

Health Law

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First District Holds Orthopedist is Not Apparent Agent of Hospital in Wrongful Death Case

The Illinois Appellate Court for the First District recently considered whether Silver Cross Hospital and Medical Center (“Silver Cross”) should be held liable under vicarious liability for an orthopedic surgeon’s alleged negligence in a wrongful death suit brought by the decedent’s widower. *Delegatto v. Advocate Health & Hospitals et al.*, 2021 IL App (1st) 200484, ¶ 1. Ultimately, the First District concluded that there was no material issue of fact; Silver Cross had not held the doctor out as its agent or employee, and therefore Silver Cross was entitled to summary judgment. *Delegatto*, 2021 IL App (1st) 200484, ¶¶ 1, 61.

Factual and Procedural Background

The *Delegatto* case arose from a wrongful death action for medical negligence by James Delegatto (“Delegatto”). *Id.* ¶ 1. Delegatto alleged that Silver Cross should be held vicariously liable for the wrongful death of his wife, Tracy Delegatto (“Tracy”), due to the alleged medical negligence of Dr. Anthony Rinella, an orthopedic surgeon, and Douglas Stevens, a physician assistant (“PA Stevens”). *Id.* ¶ 4. Specifically, Delegatto alleged in his complaint that Silver Cross acted in a manner that would lead a reasonable person to conclude that Dr. Rinella and PA Stevens were employees and/or agents of Silver Cross, and that Silver Cross never informed Tracy that her medical care was being provided by non-employees. *Id.*

In 2014, Tracy was injured in a motor vehicle accident. *Id.* ¶ 5. After the accident, Tracy underwent physical therapy and epidural steroid injections for pain management under the care of Dr. Faris Abusharif, a pain medicine specialist. *Id.* ¶ 5. Eventually, after Tracy’s pain could not be alleviated, Dr. Abusharif suggested that Tracy undergo surgery. *Id.* ¶ 5. Tracy consulted with Dr. Rinella and PA Stevens at Dr. Rinella’s office located in the Illinois Spine and Scoliosis Center (“ISSC”). *Id.* ¶ 6. During the consultation, Tracy signed two patient forms titled “ISSC Patient Registration Form” and “ISSC Authorization to Release Healthcare Information.” The first form contained the following language, “I authorize payment of medical benefits for any services to me by Illinois Spine & Scoliosis Center, to be paid directly to Illinois Spine & Scoliosis Center.” *Id.*

The facts showed that Tracy researched local hospitals and determined that she wanted her surgical procedure to be performed at Silver Cross. *Id.* ¶ 7. According to Delegatto’s deposition, Tracy chose Dr. Rinella because of his affiliation with Silver Cross, and she was adamant about having the surgery performed at that location. *Id.* Tracy signed Silver Cross consent forms, including a “HOSPITAL SERVICES” consent form, which contained the following language: “I UNDERSTAND THAT ALL PHYSICIANS, NURSE PRACTITIONERS, AND PHYSICIAN ASSISTANTS FURNISHING SERVICES TO ME, INCLUDING EMERGENCY DEPARTMENT, RADIOLOGISTS, ANESTHESIOLOGISTS, PATHOLOGISTS, AND THE LIKE, ARE INDEPENDENT CONTRACTORS AND ARE NOT EMPLOYEES OR AGENTS OF THE HOSPITAL.” *Id.* ¶¶ 9-10. Tracy’s signature appeared at the bottom of the

form, attesting, “I [h]ave read this form and I am satisfied that I understand it’s [sic] content and significance.” *Id.* ¶ 10. Tracy executed a surgical consent form containing similar language. *Id.* ¶ 11.

In his deposition, Dr. Rinella stated that: (1) he did not report to any supervisor at Silver Cross, (2) there was no direct supervision from Silver Cross, (3) his only role with Silver Cross was to serve on a surgical committee, (4) Silver Cross did not compensate him for Tracy’s surgery, and (5) he did not engage in activity in which he held himself out as an agent of Silver Cross. *Id.* ¶ 12. Dr. Rinella and PA Stevens were independent contractors and had privileges at Silver Cross, but were employed by “Anthony S. Rinella, M.D., S.C. d/b/a Illinois Spine and Scoliosis Center.” *Id.* ¶¶ 7, 12.

Silver Cross filed a partial motion for summary judgment, arguing that Dr. Rinella and PA Stevens were neither employees nor actual agents of Silver Cross, that they were independent contractors, and that Delegatto was unable to prove the requisite elements of an apparent agency action. *Id.* ¶ 13. Delegatto, on the other hand, argued that Tracy believed that Dr. Rinella and PA Stevens worked for Silver Cross, and alleged that they failed to take affirmative actions to inform Tracy of their independent contractor status. Additionally, Delegatto argued that material facts were still in dispute, including whether Tracy knew or should have known that Dr. Rinella and PA Stevens were not agents of Silver Cross, whether Silver Cross acquiesced to Dr. Rinella and PA Stevens’ appearance of authority, and whether the signed consent forms were dispositive on the issue of agency. *Id.* ¶ 14.

The circuit court granted Silver Cross’ motion for summary judgment, holding that there was no material question of fact as to whether or not the holding-out requirement was met as it related to PA Stevens – he was not an apparent agent of the hospital. *Id.* ¶ 17. As to Dr. Rinella, the circuit court held that the language in the consent forms created no ambiguity and that there was no evidence to indicate that Dr. Rinella was being held out as an agent or that the hospital acquiesced to the alleged apparent agency. Delegatto appealed. *Id.* ¶ 18.

