Medical Litigation Newsletter

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How Apparent Agency Has Evolved Since *Gilbert*

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Gilbert Recognizes Apparent Agency and Sets Forth the Framework

Hospitals have always been liable for the acts and omissions of their employees and actual agents. About 20 years ago, the Illinois Supreme Court held that hospitals could be also be liable under an apparent agency theory in *Gilbert v. Sycamore Municipal Hosp.*, 156 Ill.2d 511 (1993). Apparent agency is frequently invoked against physicians in emergency departments, but is equally applicable to physicians who provide services at a hospital without disclosure that they are not hospital employees or agents. *McCorry v. Evangelical Hosps., Corp.,* 331 Ill.App.3d 668 (1st Dist. 2002) (surgeon); *Scardina v. Alexian Bros. Med. Ctr.,* 308 Ill.App.3d 359 (1st Dist. 1999) (radiologists); *Kane v. Doctors Hosp.,* 302 Ill. App.3d 755 (4th Dist. 1999) (same).

Gilbert established an "analytical framework" to apply when a patient seeks treatment at a hospital. *York v. Rush-Presbyterian-St. Luke's Med. Ctr.,* 222 Ill.2d 147*,* 193 (2006). This framework is based on the "reasonable expectations of the public that the care providers they encounter in a hospital are also hospital employees." *York*, 222 Ill.2d at 192. *Gilbert* sets out the specific elements in a medical malpractice action to prove apparent agency between a physician and hospital:

> [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.

York, 222 Ill.2d at 184-85 (quoting *Gilbert*, 156 Ill.2d at 525).

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Hinshaw Representative Matters

Dawn Sallerson, an attorney in Hinshaw's Belleville office was chosen to serve on an eight member Appellate Court Selection Panel via appointment from Illinois Supreme Court Justice Lloyd A. Karmeier to fill the vacancy of Appellate Justice James Wexstten of the Fifth District Appellate Court. Each applicant was interviewed and their credentials reviewed by members of the panel, which forwarded a short list of recommended candidates to Justice Karmeier. Justice Karmeier interviewed the recommended candidates and selected Fourth Judicial Circuit Chief Judge S. Gene Schwarm as the candidate for appointment by the Illinois Supreme Court. The Illinois Supreme Court appointed Justice Schwarm to serve on the Fifth District Appellate Court with a term to expire December 5, 2016 when the position will be filled by the winner of the 2016 General Election.

Jeffry S. Spears and ***Kelly J. Epperson***, attorneys in Hinshaw's Rockford office, successfully protected the pre-suit claims investigation performed by a third-party administrator (TPA) on behalf of a self-insured hospital. The Court's decision was significant as no published court decision has yet extended the insurer-insured privilege to a self-insured entity who retains the services of a third-party administrator to provide claim administration services. The Court relied on the treatise Couch on Insurance, *Chicago Hosp. Risk Pooling Program v. Illinois State Med. Inter-Ins. Exch.*, 325 Ill.App.3d 970 (1st Dist. 2001), and the hospital's trust agreement that governed the self-insurance trust in holding that the self-insurance trust functions the same as any third-party private insurer. The Court further found that the trust agreement provisions regarding actuarial requirements, the definition of covered

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The first element, the "holding out" on the part of the hospital, is met "if the hospital holds itself out as a provider of care without informing the patient that the care is provided by independent contractors." *Id.; Frezados v. Ingalls Memorial Hosp.,* 2013 IL App (1st) 121835, ¶16. If "the patient knows or should have known that the physician is an independent contractor," then a hospital is not vicariously liable. *York,* 222 Ill.2d at 193; *Gilbert,* 156 Ill.2d at 524. The "knew or should have known" element is met where "the patient is in some manner put on notice of the independent status of the professionals with whom he might be expected to come into contact," because otherwise "it would be natural for him to assume that these people are employees of the hospital." *York*, 222 Ill.2d at 182. The second element is sometimes considered as part of the first element.

