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September 2, 2021

VIA TRUEFILING

Presiding Justice Lamar W. Baker
Associate Justice Carl H. Moor
Associate Justice Dorothy C. Kim
Court of Appeal of the State of California
Second Appellate District, Division Five
300 South Spring Street, Second Floor
Los Angeles, California 90013

Re: *Steger v. CSJ Providence St. Joseph Medical Center*
Court of Appeal No. B304043
Request for Publication
Opinion filed August 16, 2021

Dear Presiding Justice Baker and Associate Justices:

Under California Rules of Court, rule 8.1120(a), the California Hospital Association (CHA) requests that this court publish its August 16 opinion in *Steger v. CSJ Providence St. Joseph Medical Center* (Aug. 16, 2021, B304043) (*Steger*). As explained below, the decision warrants publication because it clarifies the circumstances in which hospitals may, or may not, be held vicariously liable for the conduct of physicians who are independent contractors, and provides useful guidance concerning the application of that rule in the context of emergency room care.

CHA is a nonprofit, member-driven organization, representing more than 400 hospitals throughout California. It advocates for better and more accessible health care for Californians, including providing resources and information to state and federal policy makers. To that end, CHA supports hospitals in improving health care quality, access, and coverage; promoting health care reform and integration of services; complying with laws and regulations; and maintaining the public trust in health care. CHA's member hospitals benefit from clear and consistent legal precedent governing principles of ostensible agency and vicarious liability with respect to alleged malpractice by physicians who treat patients at their facilities.

A Court of Appeal opinion "should be certified for publication" if it applies an existing rule of law to a new set of facts, explains an existing rule of law, or involves a legal issue of continuing public interest. (Cal. Rules of Court, rule 8.1105(c)(2), (3) & (6).) This court's opinion in *Steger* fits these criteria and should be published.

This court's opinion appropriately held that an independent contractor doctor is not an ostensible agent of a hospital if "(1) the hospital gave the patient actual notice that the treating physicians are [independent contractors and] not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (Typed opn. 21, citing *Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 884 (*Wicks*).) Further, the existence of an ostensible agency relationship "may be resolved on a motion for summary judgment, where the undisputed evidence indicates that the patient knew or had reason to know and the capacity to understand that the treating physician was not the hospital's agent." (*Ibid.*) In so doing, this court affirmed the holding of Division Eight's recent opinion in *Wicks*.

Publication of this opinion, in addition to *Wicks*, is necessary. Although *Wicks* itself is published, it is a single opinion, and one of very few published California cases relating to ostensible agency of doctors treating hospital patients as independent contractors. Further, it is a legal issue that frequently arises in medical malpractice cases in this state. As a result of California's statutory prohibition against corporations hiring physicians on a salary basis, the vast majority of physicians practicing medicine in California hospitals are in fact independent contractors. (See Bus. & Prof. Code, § 2400 [prohibiting corporations or other artificial legal entities from exercising professional rights, and allowing employment of licensees on a salary basis by approved "charitable institutions, foundations, or clinics" which do not charge patients for services].)

In the experience of defense counsel for hospitals, plaintiffs in other ostensible agency cases currently on appeal are arguing that *Wicks* is an aberration and its holding should be disregarded, and that the rule that a hospital may avoid liability by providing actual notice that physicians are not employees is inconsistent with California law. Publication of *Steger* would clarify that *Wicks* is an accurate statement of the law in this state and should be followed by other courts. This would help to avoid the development of a split of authority that would introduce significant uncertainty about this important issue.

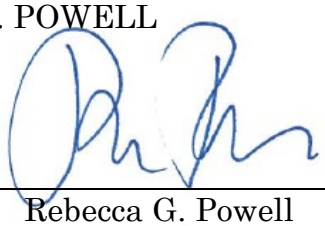
Wicks is also being overlooked by the Judicial Council Advisory Committee on Civil Jury Instructions. That committee is currently seeking public comment on proposed additions and revisions to the California Civil Jury Instructions (CACI), which would include a new instruction for "Ostensible Agency—Physician-Hospital Relationship." (Judicial Council of Cal., Invitation to Comment, CACI 21-02, Draft CACI No. 3714, p. 92 <https://www.courts.ca.gov/documents/CACI21-02.pdf> [as of September 1, 2021].) Although *Wicks* is a recent published decision on precisely this issue, the draft CACI instruction does not cite to or mention *Wicks*. Further, it does not state the complete holding from *Wicks* and *Steger*. The draft instruction provides that notice to a patient that a physician is not an agent of the hospital "may not be adequate if a patient in need of medical care cannot be expected to understand or act upon the information provided," taking into consideration the patient's "condition at the time." (*Ibid.*) But this does not specify that the hospital need only show that there is "no *reason to believe* the patient was unable to understand or act on the information," (typed opn. 21, emphasis added, citing *Wicks*, *supra*, 49 Cal.App.5th at p. 884), suggesting instead that the hospital carries the burden of proof to demonstrate that the patient was in fact capable of understanding. And, the draft instruction does not include that the hospital may alternatively avoid liability by showing "the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Ibid.*) Publication of the court's opinion following *Wicks* may, therefore, have an impact on CACI's decision whether to adopt the proposed instruction, which is currently scheduled to become effective in November.

In *Steger*, this court also correctly held that there is no bright line exception for the ostensible agency rule articulated in *Wicks* merely because a plaintiff received care in an emergency room. Here, plaintiff relied on dicta to argue that hospital disclaimers are necessarily legally infirm if the treatment involves " 'emergency care.' " (Typed opn. 25–26, citing *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454.) But as this court correctly held, this language from *Mejia* is dicta, may not accurately reflect California law, and was implicitly (if not explicitly) rejected by the *Wicks* court. (Typed opn. 26.) Instead, courts should consider the totality of the circumstances and determine whether there is a triable issue of fact regarding whether the patient could understand the disclaimer, rather than merely focusing on whether the patient was being treated in an emergency room. This discussion of the relationship between *Wicks* and the dicta in *Mejia* clarifies an existing rule of law on a matter of public interest.

For these reasons, this court's opinion satisfies the criteria for publication and should therefore be published.

Sincerely,

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN
REBECCA G. POWELL



By: _____
Rebecca G. Powell

Attorneys for non-party
CALIFORNIA HOSPITAL ASSOCIATION

cc: See attached Proof of Service

PROOF OF SERVICE

Steger v. CSJ Providence St. Joseph Medical Center
Case No. B304043

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On September 2, 2021, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 2, 2021, at Burbank, California.

Cassandra Johnson

Cassandra Johnson

SERVICE LIST
Steger v. CSJ Providence St. Joseph Medical Center
Case No. B304043

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