NEGLIGENT ACTS OF NON-EMPLOYEES – THE DOCTRINE OF APPARENT AGENCY & POTENTIAL HOSPITAL LIABILITY

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
I. GILBERT AND THE RECOGNITION OF APPARENT AGENCY IN ILLINOIS

A. Gilbert v. Sycamore Municipal Hospital

Hospital liability for the medical malpractice of its employee physicians has and continues to follow customary vicarious liability law, in that the negligence of an employee physician will be imputed on the hospital, as the physician employee is the actual agent of the hospital. However, in 1993 the Illinois Supreme Court, resolving an inconsistency in lower court decisions on the issue, ruled conclusively that hospitals may be held liable for negligence of independent contractor physicians under the doctrine of apparent agency.

In Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511 (1993), the Illinois Supreme Court recognized hospitals may be liable for the negligence of non-employee, independent contractor physicians, and further announced how this apparent agency is established.

Under the doctrine of apparent agency, as treated in Gilbert, a hospital can be held liable for negligence of a physician providing treatment at the hospital, regardless of whether that physician is a non-employee, unless the patient knew, or should have known that the negligent physician was a non-employee.

In Gilbert, a patient presented to an emergency room with chest pains, and was seen by an emergency room physician who was an independent contractor at the hospital. The patient died shortly after being released, and the executor of the patient’s estate brought a medical malpractice suit against the doctor and the hospital. The patient’s estate settled with the doctor, but the issue of whether the hospital could be liable for the negligence of an independent contractor physician remained. In finding that the patient’s estate could pursue this claim against the hospital at trial, the Illinois Supreme Court noted the “modern realities” of hospitals as businesses that advertise to the public. First, the Court explained that:

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.”
Second, the Court went on to explain the expectations of the public in light of the first reality, stating:

Generally people who seek medical help through the emergency room facilities of modern-day hospitals are unaware of the status of the various professionals working there. 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.

As such, the Illinois Supreme Court adopted the doctrine of apparent agency. The Court held that in order to establish a cause of action against a hospital for negligence of a non-employee physician, a plaintiff must show:

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 the ordinary care and prudence.

The Court further explained that the first two elements, which are often grouped together as the “holding out” part of the apparent agency test does not require that the hospital affirmatively acknowledge the negligent physician as an employee. Instead, a plaintiff can satisfy this first part by showing that he or she was not informed that the physician providing care was an independent contractor. As to the third element, referred to as “justifiable reliance” the Court explained that reliance does not require a plaintiff to show that he actually relied on a specific physician, rather this can be satisfied by demonstrating that he or she relied on the hospital, itself, to provide emergency room care.
B. Illinois Supreme Court Extension of *Gilbert* in *York v. Rush-Presbyterian-St. Luke's Medical Center*

The Illinois Supreme Court extended its decision in *Gilbert* to the factual scenario in *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147 (2006), finding that a hospital could be liable for the negligence of an independent contractor physician beyond the confines of the emergency room setting.

In *York*, the plaintiff, a retired orthopedic surgeon, suffered a spinal injury during his third knee replacement surgery at defendant Rush hospital. The plaintiff did not sue the orthopedic surgeon, who he had personally selected, but instead sued the anesthesiologist, an independent contractor, who had administered the spinal epidural during the procedure. The plaintiff further sued the hospital on an apparent agency theory for the negligence of the anesthesiologist.

The plaintiff not only selected his preferred orthopedic surgeon at defendant Rush, but wanted to have his third knee replacement performed at Rush because he was previously satisfied with the anesthesia care he had received from a particular Rush physician, who he hoped would provide care again during his third surgery. However, on the day of the third surgery, this Rush physician was unavailable, and a non-employee anesthesiologist, who the plaintiff did not know and did not meet until the day of the surgery, was assigned to the plaintiff.

During briefing and argument, Rush conceded that it did not sufficiently put the plaintiff on notice that the anesthesiologist was a non-employee. However, it contended that the plaintiff did not act with reliance on Rush to select one of its employee anesthesiologists, and thus could not satisfy all elements of the apparent agency claim.

