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Medical Malpractice

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Using Independent Contractor Disclaimers Within Medical Consent Forms After *Schroeder v. Northwest Community Hospital*

In what could best be described as wishful thinking on my part, I dismissed the 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), when handed down in December 2006. I believed that the holding ignored clearly established precedent and would have to be reversed by a higher court. At a recent presentation to a group of healthcare risk managers, I went so far as to compare the *Schroeder* decision to an endangered tiger that would soon be extinct and thus, was nothing to fear. I rationalized that once the case made it to the Illinois Supreme Court, the reasoning of the First District would be rejected, especially in light of the supreme court's recent reaffirmation of the use of independent contractor disclaimers in medical consent forms in *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 854 N.E.2d 635 (2006). Having had its first opportunity to address the appellate court's decision, the Illinois Supreme Court recently denied Northwest Community Hospital's (Northwest's) Petition for Leave to Appeal, thereby leaving the reasoning in *Schroeder* intact for now.

In *Schroeder*, the estate of a patient brought a medical malpractice action that alleged the patient was administered improper medications that caused the formation of lymphoma, and subsequently led to his death. As part of that action, the plaintiff sued Northwest as the apparent principal for the individual doctors whose alleged negligence caused the patient's injuries.

After discovery was completed, Northwest filed a Motion for Summary Judgment on the grounds that the co-defendant doctors were neither its actual nor apparent agents. In support of its motion, Northwest attached three separate universal consent forms signed by the patient or his wife, which contained a disclosure statement that read:

> *Item 2, Disclosure Statement*: Your care will be managed by your personal physician or other physicians who are not employed by Northwest Community Hospital or Northwest Community Day Surgery Center, but have privileges to care for patients and this facility. Your physician's care is supported by a variety of individuals employed by Northwest Community Hospital or Northwest Community Day Surgery Center, including nurses, technicians and ancillary staff. Your physician may also decide to call in consultants who

practice in other specialties and may be involved in your care. Like your physician, those consultants have privileges to care for patients at this facility, but are not employed by Northwest Community Hospital or Northwest Community Day Surgery Center. *Schroeder*, 371 Ill. App. 3d at 587.

The consent form also contained language that provided that the patient's signature was an acknowledgment that he or she had read and understood the terms of the consent. *Id.*

In response to the motion for summary judgment, the plaintiff argued that the universal consent form was "extremely confusing" and ambiguous because it did not state in a clear fashion that the doctors who would be caring for the patient were not hospital employees or agents, and that the form could be reasonably interpreted to mean that the patient's personal physicians were employed by Northwest. The plaintiff further argued that the disclosure statement was "sandwiched" between other provisions on the form, which added to the patient's confusion. Finally, the plaintiff argued that the hospital made no meaningful effort to ensure that the decedent or his wife understood what was being disclosed to them. *Id*. at 589.

After initially denying Northwest's motion, the trial court granted summary judgment in the hospital's favor, basing its decision on the fact that both the patient and his wife signed the disclosure forms, and that there was no claim that they were unable to read or understand the forms. *Id*. at 589-90.

On appeal, the plaintiff argued that there was sufficient evidence for a jury to find that the physician defendants were the apparent agents of Northwest and therefore, the trial court's grant of summary judgment was improper. The appellate court agreed, reversed the trial court's summary judgment order and remanded the matter for further proceedings. While reciting the development of apparent agency law regarding health professionals in its opinion, the court referred to its own prior decision in *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 701 N.E.2d 207 (1st Dist. 1998). In *James*, the appellate court refused to find the defendant hospital vicariously liable for the conduct of the physicians at issue because the patient signed a consent form that stated that the physicians on staff at the hospital were not employees or agents of the hospital, but rather, were independent medical practitioners. The *James* court stated that the physicians' independent contract status was "clearly set out in the *consent to treatment* form, which the patient signed." *James*, 299 Ill. App. 3d at 633. While noting that the existence of an independent contractor disclaimer in a consent form is not always dispositive on the issue of holding out, the *James* court found that "it is an important factor to consider." *Id*. However, the *Schroeder* court failed to recite the remainder of its on holding in *James*, where it noted that "[c]ertainly having the patient sign a consent for treatment form which expressly states that 'the physicians on staff at this hospital are not employees or agents of the hospital' may make the proving of this element extremely difficult." *Id*.

