

Health Law

By: *Roger R. Clayton**
Heyl, Royster, Voelker & Allen
Peoria

Advertising, Consent Forms, and Apparent Agency: A Review of the Illinois Supreme Court’s Ruling in *York v. Rush- Presbyterian-St. Luke’s Medical Center* and Some Practice Suggestions

Introduction

Imagine that you represent General Hospital, which independently contracts with various specialists, including a private group of anesthesiologists called Private Anesthesiologists. Imagine waking up one morning to your morning coffee and paper. As you open the front page, to your surprise, you find yourself staring at a full-page advertisement for General Hospital with the words in bold, “Exceptional surgical care. Excellent health care services. Guaranteed.” Underneath the words are pictures of members of the medical staff at General Hospital, including a nurse, a surgeon, and an anesthesiologist. On your way to the office, you hear on the radio a new advertisement for General Hospital’s expanded surgical services. While looking out the windshield, you notice a billboard with the same advertisement for General Hospital, with a picture of an anesthesiologist from Private Anesthesiologists. It occurs to you, that your client, General Hospital has possibly provided potential surgical patients with the “holding-out” requirement for a medical malpractice claim against General Hospital arising out of the negligence of an anesthesiologist. But what about the reliance element? Does General Hospital’s surgical consent form adequately disclaim the anesthesiologists as non-employees?

The issue in this scenario is one that is not uncommon in hospital liability—the effects of advertising in medical malpractice claims sounding in apparent agency. As hospitals continue to expend substantial resources on advertising, plaintiffs are using the doctrine of apparent agency more frequently in their efforts to hold hospitals vicariously liable for the negligence of non-employee, independent contractor physicians.

In Illinois, apparent agency claims originally arose out of the emergency room context, but plaintiffs have prevailed in expanding the doctrine’s application to a variety of clinical scenarios. While the case law in Illinois is still developing in analyzing apparent agency in various medical malpractice settings, the recent decision of the Illinois Supreme Court in *York v. Rush-Presbyterian-St. Luke’s Medical Center*, 222 Ill. 2d 147, 854 N.E.2d 635 (2006), continues to expand the basis of liability hospitals face under an apparent agency theory. This column briefly reviews the court’s decision in *York*, which relied on the landmark decision in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 622 N.E.2d 788 (1993), and provides suggestions for reviewing a health care client’s advertising campaign and consent forms in order to defeat potential apparent agency claims.

The York Decision

In *York*, the plaintiff, Dr. James York, was a retired orthopedic surgeon. Dr. York suffered a spinal injury during a knee replacement surgery performed at Rush-Presbyterian-St. Luke's Medical Center ("Rush"). Notably, Dr. York did not sue the orthopedic surgeon, whom he had personally selected. Instead, Dr. York sued Rush, the attending anesthesiologist, Dr. Abdel Raouf El-Ganzouri, and his employer, University Anesthesiologists, for injuries resulting from the improper administration of anesthetic during a spinal epidural. Dr. York's theory of liability against Rush was that Dr. El-Ganzouri was an apparent agent. After a jury trial, all three defendants were found liable for Dr. York's injuries and the jury awarded him damages in the amount of \$12.6 million. On appeal, the appellate court affirmed the verdict against all defendants. The Illinois Supreme Court granted Rush's petition for leave to appeal solely on the issue of whether Dr. El-Ganzouri was Rush's apparent agent.

The underlying surgery, on February 9, 1998, was Dr. York's third knee replacement surgery at Rush since 1997. All three surgeries were performed by orthopedic surgeon, Dr. Aaron Rosenberg. Dr. York had signed a consent form at Rush upon admission, which stated: "I hereby authorize Dr. Rosenberg and such assistants and associates as may be selected by him/her and the Rush-Presbyterian-St. Luke's Medical Center to perform the following procedure(s) upon myself/the patient"

In this case, not only was the plaintiff a retired orthopedic surgeon, the same type of surgeon that performed his knee surgery, but his son, Jeff York, was an anesthesiology resident at Rush at the time, and a friend of Dr. Miller, the anesthesiology resident who participated in the procedure.

