

### **Spiegelman v. Victory Memorial Hospital: The “Holding Out” Theory of Vicarious Liability and *Forum Non Conveniens***

In Illinois, a hospital can be held vicariously liable based upon a principal-agency relationship between the hospital and physician. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 523, 622 N.E.2d 788, 794-95 (1993). *Gilbert* held that a hospital may be liable under the doctrine of apparent authority for the negligent acts of a physician providing care at a hospital, “regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician is an independent contractor.”

Under this “holding out” theory of vicarious liability, a plaintiff must show that: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

Noting the effect (and potential danger) of the use of specific language in legal consent forms, the Appellate Court for the First District of Illinois recently addressed the elements of the holding out theory in *Spiegelman v. Victory Memorial Hospital*, No. 1-07-3195 (Fifth Division, corrected June 9, 2009). The opinion also addresses the doctrine of *forum non conveniens* which has become an issue of particular concern to defense attorneys in Illinois.

The underlying appeal arose from a medical malpractice case filed by plaintiff, Judith Spiegelman, to recover for injuries she sustained as a result of an alleged misdiagnosis of bacterial meningitis. Defendant, Victory Memorial Hospital, was found liable based on defendant, Dr. Murray Keene’s, apparent agency. Victory Memorial

appealed, seeking reversal of the trial court’s denial of its motion for judgment notwithstanding the verdict, arguing that plaintiff failed to prove: (1) that Victory Memorial held out Dr. Keene as its agent; and (2) that the plaintiff justifiably relied on any purported holding out by Victory Memorial. Alternatively, Victory Memorial argued the trial court erred in denying its motion for a new trial because: (1) the manifest weight of the evidence failed to establish any holding out or reasonable reliance by plaintiff; (2) the court erred in admitting evidence of Victory Memorial advertisements; and (3) the court erred in denying defendants’ motion to transfer the case.

The evidence showed that at about 3:00 p.m. on November 29, 1998, Mrs. Spiegelman went to the emergency room of Victory Memorial Hospital in Lake County, Illinois, with complaints of a headache, pain in her left ear, congestion, dizziness, occasional double vision, and nausea with no vomiting. She was alert, oriented and in no acute distress. Her vital signs were all normal but she had a temperature of 100.1 degrees.

Mrs. Spiegelman signed a one-page consent form titled “CONSENT FOR EMERGENCY TREATMENT.” The consent form provided for consent to voluntary emergency treatment and stated that the Emergency Department physician and the undersigned’s attending physician were independent contractors and not agents or employees of Victory Memorial Hospital. Significantly, the form concluded with a separate section titled “RELEASE FOR RESPONSIBILITY FOR VALUABLES” under which the sole signature line was placed.

At about 4:30 p.m., plaintiff was first examined by Dr. Keene. Dr. Keene was employed by Emergency Specialists of Illinois, P.C., not Victory. Dr. Keene diagnosed the plaintiff with Bell’s Palsy, sinusitis, and an ear drum infection. Mrs. Spiegelman’s condition continued to deteriorate as she awaited x-rays and other tests. At 4:00 a.m., a neurological check revealed that she had a temperature of 102.4 degrees, was mumbling and talking incoherently.

A spinal tap to rule out bacterial meningitis was not done until around 8:30 p.m. on November 29th. The test was read as positive the next afternoon. As a result of the bacterial meningitis infection, Mrs. Spiegelman sustained permanent brain injury which left her wheelchair-bound.

Plaintiff's Second Amended Complaint alleged both institutional negligence by Victory Memorial and vicarious liability based on the negligence of its apparent agents, Dr. Keene and the other examining/treating physicians. Plaintiff alleged that Keene was negligent in failing to consider bacterial meningitis when he treated her at the emergency room and by failing to order the antibiotic Rocephin. The jury returned a verdict of \$11,110,000 against Victory Memorial, Keene, and Emergency Specialists of Illinois, P.C.

Distinguishing this case from other opinions finding no vicarious liability where the physician's independent contractor status was clearly set out in the consent form, the Appellate Court noted that the key issue was whether Mrs. Spiegelman understood the consent based on the totality of the circumstances. The Court cited the ambiguity of the consent form itself in that the plaintiff may have believed that she was merely consenting to the release for responsibility of her valuables. The Court determined that the plaintiff's worsening medical condition made it reasonable for the jury to infer that she was confused about which doctors were employees of the hospital and which were independent contractors. The Court found it significant that the plaintiff did not choose Dr. Keene, but that the hospital provided him to her for emergency room treatment. As such, she reasonably relied upon advertisements holding out the hospital as a provider of "complete care", whether she actually saw such advertisements or not.

