

# HEALTH LAW

## Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### Am I My Doctor's Keeper? Tennessee Hospitals May Be Vicariously Liable for the Negligence of Independent Contractor Physicians

June 19, 2008

On May 6, 2008, the Tennessee Supreme Court opened the door to holding hospitals in Tennessee vicariously liable for the actions of independent contractor physicians under the doctrine of apparent agency. The high court released two decisions on the same day,<sup>1</sup> both of which reversed appeals court decisions granting summary judgment in favor of the hospitals. These rulings follow an emerging trend that we observed in an earlier Health Law Update.<sup>2</sup> State courts around the country are increasingly unwilling to allow hospitals to disclaim liability for their independent contractor physicians. These rulings could mean increased exposure to medical malpractice liability for Tennessee hospitals.

#### **Apparent Agency**

Following the lead of other jurisdictions, the Tennessee High Court adopted the apparent agency analysis derived from the *Restatement (Second) of Torts* § 429. To hold a hospital vicariously liable for the negligent or wrongful acts of an independent contractor physician, a plaintiff must show that: (1) the hospital held itself out to the public as providing medical services; (2) the plaintiff looked to the hospital rather than to the individual physician to perform those services; and (3) the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee.<sup>3</sup>

Both cases focused on whether the hospitals provided adequate notice to patients that their physicians were independent contractors and not employees. The Court stated that the adequacy of the notice turned on whether the notice was "meaningful." For example, the Court in *Boren v. Weeks* held that "[u]nder some circumstances, such as the case of a medical emergency, . . .

<sup>1</sup> *Boren v. Weeks*, No. M2007-00628-SC-R11-CV, 2008 WL 1945985, at \*10 (Tenn. May 6, 2008); *Dewald v. HCA Health Servs.*, M2006-02369-SC-R11-CV, 2008 WL 1945987, at \*3 (Tenn. May 6, 2008).

<sup>2</sup> *Illinois Case Holds Hospital Liable for Independent Contractor Anesthesiologist*, HEALTH L. UPDATE (Bass, Berry & Sims, PLC), Aug. 3, 2006, available at [www.bassberry.com](http://www.bassberry.com).

<sup>3</sup> *Boren*, 2008 WL 1945985, at \*7.

written notice may not suffice if the patient had an inadequate opportunity to make an informed choice."<sup>4</sup>

### **Boren v. Weeks**

In the lead case, Marvin Boren filed suit on behalf of his deceased wife against River Park Hospital claiming that the hospital was vicariously liable for the negligence of Dr. Mark Weeks, an emergency room physician with staff privileges. Mrs. Boren was admitted to the River Park Hospital emergency department multiple times before she eventually died of pulmonary emboli. The Court explored the circumstances surrounding each of Mrs. Boren's admissions to determine whether River Park Hospital provided the Borens with "meaningful" notice of Dr. Weeks' independent contractor status.

The consent form used by River Park Hospital included a disclaimer which "disavowed the existence of any employment or agency relationship with the emergency department physicians."<sup>5</sup> A member of the Boren family signed the consent form each time Mrs. Boren was admitted to the emergency department. However, the Court held that it could not "say as a matter of law that the disclaimer provided the Borens with adequate notice under the circumstances" where the form was completed in an electronic format, the pertinent language was buried in a three-page document, the hospital staff made no effort to call attention to the disclaimer, and patients and their representatives were simply asked whether they consented to treatment.<sup>6</sup>

### **Dewald v. HCA Health Services**

Likewise, in *Dewald v. HCA Health Services*, the Court held that StoneCrest Medical Center was not entitled to summary judgment where Dr. Lamballe, an independent contractor radiologist, incorrectly diagnosed Amanda Lynn Dewald with advanced lung cancer. The issue in *Dewald* was "whether StoneCrest adequately disclosed the nature of its relationship with Dr. Lamballe to defeat the plaintiff's assertion of apparent agency."<sup>7</sup>

The Court held that it could not, as a matter of law, conclude that StoneCrest had provided Ms. Dewald with adequate notice of Dr. Lamballe's independent contractor status. Ms. Dewald testified that she was "under the impression at all times that the physicians were employees of the hospital."<sup>8</sup> She also testified that "she was never told that they were not employees."<sup>9</sup>

Moreover, the Court in *Dewald*, like the Court in *Boren*, noted that a disclaimer will not always serve as "meaningful" notice. Mr. Dewald signed a "Consent for Medical Procedures and Treatment" form on his wife's behalf at the time of her admission. The form included the following provision:

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<sup>4</sup> *Boren*, 2008 WL 1945985, at \*9 (citing *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999)).

<sup>5</sup> *Boren*, 2008 WL 1945985, at \*2.

<sup>6</sup> *Id.* at \*10.

<sup>7</sup> *Dewald*, 2008 WL 1945987, at \*1.

<sup>8</sup> *Id.* at \*2.

<sup>9</sup> *Id.*

I understand those physicians providing medical services are not agents or employees of the hospital. This includes but is not limited to the emergency department physicians and physician assistants, the anesthesiologist, the radiologists . . . .<sup>10</sup>

Although Ms. Dewald admitted that she had signed such forms in the past, she stated that "[w]hen they bring [the forms] to you, they just say: sign here and there. And when you're sick, you sign. And I did not take the time to read, no."<sup>11</sup> The Court remanded the case to the trial court to determine whether StoneCrest, under the circumstances, provided "meaningful" notice to Ms. Dewald of Dr. Lamballe's independent contractor status.

### **Conclusion**

In *Boren* and *Dewald*, the Tennessee Supreme Court laid the groundwork to expand the scope of liability for Tennessee hospitals under the doctrine of apparent agency. While the ramifications of these cases are still unknown, trial courts will undoubtedly grapple with these issues in the months to come. Please feel free to call any of the attorneys in our Healthcare Practice Area if you have any questions regarding these decisions.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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