

# MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL  
LIABILITY AND HEALTHCARE ISSUES

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## A Word From the Practice Group Chair

This issue of the “Monitor” brings you an article by Ed Wagner of our Urbana office concerning the legal theory of apparent agency which allows plaintiffs to argue to juries that a given defendant hospital should be held vicariously liable for physicians who serve on its medical staff and/or in its emergency room.

Mark Hansen and Emily Perkins of our Peoria office have also provided us with a summary of recent case law which requires that medical battery claims be supported by the filing of a certificate of merit from a licensed physician certifying that the facts of the matter constitute a meritorious claim before further litigation may proceed. Such certificates of merit have been required in medical malpractice litigation in Illinois since 1985, but until recently the question remained unsettled as to whether a certificate of merit would be also required for claims based upon a theory of medical battery.

As usual our firm has been busily defending medical professionals in Illinois courts. Doug Pomatto and Mike Denning of our Rockford office have in the last few weeks obtained a defense verdict in an appendectomy case, and Adrian Harless and Tyler Robinson of our Springfield office have won a very significant and hard fought victory in a shoulder dystocia case. We’re proud of their efforts and their success and we are always willing to be a part of your success as well when called upon.

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## Signed “Consent for Treatment” Forms Successful in the Defense of Hospital Vicarious Liability Claims

By Ed Wagner

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Many hospital emergency rooms utilize independent groups to staff and provide physician care services to the patients who seek care and assistance at their centers. This arrangement is typically based on a contract entered into by the hospital with the independent group. The contract usually clearly states that all physicians practicing in the E.R. are agreed to be independent contractors and not employees or agents of the hospital. The problem arises when a patient is unhappy with the care or result of the physician’s treatment and sues both the physician and the hospital, with the claim against the hospital

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- Signed “Consent for Treatment” Forms Successful in the Defense of Hospital Vicarious Liability Claims
- Illinois Court Extends Affidavit and Health-Professional’s Report Requirements to Medical Battery Claims

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based on vicarious liability due to an alleged “apparent agency” relationship between the hospital and the treating E.R. physician.

Because the contract between the hospital and their E.R. physicians establish that the physicians are not actual agents or employees of the hospital, plaintiffs have only successfully sued hospitals in certain circumstances where they allege that the hospital “held out” or lead their patients to believe that the E.R. physicians were hospital employees or agents. This legal theory is called “apparent agency.” However, hospitals have been able to successfully defeat these claims when there was clear evidence that the patients were adequately informed that the physicians providing care were independent contractors and not employees of that hospital.

A string of three recent cases show what type of evidence was required for a hospital to defeat such a vicarious liability claim where the E.R. physician was, by written contract, clearly an independent contractor.

In *Frezados v. Ingalls Memorial Hospital*, 2013 IL App (1st) 121835, the evidence showed:

- The “Consent for Treatment” form, signed by the patient, clearly stated, with no exceptions or contradictions, that the patient had been informed and he or she understood the physicians in the E.R. were not employees or agents or apparent agents of the hospital but were independent medical practitioners.
- The signed “Consent for Treatment” form also noted that the E.R. physician would bill the patient separately for their services.
- The hospital did not provide any compensation to those E.R. physicians.
- There were signs posted in the waiting rooms and all examination rooms at that hospital stating the E.R. physicians were not employees

or agents of the hospital, but rather independent contractors who would bill separately from the hospital charges.

In *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, the evidence showed:

- The “Consent for Treatment” form, signed by the patient, clearly stated, with no exceptions or contradictions, that the patient had been informed and he or she understood the physicians in the E.R. were not employees or agents or apparent agents of the hospital but were independent medical practitioners.
- The signed “Consent for Treatment” form also stated that each physician was solely responsible for the care, treatment and services ordered, requested, directed or provided by that physician; and that each physician was also not subject to the supervision or control of the hospital.
- The signed “Consent for Treatment” form was also witnessed by a relative.

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- The signed “Consent for Treatment” form noted the E.R. physicians would bill separately for their care and services.
- The signed “Consent for Treatment” form included a term confirming that “. . . any questions I’ve had have been satisfactorily answered.”
- There was no evidence the adult patient was unable to understand or assent to the terms in the consent form.
- There were no actions or statements made by the E.R. physician that he was, in any way, an employee or agent of the hospital.

Most recently in *Gore v. Provena Hospital*, 2015 IL App (3d) 130446, the evidence showed:

- The “Consent for Treatment” form, signed by the parent of a minor patient, clearly stated, with no exceptions or contradictions, that the parent had been informed and he or she understood the physicians in the E.R. were not employees or agents or apparent agents of the hospital but were independent medical practitioners.
- The signed “Consent for Treatment” form included a term confirming that “. . . I understand that professional personnel are available to explain the statements;” and the form was not misleading in any way.
- The parent signing the “Consent for Treatment” form was a capable adult.
- The fact that it was an emergency medical situation and that the EMS paramedics chose the hospital, and not the parent, did not render

the disclaimers in the consent form void.

Each of these cases noted that the patient’s signature on the consent form was legally binding as to the patient’s knowledge of its contents, even when not read. A competent adult is charged with the knowledge of and agreement to a document that adult signs and ignorance of its content does not void its effect, and this principle has been consistently repeated by our Illinois courts.

It can be suggested that the best elements of each case and each consent form be adopted for future use.

