Note

Tort Law—Who's Really Who? Apportioning Liability of Independent Contractors Who Work for Hospitals that Qualify for Sovereign Immunity in a Rural State; Campbell County Memorial Hospital v. Pfeifle, 317 P.3d 573 (Wyo. 2014)

*Sam Williams**

Introduction

Eighteen of the twenty-seven hospitals in Wyoming are governmental entities.[1] With a majority of the hospitals relying on funding from taxpayers, courts in Wyoming are tasked with balancing the expenditure of public funds and making parties injured by negligent care whole. *Campbell County Memorial Hospital v. Pfeifle* forced the Wyoming Supreme Court to decide the scope of a governmental hospital's liability in a case of negligent care by an independent contractor found to be an apparent agent.[2]

The injured patient was a pregnant woman who sought the obstetrician services of Campbell County Memorial Hospital (CCMH), a district hospital in Wyoming.[3] In preparation for a cesarean section, the patient was improperly

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* J.D. Candidate, University of Wyoming, 2016. I would like to thank Kyle Hendrickson, Bailey Schreiber, Brianne Phillips, Professor Jerry Parkinson, and Dick Williams for the work they put in and the input they provided in drafting this case note.

[1] *See Individual Hospital Profiles*, AHA Data Viewer, *available at* http://www.ahadataviewer.com/ (last visited Jan. 19, 2015) (Click on "Get a Free Hospital Profile" hyperlink; then enter name of hospital; select hospital; then click download). The governmental hospitals in the state at the time of publication are:

> 1) Campbell County Memorial Hospital, Gillette; 2) Cheyenne Regional Hospital, Cheyenne; 3) Crook County Memorial Hospital, Sundance; 4) Hot Springs County Memorial Hospital, Thermopolis; 5) Ivinson Memorial Hospital, Laramie; 6) Johnson County Healthcare Center, Buffalo; 7) Memorial Hospital of Carbon County, Rawlins; 8) Memorial Hospital of Converse County, Douglas; 9) Memorial Hospital of Sweetwater County, Rock Springs; 10) Niobrara Health and Life Center, Lusk; 11) North Big Horn Hospital, Lovell; 12) Sheridan Memorial Hospital, Sheridan; 13) South Bighorn County Hospital, Basin; 14) South Lincoln Medical Center, Kemmerer; 15) Star Valley Medical Center, Afton; 16) St. John's Medical Center, Jackson; 17) Weston County Health Services, Newcastle; 18) West Park Hospital, Cody.

(Of the remaining nine hospitals, five are organized as nonprofits and the remaining four are privately owned hospitals.) *Id.*

[2] *See* Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573 (Wyo. 2014).

[3] *Id.* at 575.

administered spinal anesthesia three times by a registered nurse anesthetist employed by Northern Plains Anesthesia Associates (Northern Plains).[4] The patient claimed CCMH was vicariously liable for the actions of the employee of Northern Plains under the theory of apparent agency, due to the patient's justifiable reliance on the nurse's care and skill and her reasonable belief that the nurse was an employee of CCMH.[5]

Because CCMH is a governmental hospital, the patient brought suit pursuant to the Wyoming Governmental Claims Act (WGCA).[6] The patient claimed that apparent agents fit the definition of "public employees" as defined by the WGCA; therefore, the acts of apparent agents waived the defense of sovereign immunity.[7] The Wyoming Supreme Court rejected this interpretation of the WGCA and held that sovereign immunity had not been waived because the nurse was an independent contractor.[8]

This case note starts with a discussion of traditional agency analysis and the establishment of apparent agency in Wyoming, followed by an overview of the WGCA.[9] Next, the case note outlines the pertinent facts and how the court applied the law in *Pfeifle*.[10] This case note argues the court in *Pfeifle* incorrectly held that the actions of apparent agents do not waive sovereign immunity.[11] The note also argues that the court properly interpreted the provisions of the WGCA concerning independent contractors.[12] It then argues the court should have held that apparent agents fit the plain meaning of "public employee" in the WGCA, which would qualify their actions as a waiver of sovereign immunity.[13] The case note concludes with a discussion of the policy implications of *Pfeifle*.[14]

BACKGROUND

This section starts with a brief description of the unique nature of healthcare in a predominately rural state such as Wyoming.[15] It then provides Wyoming's approach to agency and the exception to the traditional employee/independent

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[4] *Id.*

[5] *Id.* at 576; Sharsmith v. Hill, 764 P.2d 667 (Wyo. 1988).

[6] *Pfeifle*, 317 P.3d at 575; WYO. STAT. ANN. §§ 1-13-101–21 (2014).

[7] *Pfeifle*, 317 P.3d at 576.

[8] *Id.* at 580.

[9] *See infra* notes 18–63 and accompanying text.

[10] *See infra* notes 64–105 and accompanying text.

[11] *See infra* notes 106–08 and accompanying text.

[12] *See infra* notes 109–17 and accompanying text.

[13] *See infra* notes 118–39 and accompanying text.

[14] *See infra* notes 140–48 and accompanying text.

