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First District Decision Reaffirms *Schroeder v. Northwest Community Hospital* and Poses Serious Challenge to the Traditional *James v. Ingalls Memorial Hospital* Consent Form

In the Fall of 2007, I used this column to discuss the Illinois Appellate Court, First District's decision in *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 862 N.E.2d 1011 (1st Dist. 2007), and the potential impact that decision might have on trial courts faced with claims of an apparent agency in which a *James* consent was present. As you may recall, *Schroeder* was a case in which the First District accepted a plaintiff's argument that he was confused by the language and form of the defendant hospital's disclosure of the independent contractor status of the physicians providing treatment to the patients, which is commonly referred to as a "*James* consent." Over the past two years, the *Schroeder* decision faded somewhat from memory, as there were no subsequent decisions from the Illinois Appellate Court applying what most defense counsel had hoped was a rogue decision by the First District. But, the First District recently reaffirmed *Schroeder* when it handed down its decision in *Spiegelman v. Victory Mem. Hosp.*, 392 Ill. App. 3d 826, 911 N.E.2d 1022 (1st Dist. 2009), thereby requiring defense counsel to once again examine how they approach cases where a *James* consent is present. This decision also provides an excellent opportunity for defense counsel to provide guidance to their hospital clients regarding the proper form for an independent contractor physician disclosure.

In *Spiegelman*, the plaintiff sued to recover for injuries she sustained because of the misdiagnosis of bacterial meningitis during her hospitalization on November 29, 1998. She named emergency room physician, Dr. Murray Keene, his practice group Emergency Specialists of Illinois, P.C., family practice physician Dr. Pedro Palu-Ay, infectious disease physician, Dr. Louise Riff, and Victory Memorial Hospital ("the hospital") as defendants. By the time the verdict of $11,110,000 in favor of plaintiff was handed down, the only remaining defendants were the hospital, Dr. Keene, and Emergency Specialists of Illinois, P.C. *Spiegelman*, 392 Ill. App. 3d at 832. Twice during the trial, the hospital moved for a directed verdict on all issues pertaining to the apparent agency of Dr. Keene, and twice the trial court denied that motion. After hearing the verdict, the hospital brought a motion for judgment notwithstanding the verdict and a motion for a new trial, both of which the trial court denied. *Id.* at 833.

On appeal, the hospital argued that the trial court erred in denying its motion for judgment notwithstanding the verdict because the plaintiff failed to prove: (1) that the hospital held out Keene as its agent; and (2) that the plaintiff justifiably relied on any purported holding out by the hospital. *Id.* at 833. In rejecting those arguments, the First District focused on the one-page consent form titled "CONSENT FOR EMERGENCY TREATMENT"(Consent Form"), which plaintiff admitted to signing prior to any treatment being provided by defendants. *Spiegelman*, 392 Ill. App. 3d at 829. Paragraph 4 of the Consent Form provided:

> I understand that the Emergency Department physician and my attending physician are independent contractors and not agents or employees of VICTORY MEMORIAL HOSPITAL. I further understand that my attending physician may request treatment or diagnostic services (including radiology, anesthesiology, pathology) by other physicians. I am also aware that any other physicians who may be called to attend my care are independent contractors and not employees or agents of VICTORY MEMORIAL HOSPITAL. *Id.* at 829.

The court agreed with the plaintiff's argument that the patient's signature on the *James* consent alone does not defeat the "holding out" element of an apparent agency claim if there is other "holding out" conduct by the hospital. Rather, the First District found persuasive the trial court's reasoning for denying the post-trial motions, where Judge Locallo stated:

> If not for the *Schroeder* case, the Court believes that (*Churkey v. Rustia*, 329 Ill. App. 3d 239, 768 N.E.2d 842 (2002)) and (*James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 701 N.E.2d 207 (1998)) would have strong positions with respect to what was signed, but because *Schroeder* … acknowledges that when these forms are presented, you have to look at the totality of the circumstances as far as the Court is concerned, and under these circumstances, acknowledgment that confusion can create an issue of fact for the jury to determine in this case,…. that it was not reasonable to assume that because she had signed the form that she knew or reasonably should have known that Dr. Keene was an independent contractor….

Spiegelman, 392 Ill. App. 3d at 836.