Some consent forms include other categories of physicians, such as radiologists and pathologists, as additional independent contractors in their disclaimers.

These independent contractor “groups” and the necessity for such disclaimers in a consent form also extend to free-standing emergency care facilities, as well as to convenient care centers. A cautious and complete approach which is updated and evaluated on a periodic basis is the best guide to protecting all parties from unexpected liability where none was agreed to, nor anticipated.

**Ed Wagner** is the managing partner of our Urbana office. He has extensive experience in complex injury litigation, with an emphasis in medical malpractice, nursing home, and professional liability. Ed regularly defends healthcare providers in professional liability actions involving significant injury or death.



### **Illinois Court Extends Affidavit and Health-Professional's Report Requirements to Medical Battery Claims**

**By Mark Hansen and Emily Perkins**

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The Illinois Appellate Court, Second District, recently re-emphasized the importance of strictly complying with the attorney affidavit and certificate of merit requirements of 735 ILCS 5/2-622 in medical malpractice cases. In *McDonald v. Lipov*, 2014 IL App (2d) 130401, the court addressed whether the plaintiff is required to comply with § 2-622 when pleading medical battery claims. This decision will be useful for attorneys defending medical battery claims, and will be especially useful in quickly disposing of non-meritorious suits.

#### **The Affidavit and Health-Professional's Report Requirements**

Section 2-622 of the Illinois Code of Civil Procedure permits the dismissal of a medical malpractice complaint where a plaintiff fails to attach a supporting affidavit of merit. The plaintiff must file an affidavit stating that, based on consultation with a health professional, there is a "reasonable and meritorious" cause for filing the action. The court may dismiss the action with prejudice if the plaintiff fails to comply with the statute. One purpose of § 2-622 is to protect the substantive rights of the parties and deter non-meritorious litigation.

#### **Factual Background and Procedure**

In *McDonald*, the plaintiff's complaint alleged medical malpractice and medical battery claims. The trial court granted the *pro se* plaintiff three extensions to comply with the affidavit and report requirements of § 2-622. The defendants filed motions to dismiss arguing that the plaintiff's filings did not meet the health professional's report requirements. The court agreed and dismissed the plaintiff's amended complaint with prejudice.

On the initial appeal, the plaintiff argued that her amended complaint should not have been dismissed with prejudice and that the trial court erred in determining that all of her claims were based only on medical malpractice. The appellate court disagreed with the plaintiff's argument and concluded that the plaintiff's medical malpractice claims required her to comply with § 2-622. The court, however, held that the trial court abused its discretion in dismissing the medical battery allegations with prejudice, and the appellate court remanded the case to allow the plaintiff the opportunity to cure the defective pleadings.

On remand, the plaintiff filed a 33-count second amended complaint, which attempted to allege the following claims: (1) medical battery; (2) medical negligence; (3) fraudulent concealment; (4) conspiracy; (5) violations of the Emergency Medical Treatment and Active Labor Act; (6) breach of contract; (7) vicarious liability; and (8) spoliation of evidence. The second amended complaint restated nine claims from the amended complaint and contained fourteen new claims. Following a new motion to dismiss, the trial court dismissed the second amended complaint with prejudice for failing to state a cognizable claim.

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Again, the plaintiff appealed, arguing that § 2-622 did not apply to her medical battery claims. Furthermore, the plaintiff argued that she satisfied the affidavit requirement of § 2-622(a)(3) by verifying the second amended complaint in accordance with § 1-109 of the Code of Civil Procedure. On this appeal, the appellate court affirmed.

### Appellate Court Analysis

The appellate court heavily relied on the recent opinion in *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 96. In *Holzrichter*, the Illinois Appellate Court, First District, concluded that the plain and unambiguous language of § 2-622 did not limit the requirement of an affidavit and certifying report solely to medical malpractice claims. The *Holzrichter* court affirmed summary judgment entered against a plaintiff alleging medical battery who failed to file a health professional's report. There, the plaintiff claimed that the defendant committed medical battery by exceeding the scope of his consent in severing tendons in a procedure that did not require the medical professional to do so. The court explained that the plaintiff's medical battery action, grounded in tort law, arose from a medical procedure that he claimed went beyond the scope of his consent.

The *McDonald* court agreed with the reasoning in *Holzrichter*, finding that § 2-622 can apply to medical battery claims. The issue was whether the defendants exceeded the surgical parameters to which the plaintiff consented. The salient issue required the assessment of the claims, which were outside the comprehension of a lay person because it required knowledge, skill, or training of a medical professional. Thus, the court held that the plaintiff required a medical expert and a supporting affidavit to sustain her medical battery claims.

### Conclusion

The affidavit and health professional's report requirements of § 2-622 are intended to deter frivolous medical malpractice suits and medical battery claims at an early stage. The *McDonald* court ultimately dismissed the complaint with prejudice, reiterating the consequences of non-compliance with the requirements outlined in § 2-622. Defense counsel should advocate for the strict compliance with § 2-622 to deter frivolous medical malpractice and medical battery actions.

**Mark Hansen** has extensive experience in complex injury litigation, with an emphasis in medical malpractice, professional liability, and product liability. Mark regularly defends medical providers in professional liability actions involving significant injury or death.



**Emily Perkins** focuses her practice in the area of civil litigation, including medical malpractice and employment/labor law.



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