[15] *See infra* notes 18–24 and accompanying text.

contractor dichotomy expressed in the theory of apparent agency.[16] It ends with an introduction to the sections of the WGCA relied on in *Pfeifle*.[17]

An Overview of the Healthcare Network in Wyoming

The Wyoming Department of Health, a statutorily created agency, plays a significant role in Wyoming by compiling reports, allocating funding, and organizing health initiatives at both governmental and private institutions in the State.[18] The department is comprised of a number of divisions and programs including the Office of Rural Health.[19] Some of the functions of the Office of Rural Health include reporting on Health Professional Shortage Areas, which every county in Wyoming is considered, and the management of the federal Medicare Rural Hospital Flexibility Program (MRHFP).[20]

The goal of the MRHFP is "to ensure access to essential health care services for rural residents by promoting rural health planning, network development, regionalization of rural health services and improving access to hospital and other health care services."[21] The MRHFP achieves these goals by allowing the state to designate certain hospitals as Critical Access Hospitals (CAHs).[22] The benefits of the program for CAHs include exception from the Prospective Payment System, Medicare reimbursement for 101 percent of their reasonable costs, eligibility for CAH specific grants, and flexibility with staffing and hospital programs.[23] These benefits ensure financial stability for rural hospitals that provide emergency and limited inpatient healthcare to Medicaid eligible citizens.[24] As a practical consequence of protecting access to healthcare in rural areas, CAH's also provides a stable market place for independent contractors who provide essential services to CAHs and operate under the same financial strains inherent in rural care.

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[16] *See infra* notes 25–49 and accompanying text.

[17] *See infra* notes 50–63 and accompanying text.

[18] WYO. STAT. ANN. § 9-2-2005 (2014).

[19] *See About the Wyoming Department of Health*, WYOMING DEPARTMENT OF HEALTH, *available at* http://www.health.wyo.gov/main/about.html (last visited Jun. 2, 2014) (listing alphabetical divisions and programs of the Wyoming Department of Health).

[20] *See Wyoming Office of Rural Health Annual Report 2010*, WYOMING DEPARTMENT OF HEALTH, *available at* http://health.wyo.gov/rfhd/rural/orhpublications.html (last visited Nov. 8, 2010) [hereinafter *Rural Health Annual Report*]; *see also* 42 U.S.C. § 1395i-4 (2012).

[21] MASTER MEDICARE GUIDE, 2014, §9.1 (Wolters Kluwer Law & Business eds., 2014) [hereinafter *Master Medicare Guide*].

[22] 42 U.S.C. § 1395i-4(c) (2012).

[23] *Rural Health Annual Report*, *supra* note 20.

[24] *Master Medicare Guide*, *supra* note 21.

Independent Contractors vs. Employees under Wyoming Case Law

A common trait of most hospitals in Wyoming is employment of independent contractors. In Wyoming, an employer's right to control the details of an individual's work distinguishes independent contractors and employees.[25] The right of control is a question of fact for the jury, with an exception for cases where only one reasonable inference can be drawn.[26] This right of control inquiry creates a dichotomy, as employees and independent contractors are "opposite sides of the same coin; one cannot be both at the same time with respect to the same activity; the one necessarily negatives the other, each depending on opposite answers to the same right of control inquiry."[27] A set of factors helps the jury determine the right of control when weighing the facts of the case.

The factors for a right of control analysis are: "the method of payment, the right to terminate the relationship without incurring liability, the furnishing of tools and equipment, the scope of the work, and the control of the premises where the work is to be done."[28] Further, express contracts are important indicators of an individual's status, but are not dispositive proof that she is an independent contractor.[29]

In theory, consideration of these factors should unequivocally delineate which side of the employee/independent contractor dichotomy an individual falls on. However, in cases where the proper result is not reached by applying the strict dichotomy, the law in Wyoming recognizes the need for exceptions, such as apparent agency and non-delegable duties.[30] In the context of independent contractors working on the premises of a hospital, the apparent agency exception has been well developed.[31]

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[25] Combined Ins. Co. of Am. v. Sinclair, 584 P.2d 1034, 1042 (Wyo. 1978).

[26] *Id.*

[27] Coates v. Anderson, 84 P.3d 953, 957 (Wyo. 2004) (citations omitted).

[28] Diamond B Services, Inc. v. Rohde, 120 P.3d 1031, 1041–42 (Wyo. 2005) (citing Stratman v. Admiral Beverage Corp., 760 P.2d 974, 980 (1988); *Sinclair*, 584 P.2d at 1043).

[29] *Id.* at 1041.

[30] *See* Sharsmith v. Hill, 764 P.2d 667 (Wyo. 1988) (adopting apparent agency for the actions of pathologist independent contractor). *See also* Jones v. Chevron U.S.A. Inc., 718 P.2d 890, 896 (Wyo. 1986) ("'. . . if the employer retains the right to direct the manner of the independent contractor's performance, or assumes affirmative duties with respect to safety, the employer has retained sufficient control to be held liable if he exercises that control negligently.'" (citation omitted)).

[31] *See generally* Steven E. Pegalis, 1 AM. LAW MED. MALPRACTICE, § 6:21 (2014) (discussing cases in Washington, Michigan, California, and New York that discussed apparent agency in the hospital liability context).

Apparent Agency

Courts have frequently cited the Restatement (Second) of Agency and the Restatement (Second) of Torts to establish the rule of apparent agency.[32] The Restatement (Second) of Agency defines apparent agency as:

> "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."[33]

To trigger vicarious liability under this rule a principal must represent in some way that an independent contractors is an agent.[34] The injured party must also justifiably rely on the apparent agent's care or skill to some degree.[35]

The Restatement (Second) of Torts version of the rule does not have the same reliance element.[36] Under the Restatement (Second) of Torts, the injured party must accept the services of an independent contractor with the reasonable belief that the contractor is an employee of the principal.[37] These two theories can intersect, because a person's reasonable belief can be the basis of her reliance and the belief is often induced by the representations of the principal.[38] Because the rules are intertwined, the choice of law in apparent agency tort claims is likely to lead to the same result.[39]

The theory of apparent agency was first recognized as a theory of vicarious liability for medical malpractice in Wyoming in *Sharsmith v. Hill*.[40] In *Sharsmith*, a patient sued multiple practitioners and St. John's Hospital, a district hospital in Jackson, for the improper diagnosis of a mass on her knee.[41] Along with the

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[32] *See* Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, THE LAW OF TORTS § 433 (2d ed. 2014).

