AGENCY & PARTNERSHIP I.A, II.A, II.B

Question 5 Analysis

Legal Problems:

(1) Is Owen an independent contractor or a servant (employee) of Best Care?

(2) Did Owen have actual or apparent authority to bind Best Care to the contract to purchase the X-ray machine?

(3) Is Best Care liable to Anita's estate for Owen's negligence on an apparent (ostensible) agency theory?

DISCUSSION

Summary: Whether Owen is an independent contractor or a servant (employee) is a question of fact. The degree of control is generally the distinguishing factor between an independent contractor and a servant (employee). Traditionally, Owen would have been an independent contractor because Best Care did not retain substantial control over how Owen was to practice medicine; however, recent opinions have moderated this position and look to the right to control rather than actual exercise of control.

Best Care is not liable on the Vision-Owen contract. Owen lacked actual authority to enter into the contract with Vision on behalf of Best Care because Vision was not a vendor in City. Further, Best Care had made no manifestations to provide Vision with a reasonable basis to believe that Owen was acting as an agent of Best Care.

Even if Owen is an independent contractor, he appears to the outside world—and to Anita in particular—to be an employee of Best Care as a result of Best Care's representations made on the billboards. Because of this apparent (ostensible) agency, Best Care would be estopped from denying liability for Owen's negligence and Anita's resulting death.

Point One: (35-45%) Owen was probably an independent contractor and not an employee of Best Care, but the facts could be argued differently.

Owen is either an independent contractor or a servant (employee). "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." RESTATEMENT (SECOND) OF AGENCY

§ 2(3). "A servant [employee] is an agent employed by a master [employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* at § 2(2). A number of factors are relevant in distinguishing an independent contractor from a servant. The crucial factor is the extent of control that the employer may exercise over the details of the work. *See* RESTATEMENT (SECOND) OF AGENCY § 220. Traditionally, doctors were considered independent contractors because of their high level of skill and the use of their independent judgment. *See McMurdo v. Getter*, 10 N.E.2d 139 (Mass. 1937). However, in recent years, courts have placed greater emphasis on the employer's "right to interfere or control rather than [the employer's] actual interference or exercise of control." *See Knorp v. Albert*, 28 P.3d 1024 (Kan. Ct. App. 2001); *Kelly v. Rossi*, 481 N.E.2d 1340 (Mass. 1985). Other factors used to distinguish between a servant and an independent contractor are: (1) whether the one employed is engaged in a distinct occupation or business, (2) the skill required in the particular occupation, (3) who supplies the materials to perform and the place to perform the service, (4) method of payment, and (5) how the parties characterize the transaction. RESTATEMENT (SECOND) OF AGENCY § 220 (2); *Chapman v. Black*, 741 P.2d 998 (Wash. App. 1987).

These facts could be argued either way. Here, most of the factors suggest that Owen is an independent contractor and not an employee or servant of Best Care. In particular items 1, 2, and 5 of the contract favor characterizing Owen as an independent contractor, while items 4 and 6 of the contract indicate some level of oversight and control on the part of Best Care. The self-labeling in item 1 is evidence, but is not decisive.

Point Two: (30-40%) Owen had neither actual nor apparent authority to bind Best Care to the contract to purchase the X-ray machine. Thus, Best Care is not liable to Vision for breach of contract.

Agency arises where one person consents that another shall act on his behalf and, at least as respects matters within the agency, subject to his control. *See generally* RESTATEMENT (SECOND) OF AGENCY § 1(1).

Actual authority arises where the principal communicates the authority to act to the agent. *See generally* RESTATEMENT (SECOND) OF AGENCY § 7; William A. Gregory, THE LAW OF AGENCY AND PARTNERSHIP, 3d ed. § 14. A principal is bound by contracts entered into between an agent with actual authority and a third party. *See generally* RESTATEMENT (SECOND) OF AGENCY § 144.

Item 3 of the contract provides that "[e]ach doctor is authorized to purchase supplies and equipment for Best Care's emergency room from a list of approved vendors located in City and within Best Care's price guidelines." This contract provision gave Owen actual authority to buy equipment for Best Care so long as it was within specified price guidelines from suppliers located in City for Best Care's account. If Owen had acted within this authority, Best Care would be bound even if Vision was unaware of the authorization. However, Owen exceeded his authority by purchasing equipment from Vision, which was not an approved vendor and was located 450 miles away from City. Therefore, Best Care is not liable under the contract because Owen did not have actual authority.

Further, Best Care is not liable under the theory of apparent authority. Apparent authority is created as to a "third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." RESTATEMENT (SECOND) OF AGENCY § 27. There are no facts to suggest that Best Care made any representations that would create a reasonable basis for Vision to believe that Owen was authorized to purchase the X-ray machine.

Point Three: (25-35%) <u>Even if Owen is an independent contractor, Best Care is liable for Owen's negligence if Anita reasonably believed that Owen was acting as an agent of Best Care.</u>

While a master is liable for the torts of its servant (employee) conducted within the scope of employment, a principal is not necessarily liable for the torts of its independent contractor agent. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219, 250. A principal, however, may be estopped from denying liability for the torts of its independent contractor if the principal has created indicia of apparent authority. *See* RESTATEMENT (SECOND) OF AGENCY § 8B. This is sometimes referred to as the "holding out" theory or ostensible agency. *See Adamski v. Tacoma General Hospital*, 579 P.2d 970 (Wash. Ct. App. 1978) (The hospital may be liable under the "holding out" theory so long as the hospital acted in some way that leads the patient to a reasonable belief that he is being treated by a hospital employee.).

RESTATEMENT (SECOND) OF AGENCY § 267 provides that "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." Here, Best Care publicly advertised, on billboards strategically placed throughout City, that people should come to its emergency room because "Best Care's emergency room doctors are the absolute *best* and will really *care* for you." Anita apparently saw and believed the slogan on the billboards because she expressly requested the ambulance driver to take her to Best Care because "Best Care's emergency room doctors are the absolute best." It would be reasonable for a prospective patient to conclude, based on the billboards, that all doctors in Best Care's emergency room are employees of Best Care. As it was reasonable for Anita to believe that Owen was an agent of Best Care, under the general principle that a principal is liable for the torts committed by its agents Best Care would be liable to Anita's estate for Owen's actions (negligently severing an artery so that she bled to death).

NOTE: Most jurisdictions provide that a principal who hires an independent contractor to perform an "ultrahazardous" or "inherently dangerous" activity has a nondelegable duty to exercise due care to provide for the safety of persons who may be harmed by that activity. However, the usual tort and agency law definitions of ultrahazardous activity would not cover surgery, and there is no line of authority holding that a doctor's performance of surgery falls within this rule.