At trial, Dr. York argued that Rush was liable for Dr. El-Ganzouri's negligence because he had not been informed that Dr. El-Ganzouri was an independent contractor and relied on Rush to provide an anesthesiologist. Dr. York also asserted that Dr. El-Ganzouri appeared to be a Rush employee based on the language of the consent form, and the scrubs and lab coat he wore, which bore the Rush insignia.

Rush countered by arguing that Dr. York could not have reasonably believed that Dr. El-Ganzouri was a Rush employee based on his own experience as an independent contractor and orthopedic surgeon. Rush denied that Dr. York relied on Rush to provide an anesthesiologist. Instead, Rush argued that Dr. York relied on his son, who chose the anesthesiologist for the surgery.

The plaintiff testified that before coming to Rush, he had undergone several knee surgeries, beginning in the 1970s. He handpicked each surgeon and would travel to wherever the chosen surgeon practiced. The plaintiff testified that he thought "there were good docs at Rush," and had his son refer him to Dr. Rosenberg at Rush. Dr. York was happy with Dr. Rosenberg's first two knee replacement surgeries, as well as with the anesthesia care he received from Dr. Tom Krolick and resident, Dr. Rodney Miller. Before the February 9, 1998 surgery, the plaintiff had asked his son if he could get both Drs. Krolick and Miller as anesthesiologists.

It turned out that on the day of surgery, Dr. Krolick was unavailable, but Dr. Miller was the assigned anesthesiology resident. The plaintiff did not know Dr. El-Ganzouri and did not meet him until the day of the surgery. The plaintiff's son did not know that Dr. El-Ganzouri had been assigned to the plaintiff's surgery.

In analyzing the apparent agency issues, the court extensively reviewed its landmark decision in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 622 N.E.2d 788 (1993), in which the court held that a hospital may be held vicariously liable for the negligence of an independent contractor under the doctrine of apparent agency.

In *Gilbert*, the court settled a split among the appellate courts and noted that these prior decisions overlooked the realities of modern hospital care. The first reality involved the business of a modern hospital, where:

Hospitals increasingly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health services. One need only pick up a daily newspaper to see full and half page advertisements extolling the medical virtues of an individual hospital and the

quality health care that the hospital is prepared to deliver in any number of medical areas. Modern hospitals have spent billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities. All of these expenditures have but one purpose: to persuade those in need of medical services to obtain those services at a specific hospital. In essence, hospitals have become big business, competing with each other for health care dollars. *Gilbert*, 156 Ill. 2d at 520 (quoting *Kashishian v. Port*, 481 N.W.2d 277, 282 (Wis. 1992)).

The second reality of modern hospital care involved the reasonable expectations of the public. In the ER context, the court noted that:

Absent a situation where the patient is directed by his own physician or where the patient makes an independent selection as to which physicians he will use while there, it is the reputation of the hospital itself upon which he would rely. Also, unless the patient is in some manner put on notice of the independent status of the professionals with whom it might be expected to come into contact, it would be natural for him to assume that these people are employees of the hospital. *Gilbert*, 156 Ill. 2d at 521 (quoting *Arthur v. St. Peters Hospital*, 405 A.2d 443, 447 (N.J. Super. Ct. 1979)).

Given these modern realities, the court held that “liability attaches to the hospital only where the treating physician is the apparent or ostensible agent of the hospital. If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable.” *Gilbert*, 156 Ill. 2d at 522.

Instead of adopting section 429 of the Restatement (Second) of Torts or section 267 of the Restatement (Second) of Agency, the court recognized that Illinois case law has long recognized the doctrine of apparent agency as follows:

Apparent authority in an agent is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing. It is the authority which a reasonably prudent person, exercising diligence and discretion, in view of the principal’s conduct, would naturally suppose the agent to possess. *Gilbert*, 156 Ill. 2d at 523 (citations omitted).

The court also pointed out that apparent agency can give rise to tort liability “where the injury would not have occurred but for the injured party’s justifiable reliance on the apparent agency.” *Id.* at 524 (citations omitted). As such, the court set forth the following elements that a plaintiff must show in order to hold a hospital liable under the doctrine of apparent agency:

- (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. *Gilbert*, 156 Ill. 2d 524-25 (quoting *Pamperin v. Trinity Memorial Hospital*, 423 N.W.2d 848, 855-56 (Wis. 1988)).