According to the First District, the consent form in *Spiegelman*, like the form previously considered in *Schroeder*, was confusing and ambiguous because it "utilized a multi-part format and contained various provisions unrelated to the independent contractor disclaimer." *Id.* at 837. Therefore, the court stated that the jury "could rightfully infer that plaintiff was confused as to which doctors were employees of the hospital and which were independent contractors" because the Consent Form: 1) was titled "CONSENT FOR EMERGENCY TREATMENT," 2) contained a signature line that was beneath a separate unnumbered paragraph concerning the release of property, and 3) contained a separate paragraph stating: "I am aware that during my visit to the Emergency Department of Victory Memorial Hospital, hospital employees will attend to my medical needs as may be necessary." *Id.* at 837.

The appellate court reiterated its holding in *Schroeder* that if "there is evidence that the decedent reasonably believed his personal care physician and the consulting physicians were agents or employees of the hospital, a triable issue of fact exists and should be presented to a jury." *Schroeder*, 371 Ill. App. 3d at 593-94, 862 N.E.2d at 1020. The First District further stated there were additional facts in *Spiegelman* bearing upon the element of "holding out" sufficient to support the jury's determination of liability based on apparent agency. *Spiegelman*, 392 Ill. App. 3d at 839.

While the First District does not specifically identify these additional facts which support a finding that the hospital held out Dr. Keene as its agent, the trial court record contains newspaper advertisements exalting the health care the hospital provided. The trial court record, however, is lacking evidence that the plaintiff actually saw these advertisements, therefore, leading to the logical question of how plaintiff could have relied upon a "holding out" of which he was unaware.

The First District pronounced an "objective standard" for "holding out," stating, "whether [the plaintiff] in fact saw the advertisements is irrelevant." *Id.* at 839. The court then declared, "the advertisements were relevant to the element of holding out – whether the hospital held itself out as a provider of complete medical care." *Id.* at 841.

The First District also appears to adopt another of the plaintiff's arguments in *Spiegelman*, stating, "[t]he Hospital cannot have it both ways. It cannot advertise it has the best doctors in the community and then tell a jury that there is no evidence that emergency department doctors were its employees." *Id.* at 841. Should a trial

court narrowly apply this statement, it is possible that the trial court could bar defense counsel representing hospitals that advertise their services from arguing the independent contract status of their physicians to a jury.

The First District's holding in *Spiegelman* appears to surpass its prior ruling in *Schroeder*; thus, the appellate court has further eroded the effectiveness of the traditional *James* consent in defeating claims of apparent agency for independent-contractor physicians. *Schroeder* adopted the confusing and implausible distinction between confusion due to the actions by a hospital and confusion caused by the disclosure form itself. The *Spiegelman* decision indicates that if a plaintiff testifies that he or she was confused by a consent form disclosure, then the issue of apparent agency must be submitted to a jury.

In order to address the issues presented in *Spiegelman*, counsel should continue to challenge a deponent who states that he or she was confused or was misled by a consent form. Question how the form confused the patient and why the patient did not seek clarification from someone at the hospital. Ask the patient if he or she was confused about any other treatment that was provided during the admission. Also, make sure that you have requested all documents that the patient received prior to admission, which disclose the proper employer of the physician.

If you did not counsel your hospital clients on how to appropriately draft the disclosure forms after *Schroeder*, you should have that discussion now. The independent contractor disclosure statement should be on a separate sheet of paper, rather than included with the other traditional consents and disclosures. It must provide sufficient and clear notification of the physicians' independent contractor status and should be individually signed by the patient or his or her representative. To provide the greatest chance of defeating claims of apparent agency, the disclosure should identify and disclose by name the physicians who have privileges, but are not employees. A paragraph stating that the patient has the right to choose his own physician and refuse treatment from any physician would also be beneficial. Finally, and perhaps most importantly, the hospital clients should train their staff to read the disclosure forms to the patients and answer any questions patients may have regarding the forms.

About the Author

Edward J. Aucoin, Jr. is an associate in the Chicago firm of *Pretzel & Stouffer, Chartered.* He has over nine years of experience in medical malpractice defense, commercial litigation, and contract litigation practice. Mr. Aucoin's substantial client base includes private hospitals and medical practice groups, physicians and other medical professionals, and national commercial corporations. He has extensive experience in preparing complex litigation for trial, and has second-chaired medical malpractice trials in Cook County and DuPage County. Mr. Aucoin received his B.A. from Loyola University of New Orleans and his J.D. from Loyola University of New Orleans School of Law. He is also a member of the IDC.

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