[33] RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

[34] Dobbs, *supra* note 32, § 433.

[35] *Id.* To what degree the third party must rely has caused a split in the courts, but in the hospital context courts have found reliance in a "loose or attenuated sense" sufficient because it is not likely that a patient receiving unforeseen medical care would change his mind upon learning of the apparent agent's actual status. *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Sharsmith v. Hill, 764 P.2d 667, 669 (Wyo. 1988).

[41] *Id.* at 668–69.

direct claim against St. John's Hospital, the patient asserted a claim of vicarious liability for the actions of two pathologists practicing at the hospital.[42] The district court granted St. John's motion for summary judgment on the vicarious liability claim, although the order did not contain a statement of the evidence or the court's reasoning.[43]

On appeal the patient in *Sharsmith* argued the circumstances surrounding her injury warranted an exception to the traditional agency dichotomy.[44] She urged the court to adopt the apparent agency rule, "which imposes vicarious liability against hospitals for the negligence of those practitioners who are the ostensible or apparent agents of the hospital, *regardless of whether they are employees or independent contractors*."[45] Finding the rationale behind the theory persuasive, the court adopted the rule of apparent agency and held that in cases of treatment by an independent contractor:

> "Where a hospital holds itself out to the public as providing a given service…and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians."[46]

The court also cited both the Restatement (Second) of Torts and Agency for their respective definitions of apparent agency.[47] Because of the interrelated nature of the all the theories relied on in *Sharsmith*, later courts have applied the apparent agency rule using both the elements of reliance on the part of the

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[42] *Id.*

[43] *Id.* at 669.

[44] *Id.* at 671–72.

[45] *Id.* at 672 (emphasis added) (citations omitted).

[46] *Id.* (quoting Hardy v. Brantley, 471 So.2d 358, 371 (Miss. 1985)). The Wyoming Supreme Court defined respondeat superior when it held, "[a]s a matter of public policy and economic requirements a master is liable for damages caused by the negligence of his servant within the scope of the latter's employment." Blessing v. Pittman, 251 P.2d 243, 246 (Wyo. 1952).

[47] *Sharsmith*, 764 P.2d at 672 (citing RESTATEMENT (SECOND) OF TORTS § 429 (1965); RESTATEMENT (SECOND) OF AGENCY § 267 (1958)). Courts in Wyoming have not consistently relied on one version of the rule. *See* Hamilton v. Natrona County Educ. Ass'n, 901 P.2d 381, 385 (Wyo. 1995) (citing RESTATEMENT (SECOND) OF AGENCY § 267 (1958)) (the court also discussed reasonable belief in the context of a principal's representation of the independent contractor's status); Singer v. New Tech Engr. L.P., 227 P.3d 305, 312 (Wyo. 2010) (citing RESTATEMENT (SECOND) OF TORTS § 429 (1965)); Pfeifle v. Campbell Cnty. Mem'l Hosp., 2012 WL 8429590 at 1 (No. 31854), *rev'd*, 317 P.3d 573 (2014) (the district court's analysis relies primarily on the Restatement (Second) of Agency section).

injured party and his "reasonable belief that the services are being rendered by the employer or by his servants."[48] In its adoption of the apparent agency, the court did not discuss whether the actions of apparent agents waive sovereign immunity, for which St. John's qualified.[49]

Waiver of Immunity for Governmental Healthcare Providers under the WGCA

Sovereign immunity for governmental entities prevails in Wyoming.[50] However, an exception arises when negligent public employees act within the scope of their employment.[51] The need for exceptions to the rule of immunity stems from the legislature's recognition that strict application of the rule leads to "inherently unfair and inequitable results."[52] In allowing liability, the legislature also recognized its role as the "[trustee] of public revenues."[53] Therefore, by enacting the WGCA, the legislature intended "to balance the respective equities between persons injured by governmental actions and the taxpayers of the state of Wyoming whose revenues are utilized by governmental entities on behalf of those taxpayers."[54] Public hospitals, because of their prevalence in the state and the potential for negligence claims, are a consistent point of friction between these two considerations.[55]

The WGCA provides a section specifically for hospitals that qualify as governmental entities.[56] That section states: "A governmental entity is liable

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[48] *Sharsmith*, 764 P.2d at 672 (citing RESTATEMENT (SECOND) OF TORTS § 429 (1965)).

[49] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 580 (Wyo. 2014). The court in *Pfeifle* speculated that because there is no mention of sovereign immunity in the pleadings in *Sharsmith*, "[it appeared] that St. John's Hospital may have waived sovereign immunity by not raising the affirmative defense." *Id.* at 580 n.3.

[50] WYO. STAT. ANN. § 1-39-104(a) (2014).

[51] *Id.*

[52] *Id.* § 1-39-102(a). The section reads in part:

> The Wyoming legislature recognizes the *inherently unfair and inequitable results which occur in the strict application of the doctrine of governmental immunity*. . . . It is further recognized that the state and its political subdivisions as trustees of public revenues are *constituted to serve the inhabitants of the state of Wyoming and furnish certain services not available through private parties and, in the case of the state, state revenues may only be expended upon legislative appropriation*. This act is adopted by the legislature to balance the respective equities between persons injured by governmental actions and the taxpayers of the state of Wyoming whose revenues are utilized by governmental entities on behalf of those taxpayers. . . .