The court pointed out that the “holding out” element does not require an express representation from the hospital that the allegedly negligent doctor was an employee. Rather, in *Gilbert*, which involved emergency room care, the plaintiff could satisfy this element if he can show that he was not informed that the physician providing the care was an independent contractor. Further, the “justifiable reliance” element does not require that the plaintiff show that he relied on a specific physician, but

rather plaintiff satisfies the element by showing that he relied on the hospital to provide complete emergency room care.

After reviewing these holdings from *Gilbert*, the *York* court reviewed its subsequent decision in *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 670 N.E.2d 632 (1996). In *O'Banner*, the court revisited the concept of apparent agency, but in a different factual context, a slip and fall in a McDonald's bathroom. The court affirmed the trial court's granting of summary judgment in favor of McDonald's. McDonald's argued that one of its franchisees owned the restaurant where the fall occurred, and that McDonald's did not control or maintain the premises.

The *York* court pointed out that in *O'Banner*, the court required the plaintiff to show detrimental reliance in order to make the apparent agency claim. As applied in *O'Banner*, the court noted that even if McDonald's advertising enticed the plaintiff to go to the restaurant thinking it was an agent of the corporation, the plaintiff still had to show he actually relied on the apparent agency in going to the restaurant. In *O'Banner*, the court pointed out that there was no indication as to why the plaintiff went to the restaurant.

In *York*, Rush did not dispute the plaintiff's "holding out" claim, but argued that under *Gilbert* and *O'Banner*, Dr. York failed to show that he detrimentally relied on the apparent agency in selecting Rush for his surgery and in believing that Dr. El-Ganzouri was Rush's agent. Rush relied on the prior appellate decisions in *Butkiewicz v. Loyola University Medical Center*, 311 Ill. App. 3d 508, 724 N.E.2d 1037 (1st Dist. 2000), and *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 701 N.E.2d 207 (1st Dist. 1998), which found that the plaintiffs were unable to establish their reliance on the hospitals' representations in their initial decision to select the hospitals. In *Butkiewicz*, the decedent's primary care physician referred him to the hospital, and in *James*, the plaintiff selected the hospital based on her belief that her insurance carrier required her to go there.

Dr. York countered by arguing that there was sufficient evidence that he relied on Rush, rather than on a specific physician, to provide anesthesiology care during his surgery. Dr. York argued that *O'Banner* was distinguishable as it did not address the everyday realities of doctors that have hospital-based practices. Dr. York relied on the cases of *McCorry v. Evangelical Hospitals Corp.*, 331 Ill. App. 3d 668, 771 N.E.2d 1067 (1st Dist. 2002), and *Scardina v. Alexian Brothers Medical Center*, 308 Ill. App. 3d 359, 719 N.E.2d 1150 (1st Dist. 1999), for his argument that the relevant inquiry with respect to the reliance element was not whether the plaintiff chose the hospital at the direction of another person, but rather, whether the plaintiff looked to the hospital to furnish all the essential treatment.

The court agreed with Dr. York and rejected Rush's position. The court pointed to its decision in *Gilbert* in emphasizing that the realities of modern hospitals present "a matrix of unique interactions that finds no ready parallel to other relationships," and that the "fervent competition between hospitals to attract patients, combined with the reasonable expectations of the public that the care providers they encounter in a hospital are also hospital employees, raised serious public policy issues . . ." *York*, 222 Ill. 2d at 192. The court pointed out that in *Gilbert*, the court's "critical distinction [was] whether the patient relied upon the *hospital* for the provision of care or, rather, upon the services of a particular physician." *Id.* at 193 (citing *Gilbert*, 156 Ill. 2d at 525.)

The court pointed out that "*Gilbert* recognized that when a patient relies on a hospital for the provision of support services, even when a physician specifically selected for the performance of a procedure directs the patient to that particular hospital, there may be sufficient reliance under the theory of apparent agency for liability to attach to the hospital in the event one of the supporting physicians commits malpractice." *York*, 222 Ill. 2d at 193.

The court held that a plaintiff satisfies the reliance element if he or she reasonably relies upon a hospital to provide medical care, rather than upon a specific physician. This is because "it is the hospital, and not the patient, which exercises control not only over the provision of necessary support services, but also over the personnel assigned to provide those services to the patient during the patient's hospital stay." *Id.* at 194.