The Appellate Court, First District also cited the Second District's decision in *Churkey v. Rustia*, 329 Ill. App. 3d 239, 768 N.E.2d 842 (2nd Dist. 2002). In *Churkey*, the court upheld summary judgment in favor of the hospital because the patient signed a consent form that disclosed the independent nature of the physicians who were performing services to her during her admission. The *Churkey* court rejected an affidavit from the plaintiff that stated she believed the physicians were employees of the hospital, because she failed to present any specific facts to support that assertion. *Churkey*, 329 Ill. App. 3d, at 244-45.

In reversing the trial court's order granting summary judgment in the *Schroeder* case, the Appellate Court stated, "We believe the issue is not whether plaintiff was confused or led to believe by any actions on the part of Northwest that the physicians were its agents or employees, but whether decedent was confused or misled by the disclosure forms and whether he perceived or believed the physicians were the agents or employees of Northwest." *Schroeder*, 371 Ill. App. 3d at 593. The court further stated, "If, however, there is evidence that 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." *Id*. at 593-94.

Then, with no explanation or provision of specific facts to support its decision, the appellate court held that there was sufficient material evidence on the issue of apparent agency that should be submitted to the trier of fact, so summary judgment was inappropriate. *Id*. Therefore, the appellate court's ruling begs the question: exactly what facts exist to support the patient's reasonable belief that the physicians were employees of the hospital, such that his case is distinguishable from the Second District's holding in *Churkey*.

Perhaps more confusing is the court's attempt to elaborate the true issue in *Schroeder* as between 1) confusion due to the actions by Northwest and 2) confusion caused by the disclosure forms. Presumably, the disclosure forms were provided by Northwest. If so, the distinction becomes implausible as a basis to overrule the order granting summary judgment. While it cannot be disputed that the independent contractor disclaimer was inartfully drawn and not as clear as the forms used in *James* and *Churkey*, the failure of the appellate court to provide specific facts which support the patient's alleged confusion regarding those forms invites challenges against all hospital consent forms.

One can expect plenty of deposition testimony where the patient was confused or unsure of the terms of the consent form and that the patient at all times believed that the physicians were employees of the hospital, even after signing the consent form and thereby attesting to understanding its contents. Since the appellate court remanded the case for further proceedings, we likely have not seen the last of *Schroeder*. Until that time, counsel should be reevaluating their hospital clients' independent contractor disclaimer statements to ensure that they provide sufficient and clear notification of the physicians' independent contractor status.

In order to directly address some of the issues stated by the appellate court, counsel may consider further distinguishing and separating out the disclaimer sentence(s) or even providing that disclaimer on a separate piece of paper that is individually signed by the patient or the patient's representative. Where practical, hospitals may want to identify and disclose by name the physicians who have privileges, but are not employees. While this may entail a significant administrative burden upon the hospital, it would also address the supreme court's holding in *York, supra*, concerning the separate and recurring ability to claim reliance by the patient upon each individual medical care provider.

> Counsel must also reevaluate their strategy during depositions and other discovery proceedings. When the deponent states that he or she was confused or was misled by the consent forms, counsel must be prepared to challenge those claims. Failure of the patient to seek clarification of the consent form from the hospital staff and the existence of documents that the patient received prior to admission that disclose the proper employer of the physician are good places to start. Most importantly, counsel should stress to their hospital clients the need to ensure that their staff is trained to answer any questions patients may have regarding the forms and that it should be part of their practice to offer that assistance.

The appellate court's holding in *Schroeder* did not invalidate the use of independent contractor disclaimer statements within medical consent forms, but it did put counsel on notice that, as the holding in *James* states, the disclaimer is not always dispositive on the issue of holding out. The disclaimer can continue to be a weapon against claims of "holding out" in apparent agency cases, as long as it is clear and supported by good practice by the staff who requests execution of the documents.

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.