The Illinois Supreme Court, however, disagreed with Rush, and found that the plaintiff did meet the reliance part of the test, and allowed the plaintiff’s apparent agency claim against the hospital. The Court specifically noted that, “the critical distinction is whether the patient relied upon the *hospital* for the provision of care or, rather, upon the services of a particular physician.” *York*, 222 Ill. 2d at 193; citing *Gilbert*, 156 Ill. 2d at 525.

The Court further explained that plaintiffs satisfy the reliance part of the test when they reasonably rely upon a hospital to provide medical care, rather than upon a specific physician. This is due to the fact that, “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.” *York*, 222 Ill. 2d at 194.
II. RECENT APPARENT AGENCY DECISIONS

A. **Hammer v. Barth**

In *Hammer v. Barth*, 2016 IL App (1st) 143066, the plaintiff was referred by his primary care physician to a hospital for cardiology services. The plaintiff was treated by multiple cardiologists who were non-employees of the hospital. The plaintiff later had a cardiac event shortly after treatment by one of the non-employee physicians, and the plaintiff’s wife and administrator of his estate, sued the hospital for the negligence of its non-employee physicians under apparent agency.

The Illinois Court of Appeals, First District, first looked to the “holding out” part of the apparent agency test. While the defendant hospital argued that the plaintiff had read and signed a consent form stating that some or all of the physicians who provide medical services at the hospital are not employees or agents of the hospital, but rather independent practitioners, the court found this language to be ambiguous. As such, the court could not find for the hospital on this element as a matter of law, but held that a jury must find whether this language was sufficient to determine if the hospital held out that its physicians in this case were independent contractors, as a factual matter. The court distinguished the consent form in this case with other consent forms that were held legally sufficient to satisfy the holding out part in favor of defendant hospitals. These consent forms included unambiguous language stating unequivocally that physicians or hospital staff are not employees or agents of the hospital.

The first district then turned to the reliance or third element of apparent agency. The court found that, again, the jury would need to determine reliance as a factual matter, and that reliance could not be precluded as a matter of law. The court heard evidence that the plaintiff had believed that the hospital was arranging both the treatment and the physicians he saw, despite a disclaimer in the consent form that he signed, which stated that “the decision to seek medical care at the hospital is not based upon any understanding, representation, advertisement, media campaign, inference, implication or reliance that the physicians who are or will be treating me are employees or agents of the hospital.” The court held that such a disclaimer could potentially defeat a claim of reliance by a plaintiff, but again, found the language ambiguous and insufficient to find lack of reliance as a matter of law. Therefore, the plaintiff’s claim for apparent agency survived the summary judgment stage, requiring a jury to make factual determinations on whether the non-employee physicians were apparent agents of the hospital. *Hammer*, 2016 IL App (1st) 143066, ¶ 33.

B. **Mizyed v. Palos Community Hospital**

In *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, a non-native English speaker was referred to the emergency room at defendant Palos Community Hospital after his primary care physician ran an ECG, which showed an incipient cardiac episode. The plaintiff was treated by several non-employee physicians at Palos, but later developed an infection from treatment and had to be hospitalized for a week at a different hospital following his treatment at Palos.
The Illinois Court of Appeals, First District, turned to the only issue of contention, being the first, or holding out part of the apparent agency determination. Again, a consent form was at issue. However, as opposed to the hospital consent form in *Hammer*, the consent form provided by defendant Palos to the plaintiff clearly stated that all physicians providing services to me are independent medical staff physicians and not employees or agents of Palos Community Hospital. *Mizyed*, 2016 IL App (1st) 142790, ¶ 8.

Further, the court held that the fact that the consent forms were in English and the plaintiff was not a native English speaker did not defeat the notice he received when signing the forms. Testimony indicated that his daughter, who was fluent in English, was present with him during his signing of the consent forms, and told him that he needed to sign them. As such, the first district found for Palos as a matter of law, granting the defendant summary judgment on the plaintiff's apparent agency claim.

### III. APPARENT AGENCY BEYOND THE HOSPITAL WALLS

Since *Gilbert*, the Illinois courts have extended the apparent agency doctrine beyond the scope of emergency room physicians. However, this doctrine had not been applied outside the walls of the hospital, itself, other than very limited, narrow exceptions, until the first district ruling in the case of *Yarbrough v. Northwestern Memorial Hospital*.