First District’s Analysis

On appeal, the First District affirmed the circuit court’s ruling granting Silver Cross’ motion for summary judgment. *Id.* ¶¶ 61-62. In analyzing the apparent agency issue, the court noted that a hospital may be held vicariously liable under the doctrine of apparent agency for the negligent acts of a physician providing care at a hospital, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician is an independent contractor. *Id.* ¶ 26. A plaintiff must plead and prove three elements to hold a hospital liable:

- (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 an 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.
- Id.*

The first element, referred to as “holding out,” is satisfied if the hospital holds itself out as a provider of care without informing the patient that the care is provided by independent contractors. *Id.* ¶ 27. The focus of the holding out element is whether the patient knows or should have known that the physician is an independent contractor. *Id.* Delegatto argued that a consent form that identifies “physicians” without identifying the treating physician, was not determinative. *Id.* ¶ 32. The court found plaintiff’s argument unpersuasive and unsupported by Illinois law. *Id.* ¶ 34. The Silver Cross consent forms signed by Tracy clearly stated that “ALL PHYSICIANS . . . ARE INDEPENDENT CONTRACTORS AND ARE NOT EMPLOYEES OR AGENTS OF THE HOSPITAL”. *Id.* ¶ 9. The First District therefore held that the

only fair reading would mean that every physician with privileges at Silver Cross is included within that broad category. *Id.* ¶ 34. The court also found that the use of language within consent forms that reference subgroups of medical practitioners, such as “[A]ll doctors furnishing service to me, including emergency department physicians, radiologists, anesthesiologists, pathologists, cardiologists, surgeons, and the like,” was not internally inconsistent, nor contradictory to the reference to “all physicians”. *Id.* ¶¶ 38-40. In sum, the court ruled that the consent forms were to be clear and unambiguous, and therefore, Delegatto failed to satisfy the first element of an apparent agency claim (“holding out”), rendering summary judgment appropriate. *Id.* ¶ 47.

The second element, “appearance of authority,” is frequently grouped with the “holding out” element, and are treated as one. *Id.* ¶¶ 27, 50. Because Delegatto failed to offer sufficient evidence under the first element of the apparent authority analysis, the court noted that it could end its analysis under the second element. *Id.* ¶ 50. In the interest of completeness, however, the court analyzed Delegatto’s arguments. *Id.* Notwithstanding that Tracy signed the consent form identifying “all physicians” as independent contractors, Delegatto contended that Dr. Rinella acted in a manner that led Tracy to reasonably conclude that Dr. Rinella was an agent or employee of Silver Cross, and that Silver Cross acquiesced in that conduct. *Id.* ¶ 49. Delegatto argued that there was competing testimony regarding Dr. Rinella’s branding efforts, and therefore, a question of credibility had been created for a jury’s analysis. *Id.* To defeat a claim of vicarious liability, Silver Cross was required to show evidence that Tracy had either actual or constructive notice of Dr. Rinella’s status as an independent contractor. *Id.* ¶ 55. The court concluded that the consent forms that Tracy had signed on three separate occasions, which clearly and unambiguously informed every signatory that “all physicians” were independent contractors, were sufficient to put Tracy on notice of Dr. Rinella’s relationship to Silver Cross. *Id.* The court emphasized that Dr. Rinella’s office space was barren, there was no signage on the door, no business cards bearing the name of his practice, and no support staff to receive phone calls or visitors at his office. However, the absence of those factors could not defeat the effect of the three signed Silver Cross consent forms and/or the surgical consent form, which contained the same language. *Id.* ¶ 53.

The third element, known as the reliance element, is satisfied if it can be shown that the plaintiff relied upon the hospital to provide medical care rather than a specific physician. *Id.* ¶ 27. The critical distinction is whether the plaintiff sought care from the hospital itself or looked to the hospital merely as a place for his or her personal physician to provide medical care. *Id.* Having found that neither the first nor second elements of the apparent authority claim were satisfied, the court failed to address the reliance element. *Id.* ¶ 59. Therefore, the court affirmed the judgment of the circuit court granting Silver Cross’ motion for summary judgment. *Id.* ¶ 61.

Conclusion

The First District concluded that Delegatto failed to establish that Silver Cross held Dr. Rinella out as its agent or employee. The question presented on appeal was essentially resolved by the hospital’s consent form that clearly and unambiguously informed Tracy that “all physicians” were independent contractors and not employees of the hospital. However, additional factors, such as the empty office space, lack of signage and business cards, and lack of support staff were also found to be pertinent. Additionally, the testimony that Dr. Rinella lacked supervision, possessed a limited role as a member of the surgical committee, and was not compensated by Silver Cross were similarly supportive of the court’s ruling. Defense counsel should carefully consider these factors and encourage health care clients to execute clearly worded and unambiguous consent forms to advise patients of the employment and/or agency status of its physicians.



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Mark D. Hansen is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. Mr. Hansen has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He received his undergraduate degree from Northern Illinois University and law degree from University of Illinois College of Law. Mr. Hansen is a member of the Illinois Association of Defense Trial Counsel and is a former co-chair of the Young Lawyers Committee, former *ex officio* member of the Board of Directors, and has served as chair for various seminars hosted by the IDC. He is also a member of the Illinois Society of Healthcare Risk Management, the Abraham Lincoln American Inn of Court, and the Defense Research Institute.

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