Based on this analytical framework, the *York* court affirmed Dr. York's apparent agency claim and verdict against Rush. The court found that Dr. York first developed an interest in Rush based on his knowledge of the hospital and its staff, and that he sought out a particular orthopedic surgeon at Rush, Dr. Rosenberg. Second, Rush failed to put Dr. York on notice that Dr. El-Ganzouri was an independent contractor, and that nothing in the consent form indicated otherwise. Third, Dr. York did not know who the attending anesthesiologist would be on the day of the surgery at issue, and that he assumed Rush would select the anesthesiologist.

The court stated that "hospitals today actively promote themselves as centers for complete medical care and reap profits when competent service is provided by the independent doctors in their facilities." *York*, 222 Ill. 2d at 202. Thus, while hospital advertising was not directly at issue in *York* with respect to the plaintiff's claim, it was certainly an indirect factor in the court's reasoning and emphasis on Dr. York's reliance on Rush's reputation.

Recommendations Post-*York*

As a result of the Illinois Supreme Court's decision in *York*, defense counsel for health care entities should undertake another review of their clients' exposure to apparent agency claims. First, while the court continues to focus on hospitals' advertising campaigns as a source of "holding out" and profit from its independent contractors, hospitals should continue to review advertising campaigns to avoid making representations of "full service" health care that may inadvertently "hold out" an independent contractor as an apparent agent. In taking proactive and precautionary measures, defense counsel should review the following:

- All advertising and marketing materials to ensure that they do not contain any language, pictures, testimonials, or any other references that would imply that independent contractors or non-employee members of the medical staff are agents of the hospital.
- Advertising and marketing materials to remove the use of any possessive language, such as "our physicians," with respect to independent contractors or non-employee members of the medical staff of the hospital.
- Advertising and marketing materials to eliminate any statements of the quality of care or the "full service" nature of the care provided by the hospital that subsumes areas of care provided by independent contractors or non-employee members of the medical staff.
- Procedures regarding the uniforms of medical staff that are independent contractors and non-employees of the hospital. Special care must be taken to distinguish the use of hospital logos on scrubs, lab coats, and name badges of non-employees.

While the "holding out" requirement was not at issue in *York*, this is still the threshold element that the plaintiff must prove in an apparent agency medical malpractice claim. Given today's "modern realities" of health care and the multi-media advertising campaigns that hospitals use, plaintiffs may be able to make it over the "holding out" hurdle, but hospitals can counter this by providing clear informed consent forms. To strengthen their defense, hospitals should do the following:

- Review and revise informed consent and treatment forms to include a disclaimer informing patients that independently contracted members of the medical staff and other non-employees are not agents of the hospital.
- Review and revise informed consent and treatment forms for specific procedures that identify specific specialists and support personnel by name, if possible, or at the very least by specialty.
- In light of the First District Appellate Court's recent decision in *Schroeder v. Northwest Community Hospital*, 862 N.E.2d 1011, 308 Ill. Dec. 808 (1st Dist. 2006), it is imperative that informed consent and treatment forms contain disclaimers that are clear and

conspicuous. Do not use universal consent forms. Ensure that the disclaimer language is not in “small print” or “sandwiched” among other provisions.

Conclusion

While these are only recommendations based on the recent case law, it is advisable that counsel for hospitals engage in a complete and ongoing review of advertising and consent forms to address apparent agency issues. Unlike the hypothetical predicament of General Hospital’s counsel in the introduction, it is advisable that defense counsel suggest to their health care clients that counsel participate in or review advertising campaigns and media before release, as well as work with clients in the development of clinically specific consent forms. With the court’s pronouncement in *York* that a plaintiff must only reasonably rely on a hospital to provide support services, it is imperative that hospitals take proactive measures to distinguish independent contractors from their employees, in order to avoid apparent agency claims.

ABOUT THE AUTHOR

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker and Allen* where he chairs the firm’s healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the IDC, the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, a board member of the Illinois Association of Healthcare Attorneys, and the current president of the Illinois Society of Healthcare Risk Management.

* The author acknowledges the assistance of **John K. Kim** of *Heyl, Royster, Voelker and Allen*, in the preparation of this article.