Of additional interest is the Court's finding that the trial court did not abuse its discretion in denying Victory Memorial's motion to transfer the case from Cook County (plaintiff's chosen forum) to Lake County, Illinois (where the cause of action arose) based on the doctrine of *forum non conveniens*. Noting that Illinois law places the burden on the defendant to prove that the balance of private and public interest factors "strongly favors" transfer, the Court once again sided with the plaintiff based on the totality of the circumstances. In fact, the Court found that none of the relevant factors weighed strongly in the hospital's favor.

The Court noted that although the plaintiff is currently residing in California, she lived in Cook County when her case was originally filed and the hospital failed to show that Lake County would have been a more convenient forum for the case to be tried. The Court pointed out that Cook County was more accessible for the wheelchair bound plaintiff through O'Hare Airport and the majority of witnesses either lived or worked in Cook County. The available medical records could be easily transported to either forum. Finally, the Court found that court congestion was an insignificant factor since the record did not show that either forum could resolve the case more quickly.

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## **NO JOINT AND SEVERAL LIABILITY FOR INJURIES SUSTAINED IN TWO SEPARATE AUTO ACCIDENTS**

In *Sakellariadis v. Campbell*, 2009 WL 1531832 (1st Dist. 05/29/2009), the plaintiff was involved in two auto accidents: one with Defendant Campbell in July, 2001 and another with Defendant Walters in October, 2001. The plaintiff sustained injuries to her neck, back, shoulder, eyes and knee which required surgery on her shoulder, knee, lower back and eyes. Before the first accident, the plaintiff had several preexisting conditions. After the first accident, the plaintiff still had the original preexisting conditions plus injuries from the first accident that had become preexisting conditions. The alleged injuries in the second accident were added to these preexisting conditions. At trial, there was conflicting medical testimony regarding which collision, if any, contributed to the plaintiff's injuries. During jury deliberations, the plaintiff settled with Defendant Campbell for \$150,000. The jury returned with a verdict of \$518,000 and attributed 50% of the liability to each defendant. The trial court entered a judgment against the non-settling defendant (Walters) for 50% of the jury verdict.

On appeal, the plaintiff contended that the non-settling defendant (Walters) should have been responsible for the entire amount of the jury verdict, less the \$150,000 paid in settlement by Campbell, because each was jointly and severally liable for the entire verdict. The plaintiff maintained that the defendants were joint tortfeasors who caused her indivisible injuries. The appellate court disagreed with the plaintiff and found that the plaintiff's injuries were not indivisible and, therefore, the defendants were not jointly and severally liable for her damages.

Well-established Illinois law dictates that where two or more persons, under circumstances creating primary accountability, directly produce a single, indivisible injury by their concurrent negligence, they are jointly and severally liable, even though there is no common duty, common design or concerted action. Accordingly, the existence of a single, indivisible injury is necessary to establish that multiple defendants are jointly and severally liable. If a plaintiff's injuries can be apportioned among multiple tortfeasors, then the tortfeasors are not jointly and severally liable.

Moreover, a plaintiff's allegations that she was injured twice in the same part of her body will not transform two injuries into one. Where one party negligently aggravates a preexisting injury caused by someone else, the aggravation is a separate and distinct injury for which the second tortfeasor is liable.

In the instant action, the plaintiff alleged that she suffered injuries in each auto accident. There was medical testimony to support the proposition that the injuries sustained in the first accident with Campbell were aggravated by the second accident with Walters, making the plaintiff's injuries separate and distinct. In light of this evidence, the appellate court held that the defendants were not jointly and severally liable and that the jury's verdict attributing 50% of the liability for the plaintiff's injuries to each defendant was not against the manifest weight of the evidence.

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## **INSURANCE POLICY'S NARROW DEFINITION OF WHO IS "INSURED" FOR UIM COVERAGE VIOLATES ILLINOIS LAW**

In *DeSaga v. West Bend Mutual Ins. Co.*, 2009 WL 1684965 (3rd Dist. 06/15/2009), the court determined whether underinsured motorists (UIM) benefits were available where the decedent was hit by a car and killed after he went into the roadway to retrieve pieces of iron that had fallen from his truck. At the time of the accident, the plaintiff's decedent was working and driving a truck for his employer. West Bend provided business automobile insurance for the truck driven by the plaintiff's decedent. The plaintiff sought UIM benefits from West Bend as a result of the accident. West Bend denied coverage claiming that the decedent had not been "occupying" the truck at the time of the accident as defined by the insurance policy.

The liability-coverage section of the policy defined an "insured" as the named insured for any covered vehicle, anyone using a covered vehicle with the permission of the named insured, and anyone liable for the conduct of an "insured". For purposes of UIM coverage, a policy endorsement defined an "insured" as anyone "occupying" a covered vehicle and anyone with regard to damages he or she was entitled to recover because of bodily injury sustained by another "insured". "Occupying" was defined in the endorsement as "in, upon, getting in, on out or off."