How Hospitals Tell Patients that the Physicians Are Independent, and Not Agents or Employees of the Hospital

Hospitals advise patients in a number of ways that the physicians they will see are not the hospital's, but independent contractors, including posting signs in emergency departments or public areas. Typically, hospitals disclose that the physicians are independent and not hospital agents or employees in consent to treatment forms. While "not always dispositive on the issue of "holding out," [disclosures forms] certainly are an important factor to consider." *Wallace v. Alexian Bros. Med. Ctr.,* 389 Ill.App.3d 1081, 1087 (1st Dist. 2009) (citing *James v. Ingalls Memorial Hosp.,* 299 Ill.App.3d 627, 633 (1st Dist. 1998)). Such forms "are almost conclusive in determining a hospital's liability for an independent physician's malpractice." *Thede v. Kapsas,* 386 Ill.App.3d 396, 401 (3d Dist. 2008).

The language used to disclose if physicians are independent contractors varies widely. A form which entirely disclaims any agency or employment, as in *Frezados,* is not subject to much interpretation as to which physicians are employed and which are not. It provides:

> I have been informed and understand the that physicians providing services to me at Ingalls, such as my personal physician, Emergency Department, and Urgent Aid physicians, radiologist, pathologist, anesthesiologists, on-call physicians, consulting physicians, surgeons and allied health care providers working with those physicians are not employees, agents, or apparent agents of Ingalls but are independent medical practitioners who have been permitted to use Ingalls' facilities for the care and treatment of their patients.

Frezados, 2013 IL App (1st) 121835, ¶5. The appellate court held that this sufficed to defeat the "holding out" element because the disclosure put the patient on notice. *Id.* at ¶20. It affirmed summary judgment and held that the plaintiff's testimony that she thought the physician was a hospital employee because he walked around did not create a question of fact. *Id.*

An unequivocal denial of employment or agency does not affect hospitals' liability for physicians who are hospital employees. When a physician is employed by the hospital and is an actual agent, denying there is any employment or agency relationship does not change the fact that there is an actual agency relationship. *Thede,* 386 Ill.App.3d at 401.

Drafting a disclosure to protect a hospital is more difficult when some, but not all, physicians are employees. In *Steele v. Provena Hosps.,* 2013 IL App (3d) 110374, the court declined to enter judgment notwithstanding the verdict holding that the plaintiff was not sufficiently put on notice that the physician was an independent contractor so as to defeat the "holding out" factor of apparent agency." *Id.* at ¶139. In *Steele,* the disclosure read:

> I acknowledge and understand that most physicians who provide physician services at Provena Health are not employees or agents of Provena Health, but instead are independent medical practitioners and independent contractors. I understand that each of these medical practitioners exercises his or her own independent medical judgment and is solely responsible for the care, treatment, and services that they order, request, direct, or provide.

There were other references in the form to the fact that the patients would see independent physicians. The Third District held that this and other evidence created a material fact issue on whether this was a sufficient disclosure. *Id.* at ¶138-39.

In *Churkey v. Rustia,* 329 Ill.App.3d 239, 244-45 (2d Dist. 2002), the disclosure stated: "I understand that Sherman Hospital uses independently contracted physicians and physician's groups to perform specific services such as Anesthesia and Radiological services…" *Churkey,* 329 Ill.App.3d at 241. It then identified the specific group of anesthesiologists who employed the defendant physician as an independent medical provider. The court held this sufficed to disclaim any appearance of apparent agency and affirmed summary judgment. *Id.* at 245.

Some disclosure forms contain conflicting provisions and fail to adequately apprise the patient that a physician is an independent contractor. If the consent form discloses both that the physicians are independent contractors, but also states that care would be provided by "hospital employees," this creates a question of fact because the fact finder could find that the patient was confused as to which physicians were employees and which were independent contractors. *Spiegelman v. Victory Mem'l Hosp.,* 392 Ill.App.3d 826, 837 (1st Dist. 2009).

