

## HOSPITAL DOES NOT HAVE A NON-DELEGABLE DUTY FOR TREATMENT BY ON-CALL



*Amick v. Banner Health*

Arizona Court of Appeals

August 15, 2023

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In *Amick v. Banner Health*, No. 1 CA-CV 22-0401 (August 15, 2023) (mem. decision), the Arizona Court of Appeals reversed the trial court's grant of summary judgment for the plaintiff on the issue of the hospital's vicarious liability for an on-call neurosurgeon.

Plaintiff went to Banner Health seeking treatment. The on-call neurosurgeon, Dr. Iskandar, was consulted and he performed surgery. After surgery, Plaintiff became quadriplegic. She sued Banner Health and Dr. Iskandar, among others. Before trial, the superior granted plaintiff's motion for partial summary judgment on her claim that Banner Health was vicariously liable for Dr. Iskandar's alleged negligence. The trial court held that Dr. Iskandar was Banner's apparent agent as a matter of law.

Banner appealed the vicarious liability summary judgment in Plaintiff's favor, and the Court of Appeals reversed, finding fact issues on apparent agency—namely, whether Banner had done anything to induce the plaintiff to believe Dr. Iskandar was acting as Banner's agent in treating her. The court also held that on retrial, disputed factual issues required the jury to determine whether Dr. Iskandar was Banner's actual agent. Dr. Iskandar was not a Banner Health employee. He was employed by East Valley Neurosurgery, which contracted with Banner Health. Pursuant to that contract, Dr. Iskandar performed neurosurgery exclusively at Banner Health, but East Valley Neurosurgery billed Plaintiff for Dr. Iskandar's medical services. Banner Health provided all operating rooms, equipment, instruments, nurses, staff, and administration necessary for Dr. Iskandar to provide services to Banner Health patients. Although Banner Health had policies and procedures that applied to all staff, including Dr. Iskandar who served on various hospital committees, it did not dictate or control the clinical care he provided Plaintiff. Moreover, when she was admitted to the hospital, Plaintiff signed a form that stated: "Physicians and other health care providers furnishing services to the patient . . . are generally not employees or agents of the hospital, and the hospital is not liable for their actions or omissions."

Most importantly, the Court rejected plaintiff's argument that Banner Health owed her a non-delegable duty to provide competent neurosurgical care. No Arizona appellate court has found that a hospital owes a non-delegable duty to provide neurosurgical care, and this case did not raise any grounds to recognize one. Non-delegable duties are imposed by common law, statute, contract, franchise, or charter; and in this case, no contract established such a duty from Banner to the plaintiff, nor did plaintiff cite any state or federal statute or regulation imposing such a duty. The Court thus held that plaintiff could not establish agency on retrial by arguing that Banner Health owed Plaintiff a non-delegable duty to provide neurosurgical care.

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[Elizabeth B. N. Garcia](#) focuses her practice in federal and state appellate matters. Liz joined JSH after gaining experience at a multi-state firm where she handled class action defense and other complex litigation. In addition to her class action experience, Liz handled breach of contract and other sophisticated commercial litigation for clients across industries. After law school, she worked for the Arizona Attorney General's Office as an Assistant Attorney General for Criminal Appeals and was named the 2017 Emerging Star for the Solicitor General's Office.

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