Id. (emphasis added).

[53] *Id.*

[54] *Id.*

[55] *See supra* note 1 and accompanying text.

[56] WYO. STAT. ANN. § 1-39-109 (2014).

for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of *public employees while acting within the scope of their duties* in the operation of any public hospital or in providing public outpatient health care."[57] Another section of the WGCA pertains specifically to health care providers and imposes liability on "health care providers who are employees of the governmental entity."[58] The providers under this section include contract physicians who are employed at state institutions and county jails.[59]

A commonly litigated phrase in the application of the WGCA is "public employees."[60] Public employees are defined as "any officer, employee or servant of a governmental entity, including elected or appointed officials, peace officers and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."[61] However, physician independent contractors are specifically excluded from this definition, unless they are engaged in providing "contract services for state institutions or county jails."[62] This definition relies on the traditional employee/independent contractor dichotomy of agency law, but it is not clear where apparent agents fit. The negligent acts of nurse anesthetist Amanda Phillips (Nurse Phillips), while acting as an apparent agent of Campbell County Memorial Hospital, provided the Wyoming Supreme Court with an opportunity to clarify how apparent agents fit the definitions used in the WGCA.[63]

PRINCIPAL CASE

Background

On September 24, 2008, Jaime Pfeifle was admitted to CCMH for labor inducement.[64] Upon admission, the attending obstetrician informed Pfeifle that a cesarean section would be required to deliver her child.[65] In preparation for surgery, Nurse Phillips, an employee of Northern Plains Anesthesia Associates, prepared and attempted to administer spinal anesthesia three times.[66] As a result

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[57] *Id.* (emphasis added).

[58] *Id.* § 1-39-110(a).

[59] *Id.*

[60] *See e.g.* Jung-Leonczynska v. Steup, 782 P.2d 578 (Wyo. 1989); Milton v. Mitchell, 762 P.2d 372 (Wyo. 1988); Veile v. Bd. of Cnty. Comm'rs of Washakie Cnty., 860 P.2d 1174 (Wyo. 1993); Cline v. Dep't. Family Servs., 927 P.2d 261 (Wyo. 1996).

[61] WYO. STAT. ANN. § 1-39-103(a)(iv)(A) (2014).

[62] *Id.* § 1-39-103(a)(iv)(C).

[63] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 580 (Wyo. 2014).

[64] *Id.* at 575.

[65] *Id.*

[66] *Id.*

of improper administration of the anesthesia, Mrs. Pfeifle suffered permanent disability.[67] In order to bring a cause of action for her injuries based on apparent agency, Mrs. Pfeifle noted her justifiable reliance on the skill and care of Nurse Phillips and her reasonable belief that Nurse Phillips was an agent of CCMH.[68]

A number of circumstances formed Mrs. Pfeifle's reasonable belief that Nurse Phillips was an agent of CCMH. For example, prior to the administration of spinal anesthesia, Mrs. Pfeifle was not informed of who would perform the complex anesthesia procedure.[69] Consequently, Mrs. Pfeifle was not involved in the decision to have Nurse Phillips administer the anesthesia without the oversight of an attending doctor or other support staff.[70] Nurse Phillips also did not to inform Mrs. Pfeifle of her status as an independent contractor, in contradiction of CCMH's general procedure policy.[71] The only information presented to Mrs. Pfeifle was a consent form with only CCMH's name and address on it.[72] The space provided to identify the anesthesia provider was left blank.[73]

Beyond the failure to expressly inform Mrs. Pfeifle of Nurse Phillip's employment status, there were other factors that led Mrs. Pfeifle to believe the anesthesia services were provided by CCMH. The failed procedures were undertaken on the campus of CCMH, which held itself out as a provider of obstetrician services.[74] The necessary equipment and supplies were provided by CCMH.[75] CCMH also provided support staff for the anesthesiologists and assigned the required work per the medical director's call schedule.[76] Mrs. Pfeifle's apparent agency claim relied on the totality of these circumstances to support her case against CCMH for the negligent acts of Nurse Phillips.[77]

In the district court, CCMH moved for summary judgment of the claims based on vicarious liability for Nurse Philips.[78] The Supreme Court of Wyoming had not addressed the issue of whether the apparent agency rule, as announced in

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[67] *Id.*

[68] Sharsmith v. Hill, 764 P.2d 667, 672 (Wyo. 1988).

[69] Brief for Appellees at 3, Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573 (Wyo. 2014) (No. S-13-0040), 2013 WL 4104012 at *2.

[70] *Id.* at 4, 2013 WL 4104012 at *3.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 4–5, 2013 WL 4104012 at *3.

[74] *Id.* at 3–4, 2013 WL 4104012 at *2–3.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 23–24, 2013 WL 4104012 at *22–23.

[78] Pfeifle v. Campbell Cnty. Mem'l Hosp., 2012 WL 8429590 at 1 (No. 31854), *rev'd*, 317 P.3d 573 (2014).

