

MEDICAL MALPRACTICE UPDATE

March 2008

Consent Forms

Helpful Tools for Defending Claims that the Hospital is Liable for Non-Employed Physicians

By Cindy C. Boer, Attorney

When plaintiffs file lawsuits alleging negligent medical care, they often sue the hospital where they received treatment, even though the physician who treated them was not employed by the hospital. These plaintiffs may contend that the hospital is responsible for the physician's treatment under a theory of "ostensible agency" – even though the physician is an independent contractor, or merely has staff privileges at the hospital. "Ostensible agency" simply means that the person receiving the medical care had a reasonable belief, based on outward appearances, that the physician was an employee or agent of the hospital.

According to *Grewe v. Mt Clemens General Hospital*, 404 Mich. 240 (1978), a hospital is generally not liable for the negligence of a physician who is an independent contractor and who simply uses the hospital's facilities to provide treatment to patients. An exception would be if the patient looked to the hospital to provide medical treatment, and the hospital represented that medical treatment would be afforded by its own physicians. However, if the patient merely viewed the hospital as the location where his or her own physician would treat him, the hospital is not liable for the physician's negligence.

In Michigan, the courts have set forth specific criteria the patient must prove in order to hold the hospital responsible for a non-employed physician's negligence:

- 1) the patient receiving the medical

- treatment had a reasonable belief that the physician was acting on the hospital's behalf;

- 2) the hospital must have done something, or failed to do something, to generate that belief; and

- 3) the patient must not be guilty of negligence.

Chapa v. St. Mary's Hosp. of Saginaw, 192 Mich App 29 (1991).

Patients who are admitted to the hospital by their own private physician, who treated the patient at their own office outside of the hospital setting, will have a difficult time proving ostensible agency. This is because most courts have held that the "pre-existing" relationship between the patient and the physician, outside the hospital setting, defeats any claim that the patient thought the physician worked for the hospital.

The situation is different when patients present to the emergency room for treatment, or go to the hospital's radiology department, or receive anesthesiology services. Physicians who provide such services are often independent contractors, not hospital employees. In such instances, however, the plaintiff may claim they did not know of the physician's "independent contractor" status and assumed they worked for the hospital. In such cases, however, the plaintiff must still show that the hospital did something to create that belief.

Having patients sign consent forms that clearly explain the status of non-employed physicians can help defeat a claim of ostensible agency. For example, one Michigan court refused to find the hospital liable for the physician when the patient signed a consent form clearly stating that physicians providing treatment at the hospital were independent contractors and not hospital employees. *Tansil v. Sherrod*, 2002 WL 31941531 (unpublished decision by the Michigan Court of Appeals, 2002).

Courts from other states have held that informed consent forms, properly worded, can defeat an ostensible agency claim. These cases provide examples of consent-form language which was held as sufficient to protect the hospital from liability for non-employed physicians:

“The physicians on staff at this hospital are not employees or agents of the hospital, but independent medical practitioners who have been permitted to use its facilities for the care and treatment of their patients.”¹

“I understand that Hospital uses independently contracted physicians and physicians’ groups to perform specific services such as Anesthesia and Radiological services for the hospital and its patients. The physicians are not employees of Hospital but have been granted privileges to practice at the institution and, if that is the case, I can expect to receive a separate bill from these physicians or physician groups.”²

“I understand that Hospital does not render or provide physician services. Physician services are provided by private independent physicians who practice at Hospital. These physicians, including emergency room physicians, are not agents or employees of Hospital.

¹ *James v. Ingalls Memorial Center*, 701 N.E.2d 207 (Illinois Court of Appeals, 1998) (a case involving an obstetrician)

² *Churkey v. Rustia*, 768 N.E.2d 842 (Illinois Court of Appeals, 2002) (anesthesiologist)

Hospital is not responsible for the services physicians provide.”³

“I understand that all physicians at Hospital, including the radiologists, anesthesiologists, CRNA’s, emergency room physicians, and pathologists are independent contractors and are not employees or agents of Hospital.”⁴

“I understand those physicians providing medical services are not agents or employees of the hospital. This includes but is not limited to emergency department physicians and physician assistants, the anesthesiologist, and radiologists.”⁵

Some of these courts said it was immaterial whether the patient actually read or understood the consent form, because all the hospital has to show is that it did not hold the physician out as its own agent or employee. Posting signs informing patients of the independent contractor status of physicians (such as physicians in the emergency department or radiology department) may have the same effect as consent forms.