The trial court granted summary judgment in favor of West Bend, finding that the decedent was not "occupying" the covered vehicle at the time of the accident as defined by the UIM endorsement. On appeal, the plaintiff asserted that she was entitled to UIM benefits because the insurance policy could not define "insured" more narrowly in the UIM endorsement than it did in the liability-coverage section of the policy. This was a new argument based upon the First District Appellate Court's decision in *Schultz v. Illinois Farmers Ins. Co.*, 387 Ill.App.3d 622 (2009), which was not issued until after the trial court's summary judgment ruling. Alternatively, the plaintiff maintained that the trial court erred in finding that the decedent was not "occupying" the covered vehicle at the time of the accident.

The DeSaga court first considered the plaintiff's argument that the UIM endorsement's definition of an "insured" violated Illinois law because it was impermissibly narrow. Relying upon the appellate court's analysis in *Schultz*, the DeSaga court held that West Bend's attempt to define the term "insured" more narrowly for UIM coverage under the policy than it did for liability coverage violates Illinois law. Under Illinois' statutory scheme of automobile insurance, an insurer is required to provide UIM coverage at the same amount as liability coverage. Once it has been determined who will be insured under the liability section of the policy, the insurer cannot, either directly or indirectly, deny UIM coverage to an insured. Defining an "insured" differently for purposes of liability and UIM coverage is an indirect attempt by the insurer to deny UIM coverage to an "insured". Therefore, the definition of an "insured" in the UIM endorsement of West Bend's policy could not be enforced and the plaintiff was entitled to UIM benefits under the West Bend policy.

Moreover, the appellate court held that the plaintiff's decedent was "occupying" the covered vehicle at the time of the accident, which would also entitle the plaintiff to UIM benefits under the West Bend policy. Prior decisions have interpreted the term "occupying" as it was used in the West Bend policy and have found that two requirements must be satisfied in order to impose liability on an insurer for a particular accident: (1) there must be some nexus or relationship between the insured party and the covered vehicle, and (2) there must be actual or virtual physical contact between the injured party and the covered vehicle. Because West Bend conceded that there was a relationship between the decedent and the covered vehicle and the parties agreed that the decedent was not in actual physical contact with the covered vehicle, the court considered whether the

decedent was in virtual physical contact with the covered vehicle when the accident occurred. The record established that the decedent had been using the covered vehicle just moments before the accident occurred. He had parked the vehicle nearby and had left the engine running as he went to remove the pieces of iron from the roadway. Under the facts of this case, the court held that the decedent was in virtual physical contact with the covered vehicle at the time of the accident and was "occupying" the covered vehicle for purposes of UIM coverage.

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## MCKENNA NEWS

**Greg Cochran**, managing partner of McKenna Storer, ended his tenure as President of the Illinois Association of Defense Trial Counsel (IDC) with an extensive list of accomplishments. Greg served as 2008-2009 President of IDC, which is the premiere association of attorneys in Illinois representing business, corporate, professionals and other individual defendants in civil litigation. With nearly 1,000 members, the IDC is the voice of the defense bar in Illinois and is working with the business, insurance and medical communities in support of tort reform legislation.

Greg focused attention across the state on threats to the system of balance and fairness in Illinois courts. He testified at a Joint Hearing of the Illinois Senate and House Judiciary Committees in support of proposed tort reform legislation which would prevent forum shopping in Illinois. The bill takes aim at the abnormally

high rates of civil litigation filed in Cook and Madison counties.

Greg also found himself in the unusual position of squaring off against the Illinois State Bar Association, over a proposal which would have a dramatic and negative impact on defendants. The ISBA proposed legislation to require the payment of prejudgment interest to successful plaintiffs in nearly all Illinois tort cases. In response, Greg worked with IDC members to draft a widely circulated position paper, outlining flaws in the ISBA proposal. He authored an editorial, published statewide in the ISBA's Bar News, describing how the plaintiff-friendly legislative initiative is bad for defendants, for the justice system, and for the struggling Illinois economy. *CONGRATULATIONS TO GREG FOR HIS HARD WORK AND ACCOMPLISHMENTS.*

Several other McKenna attorneys are active in IDC leadership. **Margaret Foster** serves on the Board of Directors, **Bob Pisani** is Co-Chair of the Product Liability Committee, **Dawn Ehrenberg** is Co-Chair of the Medical Liability Committee, and **Kristin Tauras** is Co-Chair of the Employment Law Committee.

**Margaret Foster** was named to the 2009 Super Lawyers – Corporation Counsel Edition. This publication lists attorneys who have been recognized for their abilities in defending corporations in certain practice areas. *CONGRATULATIONS TO MARGARET!*

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