Sharsmith, applied to governmental hospitals on a previous appeal.[79] Because the question was central to CCMH's motion for summary judgment, it was directed to the district court.[80]

The district court held that the apparent agency rule did apply because the hospital in *Sharsmith* was also a governmental entity, and the patient's expectations, which serve as the basis for the rule, are the same regardless of whether the hospital is a governmental entity or not.[81] The district court then broke down *Sharsmith*'s holding into four factors:

> 1. The hospital holds itself out to the public as providing a given service.
>
> 2. The hospital enters into a contractual agreement with one or more physicians to direct and provide the service.
>
> 3. The patient engages the services of the hospital without regard to the identity of a particular physician.
>
> 4. The patient is relying upon the hospital to deliver the desired health care and treatment.[82]

The court held that the factors were satisfied because Mrs. Pfeifle sought CCMH's services based solely on her need for the safe delivery of her child.[83] She did not anticipate having to undergo anesthesia, but she deferred to the judgment of the obstetrician and consented to the pre-operative procedure under the reasonable belief that it would be provided by the entity that represented itself as a provider of such services.[84] Under these circumstances the court held Nurse Phillips was an apparent agent of CCMH, and therefore, vicariously liable for her actions.[85]

The Majority Decision

The Wyoming Supreme Court took a more critical look at the WGCA and ultimately held that governmental hospitals are not vicariously liable for the actions of apparent agents.[86] The court's analysis starts with a brief history of the

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* (citations omitted).

[83] *Id.*

[84] *Id.*

[85] *Id.* at 1–2.

[86] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 580 (Wyo. 2014).

time-honored doctrine of sovereign immunity.[87] A pervasive theme of this initial analysis is a high degree of judicial deference because "the right to seek redress for [wrongs committed by the state] is determined by the policy and will of the legislative body."[88] The court also cited the purpose of the WGCA as expressed by the legislature itself, which the court would later rely to reach its conclusion.[89] The final step the court took to solidify this idea of judicial deference was to emphasize the court's consistent holding that the WGCA is a "close ended" tort claims act.[90]

After introducing the concepts of sovereign immunity and judicial deference, the court turned its focus to Sections 109 and 110 of the WGCA, which deal with healthcare supplied at governmental hospitals.[91] In construing the respective statutes the court relied on the plain meaning of the words used and attempted to construe the sections of the Act as a whole.[92] The court held the section of the Act that defined of public of employee as "any officer, employee or servant of a governmental entity… acting on behalf or in the service of a governmental entity," applies to both sections of the WGCA that reference healthcare workers.[93] The court then held the following subsections expressly exclude independent contractors from the definition.[94] Following these holdings, the court then applied its interpretation to the facts of the case.[95]

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[87] *See Id.* at 578.

[88] *Id.*

[89] *Id.*; *see supra* note 52.

[90] *Pfeifle*, 317 P.3d at 579 (citing Sawyer v. Sheridan, 793 P.2d 476, 478 (Wyo. 1990); Torrington v. Cottier, 145 P.3d 1274, 1277 (Wyo. 2006); Dept. of Corr. v. Watts, 177 P.3d 793, 796–97 (Wyo. 2008); Weber v. State, 261 P.3d 225, 227 (Wyo. 2011); DiFelici v. City of Lander, 312 P.3d 816, 819 (Wyo. 2013)). The court has defined "close ended" as meaning "unless a claim asserted against a municipality falls within one of the statutory exceptions, it will be barred." Boehm v. Cody Cnty. Chamber of Commerce, 748 P.2d 704, 709 (Wyo. 1987).

[91] *Pfeifle*, 317 P.3d at 579.

[92] *Id.*; *see also* Stroth v. N. Lincoln Cnty. Hosp. Dist., 327 P.3d 121, 125 (Wyo. 2014) (holding "when we interpret statutes, our goal is to give effect to the intent of the legislature, and we 'attempt to determine the legislature's intent based primarily on the plain and ordinary meaning of the words used in the statute.'") (citation omitted).

[93] *Pfeifle*, 317 P.3d at 579 (citing WYO. STAT. ANN. § 1-39-103(a)(iv)(A) (2014)).

[94] *Pfeifle*, 317 P.3d at 579. The subsections state the term "public employee":

> (B) Does not include an independent contractor, except as provided in subparagraphs (C) and (F) of this paragraph, or a judicial officer exercising the authority vested in him;
>
> (C) Includes contract physicians, physician assistants, nurses, optometrists and dentists in the course of providing contract services for state institutions or county jails;

WYO. STAT. ANN. § 1-39-103(a)(iv)(B–C) (2014).

[95] *Pfeifle*, 317 P.3d at 580.

Based on the district court's assumption that Nurse Phillips was an employee of Northern Plains, the Wyoming Supreme Court held she was an independent contractor.[96] Therefore, because neither of the two exceptions for independent contractor liability applied, i.e. independent contractors who provide services to state institutions or county jails, Nurse Phillips's actions did not qualify as a waiver of immunity under the WGCA.[97] The court then made a point to address the district court's conclusion that the holding in *Sharsmith* applies to all hospitals.[98]

The district court relied on the fact that the hospital in *Sharsmith* was a governmental hospital to conclude the apparent agency rule applies to all hospitals equally.[99] The Wyoming Supreme Court noted the district court's assumption attempted to create an implicit waiver of sovereign immunity based on *Sharsmith*'s silence on the issue.[100] Because *Sharsmith* did not discuss whether the legislature intended the actions of apparent agents to act as a waiver of immunity, the court held a waiver had not been established.[101] Instead, the court deferred to the legislature by holding that if the legislature had intended the actions of apparent agents to constitute a waiver it could have expressly done so.[102] The court also reasoned that redress for the victim, the inherent goal of both the WGCA and the apparent agency rule, was available to Mrs. Pfeifle because she could bring suit against Northern Plains as a private entity for the actions of Nurse Phillips.[103] Because of these conclusions, the court declined to expand liability under the WGCA to the facts of the case.[104] The case was reversed and the remaining claims were remanded.[105]

ANALYSIS

The Wyoming Supreme Court erred in its interpretation of the WGCA when it held that the actions of apparent agents do not constitute a waiver of sovereign immunity. First, the court should have found apparent agents fit the plain meaning of "public employees" under the WGCA by relying on the reasonable belief of Mrs. Pfeifle that Nurse Phillips was an employee of the hospital. [106] Second, by holding actions of apparent agents constitute a waiver of

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 580 n.2.