Using consent forms and posting signs may help a hospital defeat a claim of ostensible agency for independent contractors, but there are other factors to consider. These include whether the physician is wearing a hospital name tag suggesting an affiliation with the hospital; whether the physician is wearing scrubs with the

³ *McNamee v. Sandore*, 869 N.E.2d 1102 (Illinois Court of Appeals, 2007) (obstetrician)

⁴ *Ellis v. Community Methodist Hospital*, 2006 WL 3375204 (Kentucky Court of Appeals, 2006) (surgeon/neurologist)

⁵ *DeWald v. HCA Health Service of Tennessee*, 2007 WL 1711679 (Tennessee Court of Appeals, 2007) (radiologist). Other cases with helpful consent-form language include *Baptist Memorial Hospital System v. Sampson*, 969 S.W. 2d 945 (Texas Supreme Court, 1998) (emergency room physician); *Espalin v. Children’s Medical Center of Dallas*, 27 S.W.2d 675 (Texas Court of Appeals, 2000) (anesthesiologist); *Cantrell v. Northeast Georgia Medical Center*, 508 S.E.2d 716 (Georgia Court of Appeals, 1999) (emergency room physician); *Boren v. Weeks*, 2007 WL 1711666 (Tennessee Court of Appeals, 2007) (emergency room physician).

hospital's name embroidered on them; or what representations are made in hospital websites, brochures, and other advertising materials. Even how the physician introduces himself or herself to the patient can be important. All of these factors are used by the courts to determine whether the hospital will be held liable for the

physician's conduct under an ostensible agency theory.

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CASE LAW UPDATE

September 24, 2007 – February 21, 2008

Edited by: Brian A. Molde and Jason R. Sebolt

Supreme Court Decisions

Savings Provisions – Insanity

Long v Children's Hosp of MI, October 3, 2007
(Published Order)

The Supreme Court reversed a 2006 decision of the Court of Appeals and remanded the case to the Wayne County Circuit Court. In doing so, the Court relied upon the earlier decision in Vega v Lakeland Hosp, and stated that "the insanity saving provision of MCL 600.5851(1) applies to the plaintiff's medical malpractice claims. This Order of the Supreme Court simply reaffirms the decision in Vega that in cases involving insane plaintiff's who file medical malpractice lawsuits, they are entitled to a savings provision which extends the time for filing a claim to one year after the insanity is removed, by death or otherwise.

Court of Appeals Decisions

Statute of Limitations

Vanslebrouck v Halperin, January 15, 2008
(Published opinion)

In this birth trauma case, plaintiff appealed the trial court's grant of summary disposition in favor of the defendants. The significant issue addressed by the Court of Appeals in this case was whether MCL 600.5851(7) was a statute of limitations such that the notice tolling provision of MCL 600.5856(c) applied. In short, section 5851(7) confirms that if a malpractice action accrues to a child before his/her 8th birthday he/she can file the claim up to their tenth birthday. The trial court found that section 5851(7) was merely a savings provision and, thus, notice tolling did not apply

(which resulted in plaintiff's claim being untimely). However, the Court of Appeals reversed finding that section 5851(7) is a period of limitations as it is a "statutory provision that requires a person who has a cause of action to bring suit within a specified time." Accordingly, because section 5851(7) is a statute of limitations, the notice tolling in MCL 600.5856(c) applies.

Dilts v Majkrzak, December 4, 2007 (Unpublished opinion)

In this birth trauma action, plaintiff filed a complaint against a physician who was not originally named as a potential defendant in the Notice of Intent. Defendant subsequently moved for summary disposition and argued that the claim against him should be dismissed with prejudice because plaintiff failed to commence the action against him before his 10th birthday as required by MCL 600.5851(7). The plaintiff, on the other hand, argued that the case should be dismissed without prejudice because the insanity tolling provision of MCL 600.5851(1) applied. The Court of Appeals noted that the plaintiff had Down Syndrome and, therefore, was insane at the time his cause of action accrued. Citing to Vega v Lakeland Hosp, the Court held that the 10 year limitation period of MCL 600.5851(7) did not preclude application of the insanity savings provision of MCL 600.5851(1). Accordingly, the Court found that plaintiff's action was timely under section 5851(1) because he was afforded "until 1 year after the disability is removed through death or otherwise [to bring the action]." As the disability had not yet been removed, the statute of limitation remained tolled and plaintiff could timely file the action.