#### A. *Yarbrough v. Northwestern Memorial Hospital*

In *Yarbrough v. Northwestern Memorial Hospital*, 2016 IL App (1st) 141585, a plaintiff received prenatal care from Erie Clinic, which was affiliated with defendant Northwestern Memorial Hospital, but was a separate corporate entity. The plaintiff’s baby was later delivered prematurely at Northwestern, causing complications and injury, in part due to failure to diagnose a uterine condition during her prenatal treatment. The plaintiff sued defendant Northwestern, alleging that Erie Clinic and its staff were apparent agents of Northwestern. The trial court, certified a question for the Illinois Appellate Court, First District, asking whether a clinic and its staff, being a separate entity than the affiliated hospital, could be an apparent agent of the hospital.

The first district, while not deciding the merits of the plaintiff’s case, specifically, determined that, yes, if the elements of apparent agency, as decided by the Illinois Supreme Court in *Gilbert* could be found based on the facts of the case, apparent agency liability of a hospital could be found for negligence that occurred outside of the hospital, itself. The fact that the apparent agent, Erie Clinic, was not named as a defendant was not determinative to the first district, and would not defeat the plaintiff’s claim, by itself.
The Yarbrough court looked to the facts of the case, specifically the advertising of Northwestern and Erie, in finding that the “holding out” part of the apparent agency test was legally possible. The court specifically noted the facts that:

- Northwestern held itself out as a “full-service hospital;”
- Northwestern promoted itself as a community-oriented hospital that collaborated with neighborhood centers, including Erie, to make healthcare available to those in need;
- Northwestern publicized its relationship with Erie on its website, annual reports, community service reports, and other press releases;
- Northwestern promoted that 11.2 percent of babies delivered at the hospital in 2006 received prenatal care at Erie;
- 100 percent of prenatal patients at Erie delivered at Northwestern;
- Northwestern’s website provided a link to Erie’s website and represented that Erie was one of “Our Health Partners” and promoted their formal and long-standing affiliation with Erie;
- Two Northwestern representatives sat on Erie’s board;
- Erie was founded “as a project of volunteer physicians from Northwestern Memorial and Erie Neighborhood” House; and
- Northwestern continuously contributed financially to Erie, provided information technology assistance to Erie and did not charge Erie patients for care given at the hospital.

Yarbrough, 2016 IL App (1st) 141585, ¶ 52.

Additionally, the court heard evidence that Erie represented that if the plaintiff was treated at Erie she would likely receive additional testing at Northwestern and ultimately deliver at Northwestern. Further, Erie’s website referred to Northwestern as its “partner” and there were other references to Erie partnering with Northwestern. The website also stated that Erie physicians had faculty status at Northwestern University Feinberg School of Medicine.

The first district explained that the plaintiff did not actually have to see the advertisements in finding the “holding out” part of apparent agency, for the doctrine to potentially apply. However, the reliance part would require some facts establishing that the plaintiff acted in reliance upon the conduct of the hospital or its agents. Finding that there was evidence that the plaintiff was influenced by Erie’s and Northwestern’s conduct in making her health care decisions, the court instructed the trial court to allow the plaintiff’s claim of apparent agency to be determined by a jury, factually. Therefore, under present Illinois law, a claim for apparent agency can be made against a hospital, even when alleged acts of negligence occurred outside the hospital wall, assuming the Gilbert elements of apparent agency are found.
Matt concentrates his practice in the defense of medical malpractice and healthcare litigation. He regularly defends physicians, advanced practice nurses, nurses, hospitals and clinics in professional liability and institutional negligence claims involving significant injury or death.

Matt has experience handling all aspects of medical malpractice litigation, from inception of a plaintiff’s claim through trial and appeal. He has successfully defended multiple medical malpractice actions through jury trial, resulting in verdicts in favor of the firm’s clients.

Matt has spent his entire career with Heyl Royster following graduation from law school in 2008. Following his first year of law school, he served as a judicial clerk to the Honorable Scott Drazewski, Circuit Judge for the Eleventh Judicial Circuit, McLean County. He was also a member and articles editor for the Southern Illinois Law Journal. In 2015, Matt completed the International Association of Defense Trial Counsel (IADC) Trial Academy, held at Stanford University in Palo Alto, California.