[104] *Id.* at 580.

[105] *Id.*

[106] *See infra* notes 118–38 and accompanying text.

immunity, the court could have upheld the policy behind the apparent agency rule of making an injured party who seeks the services of a hospital whole.[107] Third, this holding would treat equally all hospitals that make up the network of essential healthcare services in rural areas, as opposed to leaving non-profit and private hospitals responsible for upholding the policy behind the apparent agency rule.[108]

Statutory Interpretation of WGCA Concerning Independent Contractors

The court in *Pfeifle* properly held that the actions of independent contractors generally do not waive immunity, however its analysis overlooked key phrases in the statute that apply to apparent agents. The court had a well-established line of precedent to rely upon when interpreting the WGCA.[109] Since its adoption in 1979, every court has held the WGCA is a close-ended tort claims act.[110] As a close-ended act, the WGCA "generally grants immunity to governmental entities and public employees, waiving that immunity only through specific statutory exceptions."[111] To delineate these exceptions the starting point of interpretation of the WGCA is an examination of the ordinary meaning of the words used in the context of the statute as a whole.[112]

The statutory provisions key to the court's holding were the subsections under the definition of "public employee."[113] The subsections lend themselves to a plain reading:

> (iv) "Public employee":
>
> (A) Means any officer, employee or servant of a governmental entity, including elected or appointed officials, peace officers and *persons acting on behalf or in service of a governmental entity in any official capacity,* whether with or without compensation;
>
> (B) *Does not include an independent contractor, except as provided in subparagraphs (C)* and (F) of this paragraph, or a judicial officer exercising the authority vested in him;

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[107] *See infra* notes 139–48 and accompanying text.

[108] *See infra* notes 139–48 and accompanying text.

[109] *See supra* note 90 and accompanying text.

[110] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 579 (Wyo. 2014).

[111] DiFelici v. City of Lander, 312 P.3d 816, 819 (Wyo. 2013) (citations omitted).

[112] Harmon v. Star Valley Med. Ctr., 331 P.3d 1174, 1178 (Wyo. 2014).

[113] WYO. STAT. ANN. § 1-39-103(a)(iv)(A–C) (2014).

> (C) Includes contract physicians, physician assistants, nurses, optometrists and dentists in the course of providing contract services for state institutions or county jails;[114]

The subsections clearly distinguish between employees and independent contractors, with independent contractors expressly excluded from the definition.[115]

The court in *Pfeifle* correctly noted that the district court accepted the factual conclusion that Nurse Phillips was not an actual employee of CCMH.[116] From this premise the court was able to hold that, as an independent contractor, Nurse Phillips's actions were specifically excluded as a waiver of immunity under the plain meaning of the statute.[117] However, applying the strict dichotomy of employee or independent contractor undermines the purpose of the apparent agency rule announced in *Sharsmith*. Applying the employee/independent contractor dichotomy ignores the possibility that independent contractors who meet the rule under *Sharsmith* fit the definition of "persons acting on behalf or in service of a governmental entity in any official capacity." [118] An examination of the claim at issue in *Pfeifle* will show how the actions of apparent agent fit the statutory definition of public employee in the WGCA.

How the Apparent Agent's Actions in Pfeifle *Fit the WGCA*

Mrs. Pfeifle had a strong case for claiming CCHM was vicariously liable for Nurse Phillips under the theory of apparent agency. The circumstances surrounding Mrs. Pfeifle's admittance to CCMH shows her belief that Nurse Phillips was an employee of CCMH was reasonable.[119] Mrs. Pfeifle sought the services of CCMH expecting labor to be induced, but ultimately consented to a cesarean section.[120] She was unable to discuss the details concerning the anesthesia services provided at the hospital, which would have been clarified if Nurse Phillips

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[114] *Id.* (emphasis added). The definition of public employees also includes contract attorneys providing services for the Office of the State Public Defender. *Id.* § 1-39-103(a)(iv)(F).

[115] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 579 (Wyo. 2014) ("The definition [of public employee] is restricted by the second subparagraph ('[d]oes not include an independent contractor, except as provided in subparagraph[ ] (C)')") (citing WYO. STAT. ANN. § 1-39-103(a)(iv)(C) (2014)); Cline v. Dept. of Family Servs., 927 P.2d 261, 263 (Wyo. 1996) (holding "[t]he term [public employee] does not include an independent contractor except contract physicians in specified circumstances.").

[116] *Pfeifle*, 317 P.3d at 577.

[117] *Id.* at 580.

[118] WYO. STAT. ANN. § 1-39-103(a)(iv)(A) (2014).

[119] *See supra* notes 64–77 and accompanying text.