How Reliance Is Shown and the Effect of a Patient's Disclaimer of Reliance on the Agency or Employment by the Hospital

The third element is reliance, and a hospital is liable if "the patient reasonably relies upon the hospital to provide [medical] services." *York,* 222 Ill.2d at 195. A plaintiff must prove that the patient "acted in reliance upon the conduct of the hospital, or its agent, consistent with ordinary care and prudence." *York,* 222 Ill.2d at 193 (quoting *Gilbert,* 156 Ill.2d at 525). Only if the patient "reasonably relies" and uses "ordinary care and prudence" in relying on the appearance of agency, may a patient "seek to hold the hospital vicariously liable under the apparent agency doctrine for the negligence of personnel performing such services even if they are not employed by the hospital." *Id.*

Reliance is not demonstrated where the personal physician directs the patient to the hospital because in that case, the patient has not relied on the hospital to provide medical care. "[T]he critical distinction is whether the plaintiff is seeking care from the hospital itself or whether the plaintiff is looking to the hospital merely as a place for his or her personal physician to provide medical

persons and covered losses, and the duty to defend showed that the self-insured trust met all of the requirements for recognition as valid self-insurance.

Relying on *Chicago Trust Co. v. Cook County Hosp.*, 298 Ill.App.3d 396 (1st Dist. 1998), the Court next found that extension of the insurer-insured privilege to a self-insurer has been tacitly acknowledged in Illinois. The Court cited to affidavits submitted by the third-party administrator and by the hospital in support of its conclusion that the TPA's investigation would be used by an attorney chosen by the self-insured hospital to defend its insured employees. The Court found that it was clear that the third-party investigator knew the investigation would be submitted to the hospital's attorneys for protection of its insureds and, therefore, any communications between the insured nurses and the TPA was protected by the insurer-insured privilege.

Michael Malone and ***Elizabeth Odian,*** attorneys in Hinshaw's Milwaukee office, represented two nurse employees of United Hospital in Kenosha in a claim brought by a patient who was cared for by the nurses postoperative to DEEP breast reconstruction surgery. The patient contended that one of the nurses applied a hot pack to her abdomen on the first postoperative day. The nurse(s) denied doing so. The patient developed third degree skin alterations on her abdomen near the area of the long abdominal incision which was needed to harvest the tissue needed for the breast reconstruction. The surgeons who performed the reconstruction testified that the patient was burned. We had an expert plastic surgeon who testified that the skin changes on the abdomen were related to ischemia from the abdominoplasty incision. After four days of testimony, the jury found no negligence as to the nurses' conduct.

care." *Gilbert,* 156 Ill.2d at 525-26 (quoted in *Butkiewicz v. Loyola Univ. Med. Ctr.,* 311 Ill.App.3d 508, 512-13 (1st Dist. 2000) (summary judgment affirmed because patient would have gone wherever his doctor told him to go)). However, a preexisting patient/physician relationship does not necessarily preclude reliance. *Lamb-Rosenfeldt v. Burke Med. Group,* 2012 IL App (1st) 101558, ¶34 (citing *York,* 222 Ill.2d at 193 and *Spiegelman,* 392 Ill.App.3d at 840-41).

Reliance is not shown where a patient testified that she would have gone to the hospital even if she knew that the emergency department physician was not an employee. Because the plaintiff failed to show reliance on such a relationship, summary judgment on the apparent agency claim is appropriate. *James,* 299 Ill.App.3d at 634.

Reliance cannot be established where the patients disclaim any reliance on an employment or agency relationship between the physicians and the hospital. *Steele v. Provena Hosps.,* 2013 IL App. (3d) 110374 ¶141 (entering JNOV where plaintiff signed disclosure that stated "I acknowledge the employment or agency status of physicians who treat me is not relevant to my selection of Provena Health for my care" because it was a "clear disclaimer" of reliance when coupled with provision that "most" physicians were independent contractors).