Significant Cases

- **Flynn v. L.M., M.D.** - Defense verdict in favor of OB/GYN, where plaintiff alleged ureter injury during laparoscopic assisted vaginal hysterectomy resulted in stenting, ureterectomy and reimplantation, and eventual nephrectomy in 33 year old patient. The plaintiff also claimed PTSD and other psychological injuries as a result of the surgical complication.
- **Barry v. J.V., M.D.** - Defense verdict in favor of cardiovascular and thoracic surgeon, where plaintiff alleged wrongful death of 55 year old male resulting from a failure to timely diagnose acute mesenteric ischemia and obtain surgical consult on a patient admitted to the hospital for unrelated peripheral artery angiography.
- **Bishop v. P.R., M.D.** - Defense verdict in favor of family physician, where plaintiff alleged wrongful death of 56 year old female resulting from a failure to order an inpatient cardiology consult and/or exercise stress test for a patient who reported to the emergency department and was subsequently admitted for complaints of chest pain at rest that radiated to the neck and jaw and left arm numbness. The patient died one day after discharge and two days before a scheduled outpatient exercise stress test.
- **Mondragon v. K.A., M.D.** - Defense verdict in favor of colorectal surgeon, where plaintiff developed severe incontinence following hemorrhoidectomy and sphincterotomy. Plaintiff alleged that incontinence was caused by an unnecessary sphincterotomy, and that informed consent was not provided for the sphincterotomy because it was not contained within the consent to treatment.
- **Arvanitis v. R.M., M.D.** - Defense verdict in favor of gastroenterologist, where plaintiff’s sigmoid colon was perforated during diagnostic colonoscopy, resulting in emergent laparotomy and sigmoid colon resection and subsequent incisional hernia repair.
- **Faso v. S.G., M.D.** - Defense verdict in favor of surgeon/intensivist, where plaintiff alleged failure to timely diagnose a post operative bleed and timely return to surgery following roux-en-y gastric bypass, resulting in code blue and hypoxic ischemic encephalopathy with permanent neurological deficit in 50 year old male.
- **Sayles v. K.K., M.D.** - Defense verdict in favor of pathologist, where plaintiff alleged failure to diagnose and failure to warn surgeon of peri-rectal neuroendocrine tumor in 42 yr. old female resulting in metastatic disease and death.
- **Nichols v. Hospital** - Medical malpractice action which arose from complications following surgical repair of a giant hernia. Plaintiff sustained catastrophic injuries, including blindness, removal of a hip due to persistent infection, and an ileostomy. During the course of the litigation, the parties disclosed a total of 24 expert witnesses across multiple disciplines. The case was settled favorably following a second mediation.
• **Mwesigwa v. DAP, Inc.** - Assisted in obtaining summary judgment in U.S. District Court for the Eastern District of Missouri, which found that the Federal Hazardous Substances Act preempts any state law cause of action based upon a theory that a product's label should have included warnings not required by the FHSA. District Court’s grant of summary judgment was subsequently affirmed by U.S. Court of Appeals for the Eighth Circuit.

**Publications**


• “Attorney Liability to Non-Clients” chapter in *Attorneys’ Legal Liability,* Illinois Institute for Continuing Legal Education (2014)


**Professional Recognition**

• Named to Law Bulletin Publishing Company’s 2015 and 2016 list of Illinois Emerging Lawyers. Only two percent of Illinois lawyers under the age of 40 or who have been licensed to practice for 10 years or less earn this distinction.

• Named to the Illinois *Super Lawyers Rising Stars* list (2012-2017). The *Super Lawyers Rising Stars* selection process is based on peer recognition and professional achievement. Only 2.5 percent of Illinois lawyers under the age of 40 or who have been practicing 10 years or less earn this designation.

**Professional Associations**

• Illinois Association of Defense Trial Counsel (*IDC Quarterly* regular columnist)

• Defense Research Institute

• Abraham Lincoln Court

• American Bar Association

• Illinois State Bar Association

• Peoria County Bar Association

**Court Admissions**

• State Courts of Illinois

• United States District Court, Central District of Illinois

**Education**

• Juris Doctor (*cum laude*), Southern Illinois University, 2008

• Bachelor of Science-Accounting, Culver-Stockton College, 2005