[120] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 575 (Wyo. 2014).

informed Mrs. Pfeifle that she was not affiliated with CCMH.[121] Because Mrs. Pfeifle had no indication that she was not still under the care of the hospital staff, she could only assume the procedure would be provided by the hospital whose services she initially sought.[122]

For Mrs. Pfeifle's apparent agency claim against CCMH to survive, the operative question was whether Mrs. Pfeifle's reasonable belief that Nurse Phillips was an agent of CCMH was enough to satisfy the definition of public employee under the WGCA. As far as Mrs. Pfeifle was concerned, Nurse Phillips was a "person acting on behalf or in service of a governmental entity in [an] official capacity," the WGCA's definition of public employee.[123] This fact underscores an important part of the district court's reasoning the Supreme Court of Wyoming failed to consider. Namely, the district court recognized the patient's reasonable belief and expectation of services are the same regardless of whether the hospital is a governmental entity or not, therefore her right to bring suit should remain intact.[124] The Supreme Court of Wyoming addressed a patient's right to be made whole by noting Mrs. Pfeifle retained the right to bring suit against the private entity that employed Nurse Phillips.[125] Because Mrs. Pfeifle was not denied redress for her injuries, the inequities that prompted the WGCA were not implicated.[126] However, the court's holding diminished the policy behind the apparent agency rule aimed at making a person whole.[127] The court could have avoided the result of its holding by incorporating a considered analysis of the apparent agency rule in it interpretation of the WGCA.

Because the court in *Pfeifle* did not rely on the belief and expectation of service of Mrs. Pfeifle in classifying Nurse Phillips, it was restricted in its interpretation of the WGCA by the "two-sides of the same coin" dichotomy.[128] The issue with the court's reliance on this reasoning is that apparent agency, an exception to the traditional right of control analysis, renders the strict differentiation between employees and independent contractors a false dichotomy.[129] Although Wyoming precedent suggests an individual "cannot be both [an independent contractor

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[121] Brief for Appellees at 3, Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573 (Wyo. 2014) (No. S-13-0040), 2013 WL 4104012 at *2.

[122] *See supra* notes 64–77 and accompanying text.

[123] WYO. STAT. ANN. § 1-39-103(a)(iv)(A) (2014).

[124] *See* Pfeifle v. Campbell Cnty. Mem'l Hosp., 2012 WL 8429590 at 1 (No. 31854), *rev'd*, 317 P.3d 573 (2014).

[125] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 580 n.2 (Wyo. 2014).

[126] *Id.*

[127] *See infra* notes 140–43 and accompanying text.

[128] Coates v. Anderson, 84 P.3d 953, 957 (Wyo. 2004) (citations omitted).

[129] *See* 6 AM. JUR. 3D *Proof of Facts* 457 § 1 (1989).

and employee] at the same time with respect to the same activity," the apparent agency rule's practical outcome in terms of vicarious liability is the opposite.[130] A plaintiff can use the theory of apparent agency to effectively circumvent the right of control inquiry and create an agency relationship that would otherwise not exist under the traditional dichotomy.[131] The holding in *Pfeifle* protects governmental hospitals from claims that bypass the independent contractor defense. In contrast, private and nonprofit hospitals are still exposed to the liability that results from the contradiction of traditional agency law presented by apparent agency.[132]

The contradiction created by apparent agency is not directly addressed in any Wyoming precedent. The theoretical underpinnings of the apparent agency rule clarify what sort of agency relationship is created by the rule.[133] Again, the apparent agency rule creates an agency relationship that would otherwise not exist.[134] One way to define this relationship is to find the independent contractor is an agent of the apparent principal, which would make the apparent principal liable under the general rule of agency liability.[135] What creates this relationship is a third party's perception of the agent in question.[136]

As applied to *Pfeifle*, the question, again, is whether or not apparent agency modifies the status of an individual enough to fit the statutory definition of "public employee." The court in *Pfeifle* could have found a waiver of immunity for apparent agents if, instead of adhering to the independent contractor/employee dichotomy, it recognized the apparent agency rule modified the status of Nurse Phillips.[137] If the court had focused on the language in the statute that says a public employee is, "any person acting on behalf or in service of a governmental entity in [an] official capacity," it could have relied on Mrs. Pfeifle's reasonable belief that Nurse Phillips was an agent acting on behalf of the governmental entity,

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[130] *Coates*, 84 P.3d at 957; *supra* notes 45–48 and accompanying text.

[131] *See* 6 AM. JUR. 3D *Proof of Facts* 457 § 1 (1989).

[132] Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 580 (Wyo. 2014).

[133] *See* RESTATEMENT (SECOND) OF AGENCY § 267 (1958); RESTATEMENT (SECOND) OF TORTS § 429 (1965); 6 AM. JUR. 3D *Proof of Facts* 457 § 1 (1989).

[134] 6 AM. JUR. 3D *Proof of Facts* 457 § 1 (1989).

[135] *Id. See also* Gamble v. United States, 648 F. Supp. 438, 441 (N.D. Ohio 1986) (noting that the Federal Government waived its sovereign immunity and was equitably estopped from claiming anesthesiologist was not an employee because VA hospital had created appearance of agency).

[136] *See* 6 AM. JUR. 3D *Proof of Facts* 457 § 1 (1989).

> The doctrine of ostensible agency is a concept that focuses not on the actual relation of the ostensible principal and tortfeasor but on the ostensible or apparent relationship. Actual agency arises from a principal's communication to its agent; ostensible agency arises from what an ostensible principal's behavior communicates to a third party.

