Trial Law TIPS

Roy D. Wasson's
TIP #88

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Avoiding Malpractice by Pleading Actual and Apparent Agency

Re-Introduction of Concept of "Pleading"

We trial lawyers regularly attempt to litigate issues of agency and apparent agency. We are forced to do so when the active tortfeasor is a professional or alleged "independent contractor" of the employer hospital or other entity, as opposed to a W-2 employee. But the litigation of this issue in our lawsuits is often a very small part of the whole case, and we give more thought to establishing violation of the standard of care, ownership of a dangerous instrumentality, and other obstacles to a favorable verdict. This Tip brings some focus to an important part of litigating agency issues that is largely overlooked.

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First we need to remember the procedure by which a trial lawyer informs the court that he or she hopes to ask the jury to decide an issue, such as the issue of whether Dr. Jones is an agent of the hospital where the negligence occurred. Issues like this are raised through the ***pleadings***. That does not mean "pleadings" in the general sense of motions and legal memoranda, but "pleadings" under the definition of Fla. R. Civ. P. 1.100(a). This "Tip" is a blast-from-the-past from our days with Professor Kingsfield in Civ. Pro. 101. How many years since you thought about whether and how something so basic should be pleaded in a complaint?

Of course, good pleadings contain facts supporting all of the elements of a cause of action: duty, breach, causation, and damages. But before getting to the elements of a cause of action, complaints should plead the relationships between the parties, including who is alleged to be whose agents. That proposition should be understood: no decent trial lawyer would fail to allege the fact that "At all times material, Dr. Jones was acting as the Hospital's actual or apparent agent." But that is not enough. You have to plead the sub-elements of agency and apparent agency and separate the two agency claims into different paragraphs of the complaint.

More and more I am seeing defense attorneys moving to dismiss counts asserting apparent agency, with such motions based (at least in part) on the ground that the complaint fails to plead the ***theory*** of apparent agency or the ***elements*** of an apparent agency claim. The complaint must both mention the doctrines of actual and/or apparent agency and plead the ***factual elements*** of those theories, not merely the legal ***conclusion*** that the doctor was the actual or apparent agent of the hospital. Although I am not aware of any malpractice claims against trial lawyers for failing to properly allege the factual elements of actual and apparent agency, appellate decisions reflect that cases can be won or lost because of the plaintiff's failure to properly plead such matters. Readers of this Tip should write themselves something of an insurance

policy against such malpractice claims by learning how to plead the existence of an actual and apparent agency, so that it withstands a motion to dismiss and appeal.

Theory of Apparent Agency Must Be Pleaded in Complaint

To begin with, when a defendant moves for summary judgment on your claim that it is responsible for the actions of an active tortfeasor, and presents evidence that the active tortfeasor was not an ***actual*** agent, but was an independent contractor, you cannot oppose the summary judgment on the argument that the tortfeasor was an apparent agent, unless you have ***pleaded*** that separately from pleading actual agency ***in your complaint***. *E.g. Fernandez v. Florida National College, Inc*., 925 So. 2d 1096 at 1101 (Fla. 3d DCA 2006). In the *Fernandez* case the trial court granted summary judgment on the Plaintiffs' claims against the college based on a motor vehicle accident that injured a mother and killed her daughter. The active tortfeasor had been an instructor at the college. The summary judgment was affirmed on appeal, in part because counsel for the plaintiff had failed to plead the theory that the tortfeasor was the college's apparent agent.

In holding that the plaintiff had waived the right to oppose summary judgment on the apparent agency issue, the court of appeal stated as follows:

> A review of the Complaint demonstrates that the ***plaintiffs failed to allege that Mr. Cisneros was FNC's apparent agent*** at the time of the accident. We agree with FNC that issues that are not pled in a complaint cannot be considered by the trial court at a summary judgment hearing. *Am. Title Ins. Co. v. Carter,* 670 So. 2d 1115 (Fla. 5th DCA 1996)(holding that at summary judgment hearing, trial court erred by considering theory not raised in the pleadings); *Hemisphere Nat'l Bank v. Goudie,* 504 So. 2d 785 (Fla. 3d DCA 1987)(holding that "under Florida law a court hearing a case on a motion for a summary

> judgment can only consider those issues raised by the pleadings"); *Reina v. Gingerale Corp.,* 472 So. 2d 530, 531 (Fla. 3d DCA 1985)("At the summary judgment hearing, the court must only consider those issues made by the pleadings."). In addition, although FNC's counsel argued that apparent agency was not pled in the Complaint, ***the plaintiffs did not at any time move to amend the Complaint. Therefore, we find that apparent agency was waived by the plaintiffs***.

Id. at 1101 (emphasis added).

Thus, unless you have good reason to expect that the defendant is going to admit an actual agency relationship with the active tortfeasor, you should always plead the theory that the defendant is liable because the tortfeasor is its apparent agent. Otherwise the theory will be waived.

Factual Elements of Actual and Apparent Agency Must Be Pleaded

It is not enough to allege in a conclusory form that the tortfeasor was the defendant's "actual or apparent agent." In order to plead a claim for apparent agency, "facts supporting [the following] three elements must be alleged: '1) a representation by the purported principal; 2) reliance on that representation by a third party; and 3) a change in position by the third party in reliance on the representation.'" *Saralegui v. Sacher, Zelman,* 19 So. 3d 1048, 1051-52 (Fla. 3d DCA 2009) (*quoting Ocana v. Ford Motor Co.,* 992 So. 2d 319, 326 (Fla. 3d DCA 2008)).

In order to plead a claim for actual agency, the following elements must be alleged: "(1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." *Fernandez v. Fla. Nat'l Coll.,*

Inc., 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006) (quoting *Goldschmidt v. Holman,* 571 So. 2d 422, 424 n. 5 (Fla. 1990)).

Further, it is not enough to simply plead the legal conclusions that each of those three elements exist. "While 'apparent agency' is not a magic phrase or the exclusive incantation necessary to assert the claim*, **facts supporting all three elements must be alleged***: "1) a representation by the purported principal; 2) reliance on that representation by a third party; and 3) a change in position by the third party in reliance on the representation." *Saralegui v. Sacher, Zelman, Van Sant Paul, Belly, Hartman & Wallace, P.A.,* 19 So. 3d 1048, 1051-52 (Fla. 3d DCA 2009) *(quoting Ocana v. Ford Motor Co.,* 992 So. 2d 319, 326 (Fla. 3d DCA 2008))(emphasis added).

Conclusion

Just when you thought you had learned how to try a case and get a good verdict, a defendant's attorney moves to dismiss or for summary judgment alleging that you failed to properly plead a basis for his client's vicarious liability for the active tortfeasor. Now is the time to look back at your complaints in cases where agency issues are involved, and if you have not succeeded in properly pleading those theories, move to amend or get a stipulation that the issues are properly pleaded. We can never avoid all the pitfalls of pleading practice; all we can do it:

Keep Tryin!

Roy

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