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**COVID-19  
HOSPITAL LIABILITY PROTECTION UNDER  
ALABAMA'S STATE OF EMERGENCY PROCLAMATION**

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**I. STATE OF EMERGENCY PROCLAMATION**

On March 13, 2020, Alabama Governor Kay Ivey executed a Proclamation declaring a state of emergency pursuant to the Alabama Emergency Management Act of 1955, Ala. Code § 31-9-1 *et seq.*, in response to the appearance of COVID-19 in the State. The Proclamation specifically addresses the potential impact of the COVID-19 pandemic on health care providers and provides liability protection related to the administration of healthcare during the declared COVID-19 public health emergency.

Section I of this Proclamation specifically declares that “COVID-19 cases could overwhelm the health care facilities and personnel of this State and undermine their ability to deliver patient care in the traditional, normal, and customary manner or using traditional, normal, and customary standards of care.” § I. In recognition of the extreme burden that COVID-19 could place on hospitals, associated

healthcare providers, and their resources, the Proclamation alters the standard of care, under the Alabama Medical Liability Act (“AMLA”), applicable to hospitals that invoke their emergency operation plans in response to the COVID-19 public health emergency, and extends State-Agent Immunity to healthcare professionals and assisting personnel working in such a hospital. By operation of Alabama law, this immunity operates to equally preclude vicarious liability against a hospital that employs or grants privileges to these healthcare professionals and assisting personnel. *Importantly, the threshold event required to trigger the liability protections provided by the Proclamation is that the hospital invoke its emergency operation plan.* § I(A)-(C).

## **II. Alternative Standard of Care**

The Proclamation declares that “[h]ealth care facilities that have invoked their emergency operation plans in response to this public health emergency may implement the ‘alternative standards of care’ plans provided therein, and those alternative standards of care are declared to be the state-approved standard of care in health care facilities to be executed by health care professionals and allied professions and occupations providing services in response to this outbreak” § I(A). The Proclamation unequivocally mandates that “[t]hese alternative standards of care shall serve as the ‘standard of care’ as defined in [the AMLA], for the purposes of [the AMLA].” § I(B).

The Proclamation further specifies that in any malpractice action arising from healthcare provided while this state of emergency remains in effect, “[t]he ‘degree of care’ owed to patients by licensed, registered, or certified health care professionals for the purposes of [the AMLA] shall be the same degree of care set forth in the

alternative-standards-of-care plans,” and that any inconsistent provisions of the AMLA are suspended. § I(B).

### III. STATE-AGENT IMMUNITY

In addition to allowing for the application of an “alternative standard of care,” all health care professionals and other hospital personnel providing services pursuant to a hospital’s emergency operation plan are declared “Emergency Management Workers” of the State of Alabama. § I(C). The significance of this declaration is that it operates to afford all such health care providers State-Agent immunity from liability. Pursuant to Ala. Code § 31-9-16, no Emergency Management Worker, “except in cases of willful misconduct, gross negligence or bad faith...shall be liable for the death of or injury to persons, or for damage to property.” § 31-9-16(b).

The State-Agent immunity conveyed to healthcare providers by declaring them to be Emergency Management Workers should preclude liability for medical negligence, or other unintentional breach of an applicable standard of care. “The immunity afforded State agents...is not abrogated for negligent and wanton behavior.” *Giambrone v. Douglas*, 874 So.2d 1046, 1057 (Ala. 2003). The Alabama Supreme Court has consistently held that “poor judgment or wanton misconduct...does not rise to the level of willfulness and maliciousness necessary to put the State agent beyond the immunity.” *Ex parte Randall*, 971 So.2d 652, 664 (Ala. 2007). Accordingly, to be entitled to recovery for any injury resulting from medical care provided during this state of emergency, the plaintiff will have the burden “to show that the State agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority.” *Ex parte Estate of Reynolds*, 946 So.2d 450, 452 (Ala. 2006).

#### **IV. VICARIOUS IMMUNITY FOR HOSPITALS**

Although the State-Agent immunity conveyed to healthcare providers by operation of the Proclamation does not directly apply to hospitals, a hospital can, obviously, only act through those it employs. The practical effect, therefore, is that hospitals are afforded immunity to the same extent as its employees. Under Alabama's doctrine of vicarious immunity, "if a putative servant is not liable...because he is immune, no liability exists to be visited upon the putative master under the rule of *respondeat superior*." *Hollis v. City of Brighton*, 885 So.2d 135, 142 (Ala. 2004); *Ex parte Labbe*, 156 So. 3d 368, 374 (Ala. 2014) ("Because the [employees] are immune from liability for their negligent acts, the [employer] is likewise immune from liability for the negligent acts of the [employees]."); *City of Bayou La Batre v. Robinson*, 785 So.2d 1128, 1131 (Ala. 2000) ("where an...employee enjoys immunity, the [employer] likewise is immune as to claims based on the employee's conduct").

#### **V. CONCLUSION**

Obviously, the effect of this Proclamation is untested, and this is an evolving situation. The potential also exists that more may be done when the Legislature returns to session. It is clear, however, that healthcare facilities need to ensure that they immediately invoke emergency operation plans, and document that action. Likewise, all emergency operational policies and procedures need to be memorialized in writing so that they may later be relied upon as establishing an alternative standard of care in the event litigation arises.