Direct Claims Against Hospital

Yanoviak v Huder, January 15, 2008 (Unpublished opinion)

Plaintiff appealed the trial court's ruling precluding her from amending her Complaint to add claims of direct negligence against the defendant hospital on the basis that the amendment would be futile. Plaintiff sought to amend her complaint to add claims that the hospital had a duty to review and supervise the patient's treatment because tests were performed *within the hospital*. Among other things, plaintiff argued that MCL 333.21513(a), MCL 333.21521 and 1999 AC, R 325.1027 impose upon a hospital the responsibility for follow-up treatment indicated by testing done within the hospital. The Court of Appeals affirmed the trial court noting that none of the cited statutory provisions create a private cause of action. In addition, the Court found that nothing in the statutes suggested that they imposed a duty upon a hospital based solely on testing done to patients not otherwise admitted to the hospital.

Standard of Care Applicable to Residents

Brooks v Univ of Detroit, October 23, 2007 (Unpublished opinion)

The defendant was a general practice dentist who, at the time of the alleged negligence, was undergoing residency training in oral and maxillofacial surgery. The plaintiff filed a lawsuit and attached the affidavit of merit from a dentist who was board certified in oral and maxillofacial surgery. The defendant moved to dismiss, arguing that the plaintiff's expert did not comply with §2169, which requires matching experts. The Court of Appeals recognized earlier cases which had held that the standard of care for a dentist was different than that of a specialist as well as cases involving residents which held them to the standard of a general practitioner. However, the Court of Appeals held that these decisions were overruled by more recent published decisions of the Supreme Court and the Court of Appeals, which held that residents are held to the standard of care in the specialty for which they are training; thus, a dentist resident training in oral and maxillofacial surgery is held to the specialty standard of care rather than that of a general practitioner.

Affidavit of Merit – Proximate Cause

Hubka v Defever, February 14, 2008 (Unpublished opinion)

Plaintiff filed affidavits of merit against emergency medicine physicians, family practitioner, and cardiologists. The affidavits filed against the emergency physicians and family practitioner did not address whether the actions of those defendants was the proximate cause of the injury – only the cardiologist's affidavit addressed causation. The plaintiff asserted that the causation element of the cardiologist's affidavit was sufficient to establish proximate cause for all the defendants. The Court of Appeals disagreed and dismissed the emergency room physicians and family practitioner. However, in a footnote the Court of Appeals asked the Legislature to correct the "glaring" hole in the statutes which requires affidavits of merit to address causation even if the specialist is not competent to testify regarding proximate cause.

Non-delegable Duty

Scott v Adelman, February 21, 2008 (Unpublished opinion)

Plaintiff requested a special jury instruction at trial holding an anesthesiologist responsible for the acts of a hospital-employed CRNA, based upon the American Society of Anesthesiology guidelines, which suggest such responsibility exists, and the theory that the anesthesiologist had a non-delegable duty to the plaintiff. The trial court denied the instruction before trial, but later reversed that decision and ordered a new trial based on the failure to provide the instruction sought by plaintiff. Defendants appealed the grant of a new trial, and the Court of Appeals reversed the trial court's ruling. In doing so, the Court of Appeals found that the testimony at trial had not established that the anesthesiologist accepted responsibility for the acts of the CRNA and that the ASA guidelines were not the law in Michigan and that there was no support for the theory that the anesthesiologist had a non-delegable duty to the plaintiff which could not be dispelled by the CRNA's alleged negligence.

SHRR NEWS & SUCCESS

Jack O'Loughlin and **Jason Sebolt** obtained a no cause verdict based upon a finding that our client vascular surgeon was not negligent in the performance of an aortobifemoral bypass grafting procedure. The verdict concluded a six-day jury trial in Kent County Circuit Court.

Joe Engel and **Cindy Boer** prevailed in a motion for summary disposition based on the statute of limitations, resulting in dismissal of a wrongful death case against an interventional cardiologist, the cardiologist's professional corporation, and the hospital where the patient was treated.

Brian Molde and **Jason Sebolt** recently conducted a deposition skills seminar for the Emergency Department Residents of a local hospital.

WATCH YOUR MAIL!

Watch for your updated **Medical Malpractice and Health Law Attorney Contact List** which will be mailed in early March. New this year: the contact card not only lists attorneys, but also paralegals and legal nurse consultants in the medical malpractice department.

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