One question which arises is whether reliance by someone other than the patient substitutes for the patient's reliance. The answer is it depends. If the patient is unconscious, then the spouse's and the emergency medical technicians' reliance on the hospital to provide medical care may suffice, although this is a fact issue. *Monti v. Silver Cross Hosp.,*262 Ill.App.3d 503, 507-08 (3d Dist. 1994) (reversing summary judgment). If the patient is a child, then the parent's reliance suffices. *Nosbaum v. Martini,* 312 Ill.App.3d 108 (1st Dist. 2000). However, if the patient is an adult, then the parent's reliance is not determinative. *Steele,* 2013 IL App (3d) 110374, ¶¶124-25 (mother's direction to the EMTs to go to this hospital in reliance of obtaining medical care not relevant where adult daughter signed the form disclaiming reliance and there was no evidence the patient was unable to sign the form). In another case, the court held a question of fact was created where the husband refused use of forceps to deliver the baby warning he would sue for medical battery, and the wife silently acquiesced. *Strino v. Premier Healthcare Assoc., P.C.,* 365 Ill.App.3d 895, 902 -03 (1st Dist. 2006).

Considerations Courts Weigh in Determining if There Are Questions of Fact on Apparent Agency Claims

There are a number of considerations which courts look at to decide if there is a genuine issue of material fact precluding summary judgment. In *York,* the Supreme Court found there was a fact issue because (1) plaintiff (a physician) sought out a physician because he had heard the hospital had good doctors; (2) the consent form did not alert the plaintiff that the physician was an independent contractor; (3) the hospital did not put the plaintiff on notice that the physician was independent; and (4) the physician's lab coat or scrubs had the hospital's logo on it. *York,* 222 Ill.2d at 196.

Spiegelman found that a question of fact was created because the consent form was inconsistent on whether the treatment would be by hospital employees. 392 Ill.App.3d at 837. It also found that the fact finder could have found the patient was further confused because she was dizzy, had vision problems, and her condition rapidly worsened in the emergency department. 392 Ill.App.3d at 837.

If the patient denies that her signature appears on a form both at her deposition and in an affidavit, and the hospital proffers an affidavit of a nurse that she signed the form, this creates a question of fact that must be resolved by the fact finder. *McNamee v. Sandore,* 373 Ill.App.3d 636, 650 (2d Dist. 2007).

Courts are sometimes troubled by the fact that the forms cover a number of subject matters (*Spiegelman,* 392 Ill. App.3d at 837), and others are not troubled, as long as the form clearly discloses that the physicians are independent and not hospital employees (*Lamb-Rosenfeldt v. Burke Med. Group,* 2012 IL App 101558, ¶¶29-30). Some courts have found the placement of the signature line on the disclosure statement relevant. *Lamb-Rosenfeldt v. Burke Med. Group,* 2012 IL App (1st) 101558, ¶30; *Spiegelman,* 392 Ill.App.3d at 837 (citing *Schroeder v. Northwest Community Hospital,* 371 Ill.App.3d 584 (1st Dist. 2006)).

Other provisions are considered in deciding if the patient is on notice that the physicians are independent. For example, courts consider if there is a provision that the physicians will bill separately from the hospital. *Steele,* 2013 IL App 110374, ¶141; *Lamb-Rosenfeldt,* 20-12 IL App 101558, ¶30; *Wallace,* 389 Ill.App.3d 1092. They find it notable if the patient has signed that same consent beforehand. *Lamb-Rosenfeldt v. Burke Med. Group,* 2012 IL App (1st) 101558, ¶30 (patient had signed the same form nine times before so knew or should have known that the physician was an independent contractor); *Wallace,* 389 Ill.App.3d 1084, 1090 (patient signed the form on four prior occasions). Courts also consider provisions in the forms that acknowledge that the patient had the opportunity to ask questions. *Steele,* 2013 IL App 110374, ¶141; *Wallace,* 389 Ill.App.3d at 1090.

One court found that the fact that the disclosure form stated that the physician was an "independent contractor" to be "key." *Lamb-Rosenfeldt,* 2012 IL App 101558, ¶30. Yet, the average layman does not understand the legal requirements of "independent contractor" or even the legal meaning of "agency."

