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Gilbert, Health Care Advertising, and Consent Forms—Second District Rules Obstetrician Was Not an Apparent Agent of Hospital

The Illinois Appellate Court, Second District, recently held that an obstetrician was not an apparent agent of a hospital because the plaintiff voluntarily signed a consent form acknowledging that the physician was an independent contractor. *Prutton v. Baumgart et al.*, 2020 IL App (2d) 190346, ¶ 55. In *Prutton*, the Second District relied on a three-part test used by the Illinois Supreme Court in *Gilbert v. Sycamore Municipal Hospital* to determine whether the hospital was liable under the doctrine of apparent agency. *Baumgart*, 2020 IL App (2d) 190346, ¶ 17 (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511 (1993)). Thus, focus on *Gilbert's* implications, as previously reported in the Quarterly's discussion of last year's case of *Williams v. Tissier*, 2019 IL App (5th) 180046, ¶ 1, has continued, albeit with more definitive results in the Second District.

Factual Background

Sherri Prutton filed a five-count medical malpractice complaint against various physicians and medical facilities alleging that they were responsible for the negligent labor and delivery of her daughter, Alexis. *Baumgart*, 2020 IL App (2d) 190346, ¶¶ 1-4. Complications during delivery caused Alexis to suffer from shoulder dystocia, and eventually a brachial plexus injury. *Id*. The injury resulted in subsequent nerve damage, which affected Alexis's use of her right arm. *Id*.

Kishwaukee Community Hospital provided medical care for Prutton throughout her life, spanning from her childhood through the births of her first two children. *Id*. ¶ 6. She was satisfied with the care she received as a patient at Kishwaukee over the years and chose to have her delivery at Kishwaukee. *Id*. By the time Prutton was pregnant with Alexis in 2010, she was advised that her prior obstetrician, Dr. Emile Hirsch, was no longer employed or associated with Kishwaukee. *Id*.

Prutton's insurance carrier advised that Northern Illinois Fertility, S.C. ("NIF") would accept her insurance. *Id*. ¶ 7. NIF was located across the street from Kishwaukee, but the two entities were not affiliated with each other, except that certain NIF physicians had privileges at Kishwaukee facilities. *Id*. ¶¶ 7-11. Upon seeking prenatal care at NIF, Prutton became a patient of Dr. Joseph Baumgart, the physician and owner of NIF. *Id*. Dr. Baumgart informed Prutton that another NIF physician, Dr. Paula Hobson, would perform her delivery if Baumgart was unavailable for any reason. Both physicians had privileges to deliver at Kishwaukee. *Id*.

On the day of delivery, Dr. Baumgart was unavailable and Dr. Hobson oversaw the Prutton's delivery at Kishwaukee. *Id*. at ¶¶ 7-8. After her admission, Prutton was taken to the delivery room and given two informed consent forms which explicitly stated that the physicians providing care during labor were independent contractors and not employees or agents

of Kishwaukee. *Id*. Prutton reviewed and signed the consent forms, acknowledging that she understood the forms and agreed to the terms before going into labor. *Id*.

Prutton drafted her complaint to contain one count directed against Kishwaukee, wherein she alleged that Dr. Hobson was an apparent agent of Kishwaukee and that the hospital was vicariously liable for the negligent acts of Dr. Hobson during delivery. *Id*. ¶ 4. Kishwaukee responded by filing a motion for summary judgment, requesting that the court rule in favor of Kishwaukee on the issue as to whether Dr. Hobson was acting as an apparent agent during the labor and delivery process. *Id*. ¶ 13. The court granted Kishwaukee's motion and the plaintiff appealed. *Id*. ¶¶ 16-20.

The *Gilbert* Analysis

In rendering its decision, the Second District relied on *Gilbert v. Sycamore Municipal Hospital*. *Baumgart*, 2020 IL App (2d) 190346 ¶¶ 23-26 (citing *Gilbert*, 156 Ill. 2d at 520). In *Gilbert*, the Illinois Supreme Court recognized that a hospital may be liable for the 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. *Baumgart*, 2020 IL App (2d) 190346 ¶¶ 23-26. The court in *Gilbert* outlined a 3-part test regarding this issue. A plaintiff alleging apparent agency must establish the following elements: (1) the hospital or agent acted in a manner that would lead a reasonable person to believe that the negligent individual was an employee or agent of the hospital; (2) the hospital had knowledge of and acquiesced in the acts of the agent that created the appearance of authority; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Id.* at ¶ 24.

The first two elements of the *Gilbert* test are together known as the "holding out" factor. *Id*. ¶ 25. As such, the court may find that a hospital holds itself out as an employer of the physician if the hospital portrays itself as the provider of specialized care without informing the patient otherwise. *Id*. The "holding out" factor does not require that a hospital make an express representation that the independent contractor was an employee or agent. Rather, an agency relationship may be created by the hospital's failure to inform patients that the independent contractor was not an employee. *Id*.