[137] *See supra* notes 128, 134–36 and accompanying text.

the apparent principal, and extended the waiver of immunity to her as an apparent agent.[138]

Instead, the court in *Pfeifle* effectively rendered the holding in *Sharsmith* hollow, as applied to hospitals, without overruling it.[139] The result is the selective application of the strict dichotomy of independent contractor and employee in vicarious liability situations concerning hospitals. Because only governmental hospitals receive the benefit of this strict dichotomy, nonprofit and private hospitals are unjustly left to uphold the policy behind the apparent agency rule. This unjust result implicates various policy concerns regarding the non-governmental hospitals that are an essential part of Wyoming's rural healthcare network.

Policy in Pfeifle

The court in *Pfeifle* seemingly attempted to uphold the policy in favor of protecting hospitals that provide essential care in Wyoming. However in doing so, it hindered the policy goal of making a patient whole and overlooked the unjust result on non-profit and private hospitals. The closest the court comes to justifying the result is its emphasis on the fact that governmental hospitals require the expenditure of public funds.[140] Considering, in the last decade, there were 62.31 million dollars in medical malpractice payments in Wyoming, the court's policy of protecting public funds is not unfounded.[141]

Despite the court's valid policy argument for protecting public funds, there is a stronger policy argument, which is embodied by both the WGCA and apparent agency, for making an injured party whole when they seek the services of a hospital.[142] The growing policy preference for making the injured party whole

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[138] WYO. STAT. ANN. § 1-39-103(a)(iv)(A) (2014).

[139] *See* Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 580 (Wyo. 2014).

[140] *See supra* notes 102–04 and accompanying text.

[141] *NPDB Research Statistics*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *available at* http://www.npdb.hrsa.gov/resources/npdbstats/npdbStatistics.jsp#ContentTop (last visited Nov. 8, 2014).

[142] *See generally* Kashishian v. Port, 481 N.W.2d 277, 285 (Wis. 1992); Simmons v. Tuomey Reg'l Med. Ctr., 533 S.E.2d 312, 317 (S.C. 2000); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 974 (Wash. Ct. App. 1978); J. STUART SHOWALTER, THE LAW OF HEALTHCARE ADMINISTRATION, 126–27 (4th ed. 2004); Martin C. McWilliams Jr. & Hamilton E. Russell III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 473 (1996); Gregory T. Perkes, *Medical Malpractice—Ostensible Agency and Corporate Negligence—Hospital Liability May be Based on Either Doctrine of Ostensible Agency or Doctrine of Corporate Negligence:* Brownsville Medical Center and Valley Community v. Gracia, 17 ST. MARY'S L. J. 551, 573 (1986); *see also* WYO. STAT. ANN. § 1-39-102(a) (2014) ("The Wyoming legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of governmental immunity.")

is shown in instances such as hospital insurance plans including, like CCMH's did, language that extends coverage to independent contractors.[143] Because of the ruling in *Pfeifle*, non-governmental hospitals, many of which are the sole providers of essential services in rural communities, are now unequally responsible for upholding this policy preference.

A final policy argument, not addressed in *Sharsmith* or *Pfeifle*, is that the apparent agency rule is harmful to the healthcare system as a whole.[144] This policy argument is based on the idea that apparent agency leads to increased insurance costs and more medical malpractice claims, which will raise the cost of health care.[145] One possible solution, which the *Pfeifle* court almost embraced by rendering the apparent agency rule hollow, is to abandon apparent agency.[146] However, the court in *Pfeifle* did not abandon the rule.[147] Since the apparent agency rule is still in force in Wyoming for non-governmental hospitals, the second best solution to rising health care costs is for the court to meaningfully reexamine the structure of the rule, which the *Pfeifle* court failed to do.[148]

CONCLUSION

The purpose of apparent agency is to bypass the traditional "two sides of the same coin" approach to determining the status of workers in order to make the injured party whole.[149] Reconciling apparent agency with the WGCA serves the purposes of both the rule and the statute.[150] The court in *Pfeifle* should have held the agency relationship created by a third party's reasonable belief fit the plain

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[143] Brief for Appellees at 8–10, Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573 (Wyo. 2014) (No. S-13-0040), 2013 WL 4104012 at *7–9.

[144] *See* Hardy v. Brantley, 471 So.2d 358, 374 (Miss. 1985) (Lee, J., dissenting in part concurring in part). A dissenting opinion in the case relied on by *Sharsmith* to establish the apparent agency rule noted "[t]he majority's decision to impose liability on a hospital for the negligent actions of a physician independent contractor is certain to have a negative impact in terms of health care costs and availability." *Id.*

[145] Perkes, *supra* note 142.

[146] *See supra* note 139 and accompanying text.

[147] *See supra* note 139 and accompanying text. *See also* Campbell Cnty. Mem'l Hosp. v. Pfeifle, 317 P.3d 573, 577, 580 (Wyo. 2014).

[148] *See Pfeifle*, 317 P.3d at 577 and 580; Martin C. McWilliams Jr. & Hamilton E. Russell III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 445–52 (1996); Adam Alstott, *Hospital Liability for Negligence of Independent Contractor Physicians Under Principles of Apparent Agency*, 25 J. LEGAL MED. 485 (2004).

[149] *See supra* notes 129–31 and accompanying text.

[150] *See supra* notes 52, 142 and accompanying text.

meaning of "public employees" in the WGCA.[151] This holding would have waived sovereign immunity for governmental hospitals for the actions of apparent agents and allowed injured parties to recover for negligent treatment at any one of the eighteen governmental hospitals in the state.[152] In failing to hold that actions of apparent agent as waivers of immunity, the court in *Pfeifle* left the other essential healthcare facilities in the state unequally exposed to this growing form of liability.

[151] *See supra* notes 137–38 and accompanying text.

[152] *See supra* notes 1, 136–39 and accompanying text.