Courts look at the entirety of the situation in deciding if the hospital sufficiently disclosed that the physicians are independent from the hospital and are not hospital employees or agents.

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Arguments Plaintiffs Have Made to Avoid a Signed Consent to Treatment Forms which Courts Have Rejected

There are number of arguments that plaintiffs raise to avoid the consequences of having signed a disclosure. They are generally rejected.

"I didn't read the form"

A frequent argument is that the patient did not read the form but just signed it. The Third District soundly rejected this argument in *Steele,* holding that "a competent adult is charged with knowledge of and assent to a document the adult signs and ignorance of its contents does not avoid its effect." 2013 IL App (3d) 110374, ¶120 (citing *Melena v. Anheuser-Busch, Inc.* 219 Ill.2d 135, 150 (2006); *All American Roofing, Inc. v. Zurich American Ins. Co.,* 404 Ill. App.3d 438, 447-49 (1st Dist. 2010); *Black v. Wabash, St. Louis & Pacific Ry. Co.,* 111 Ill. 351, 358 (1884)), The First District came to the same conclusion in *Frezados,* relying on cases in other contexts and holding "parties have a duty to read documents prior to signing them, and a failure to do so will not necessarily raise an issue of fact as to the party's knowledge of the documents' contents." 2013 IL App. (1st) 121835, ¶23 (citing cases). The Second District has also rejected the plaintiff's argument that she did not recall reading the disclosure which she admittedly signed created a question of fact. *Churkey,* 329 Ill.App.3d at 242. While the failure to read is no excuse, the inability to read would be a consideration by courts. *Spiegelman*, 392 Ill.App.3d at 837.

"I didn't mean what I said in my deposition"

Some patients testify at their depositions that they did sign the form, but then deny that they signed it in an affidavit when faced with a motion for summary judgment. Courts reject these fortuitous changes of mind. *Wallace*, 389 IllApp.3d at 1084; *Churkey*, 329 Ill.App.3d at 241-42 (where plaintiff admitted it was her signature at the deposition, an affidavit that she was told she had to sign the forms, but did not recall reading the forms did not create an issue of fact). This complies with established Illinois law on judicial admissions. *James,* 299 Ill.App.3d at 635. If the deponent makes deliberate, unequivocal admissions under oath, that testimony cannot later be contradicted. *Id.*

"My signature doesn't count because treatment had already started"

In *Wallace*, the consent was not signed until after treatment started. There, a young girl was hit by a car and was taken to the hospital by the EMTs. The mother picked up her other children and arrived after treatment started. The court upheld the disclosure and consent which the mother signed. 389 Ill. App.3d 388-89. The mother was in charge of her daughter's treatment and had consulted with the EMTs before they took her daughter to the hospital. 389 Ill.App.3d at 1084. Moreover, the hospital was not obligated to tell the mother she did not have to sign the form to continue treatment. 389 Ill.App.3d at 388-89.

"I was upset at the hospital, so my signature doesn't count"

Another argument made is that the signed disclosure form is not binding because the patient or parent was in shock or upset at the hospital. The First District rejected this argument in *Wallace,* holding: "[W]hile we do not mean to minimize the trauma plaintiff suffered regarding the injury and loss of her daughter, nothing in Schroeder, or any other case cited by plaintiff, stands for the proposition that an emotional condition, or one's educational level for that matter, without more, creates a genuine issue of material fact." 389 Ill. App.3d at 1092 n.2. If being upset in an emergency room were automatically a reason that a disclosure form has no effect, then no one would be bound by their signature. Most people are upset at a hospital.

"No one explained the form to me and I wasn't able to ask questions"

The excuses that no one explained the form and there was no opportunity to ask questions was rejected by the First District in *Wallace.* 389 Ill.App.3d at 1090. In fact, courts consider if the form states that there was an opportunity to ask questions. *Steele,* 2013 IL App 101558, ¶141.