In this case, Prutton argued that she met her burden on the "holding out" factor because of Kishwaukee's advertising efforts. *Id*. ¶ 28. Prutton testified that before she became pregnant with Alexis, she saw Kishwaukee advertisements which implied that Kishwaukee provided high-quality, full-service medical care. *Id*. In fact, she stated that the advertisements gave her the impression that the hospital had doctors with great expertise. *Id*. Prutton testified that she recalled seeing advertisements featuring specific physicians, including Dr. Baumgart and Dr. Hobson, and that she believed that any reasonable person would assume that the doctors in the advertisements were employees of the hospital. *Id*. Prutton further argued that she established the "holding out" factor because that Dr. Hobson wore hospital scrubs with marks or logos which identified his affiliation with Kishwaukee during Alexis' delivery. *Id*. ¶ 29.

The final element of the *Gilbert* analysis is the reliance factor. *Id*. ¶ 30. To satisfy this element, the plaintiff must establish that she relied on the hospital, rather than a specific physician, to provide complete care. *Id*. at ¶ 25. In an attempt to meet the standard set forth in the reliance factor, Prutton argued that she relied on Kishwaukee when she sought out a doctor that would deliver at Kishwaukee, instead of relying on a specific doctor in the practice of prenatal care. *Id*. ¶ 30.

Second District's Analysis

Applying the test outlined in *Gilbert*, the Second District first considered whether the advertisements may be used by the plaintiff as evidence to show that she meets the "holding out" factor. *Id*. ¶ 48. While the court agreed that the advertisements were admissible and relevant, it concluded that if the advertisements were viewed in isolation, there would be a question of fact as to whether there was an employee-employer relationship, and Kishwaukee would not have been entitled to summary judgment. *Id*.

Unfortunately for the plaintiff, the "holding out" factor also required the court to consider whether the hospital informed the patient of Dr. Hobson's independent contractor status. *Id*. ¶ 50. The court rejected the plaintiff's argument that the consent forms were not valid because she signed them under duress as she went into labor. *Id*. ¶ 51. The court explained that the plaintiff should not be allowed to diminish the power of the consent form by claiming she was under distress because it would open the door for many other patients to bring claims against hospitals in nearly every situation where an independent contractor was involved. *Id*. The court rejected Prutton's argument, noting that it is not uncommon for patients to be in distress when seeking emergency medical care. *Id*.

Prutton also argued that she did not give actual consent because the forms were ambiguous and confusing. *Id*. ¶ 52. A review of the forms by the court defeated this argument. *Id*. The patient authorization record contained a single page and the statement explaining that the physicians were independent contracts on that page was in bold. *Id*. Prutton was required to initial after the paragraph with the bolded sentence and provide her signature at the bottom of the form. *Id*. The other consent form for obstetrical services was two pages long and was easy to read because of the bulleted paragraphs. One paragraph in the two-page form contained the following sentence, "I understand that the physicians who participate in the procedure (for example: surgeon, assistants, anesthesiologist, obstetrician, pathologist, and the like) are independent practitioners and are not employees or agents of Kishwaukee Community Hospital." *Id*. Prutton signed her name on the signature line at the end of the form. Below her signature, in bold, was a sentence stating that her signature constituted her acknowledgement that she had read, understood, and was agreeing to the terms. *Id*. ¶ 52. Prutton attempted to attack the validity of the consent forms by arguing they were insufficient because neither form identified Dr. Hobson or NIF by name. *Id*. ¶ 54. The court rejected Prutton's argument, reasoning that many courts have held consent forms to be valid despite their failure to specifically identify physicians or medical practices. *Id.*

The Second District agreed that Kishwaukee's advertisements could have created a genuine issue of material fact as to whether Kishwaukee held Dr. Hobson out as an employee or agent. However, the court determined that Kishwaukee's argument that Prutton was aware that Dr. Hobson was an independent contractor because she signed the consent forms was more important than the issues raised by the advertisements. *Id*. ¶ 55. As a result, the court held that there was no issue of material fact as it relates to this issue because Prutton acknowledged that she was aware the physician was an independent contractor when she signed both of the consent forms. *Id*.

Conclusion

Counsel for healthcare entities should take proactive measures to distinguish its employees from independent contractors in an effort to minimize exposure under an apparent agency theory of liability. Healthcare entities may look to the Second District's analysis in the *Prutton* case for guidance as it relates to consent forms and advertising specifically. In doing so, two lessons can be learned. First, healthcare entities should distribute unambiguous consent forms to patients, properly train staff to explain the forms in layperson's terms, and obtain a voluntary signature from each patient prior to

rendering medical care. Second, healthcare entities should refrain from spotlighting non-employee physicians in advertising, in an effort to avoid the appearance of an employment relationship. Healthcare entities should further refrain from providing these non-employee physicians with any clothing that may contain the healthcare entity's logo or emblem.

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