Burden on the Plaintiff to Demonstrate the Elements Are Met

The burden is always on the plaintiff to produce evidence in to create a genuine issue of material fact when faced with a motion for summary judgment. This is equally true in apparent agency claims. *Buckholtz v. MacNeal Hosp.,* 337 Ill.App.3d 163, 172 (1st Dist. 2003). To survive a hospital's motion for summary judgment in an apparent agency claim, "a plaintiff must present at least some evidence to satisfy each of the *Gilbert* factors." *Lamb-Rosenfeldt,* 2012 IL App (1st) 101558, ¶25. If a plaintiff fails to satisfy even one of these factors, summary judgment is proper. *Wallace,* 389 Ill. App.3d at 1094.

Outside of the summary judgment context, the Third District recently reversed a jury verdict against the hospital and entered judgment notwithstanding the verdict because the patient signed a disclosure form that disclaimed any reliance on an employment relationship. *Steele,* 110374 IL App (3d), ¶141. *Steele* is notable because courts are generally loath to upset a jury's verdict. Yet, the same standards apply to summary judgment, directed verdict, and JNOV. *Fooden v. Bd. of Gov'rs,* 48 Ill.2d 580, 587 (1971); *Koziol v. Hayden*, 309 Ill.App.3d 472, 477 (4th Dist. 1999) ("Even if some issue of fact is presented by a motion for summary judgment, if

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what is contained in the pleadings and affidavits would have constituted all of the evidence before the court at trial and upon such evidence nothing would be left to go to a jury, and the court would be required to direct a verdict, then a summary judgment should be entered.").

Steele properly followed the law in entering judgment notwithstanding the verdict because the plaintiff could not prove reliance. The patient had signed a form disclaiming any reliance on an employment or agency relationship between the hospital and physicians.

How Hospitals Can Protect Themselves from Liability Resulting From the Acts and Omissions of Independent Physicians

The cases discussing apparent agency in a hospital setting make it clear that the effectiveness of a form disclosing there is no agency relationship is determined on a case-by-case basis. However decisions since *Gilbert* demonstrate that a hospital may be able to protect itself from the liability resulting from an independent physician by creating a clear disclosure form.

Problems may be avoided by not using a multi-part consent-to-treatment form. Hospitals would be well-advised to draft a separate document with an appropriate descriptive heading such as "disclosure," and not include this in the multi-part "consent to treatment." This form should be easy to read with larger typeface and generous margins. Creating a document with single-space small print and small margins could be challenged as difficult and confusing to read.

The form should clearly state that

1. The physicians that the patient will see are not hospital employees or agents, but are independent contractors.
2. The hospital cannot supervise or control the treatment by independent physicians.
3. The patient or parent should disclaim that he/she relied on an employment or agency relationship between the hospital and physicians in coming to the hospital for treatment.
4. The patient has had an opportunity to ask any questions about this form.
5. The patient acknowledges that he/she has read and understood the disclosure.

For each of these paragraphs, there should be a place for the patient's initials, plus a signature line and witness line at the bottom. There should also be a provision that the form was read to patients or parents who are unable to read it.

In recognizing that the doctrine of apparent agency, the Supreme Court noted that hospitals market themselves as full-care modern health facilities and spend millions in advertising. *Gilbert*, 156 Ill.2d at 520. It reiterated this in *York*.222 Ill.2d at 192. Yet, it held, there are "serious public policy issues with respect to a hospital's liability for the negligent actions of an independent-contractor physician." *York*, 222 Ill.2d at 192. That is why it established the *Gilbert* framework, which is "tailored to this precise factual situation." *York*, 222 Ill.2d at 193. If hospitals want to market themselves as having excellent physicians, then not using a disclosure form may be a business decision.

Making the business decision to assume the risk of liability for the acts and omissions of an independent physician, however, has ramifications. Apparent agency claims effectively make the hospitals excess insurers for physicians when they cannot control the acts and omissions of those independent physicians. Forms which clearly and consistently disclose that the patients will see the physician who are independent from the hospital can be an effective way to protect hospitals from apparent agency claims.