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Health Law

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Summary Judgment for Hospital Reversed Under Apparent Agency Theory

The Illinois Appellate Court Fifth District recently reversed a trial court's decision granting summary judgment to a hospital in a medical negligence action. In *Williams v. Tissier*, 2019 IL App (5th) 180046, *appeal denied sub nom.*, 2020 WL 1488617 (Ill. Mar. 25, 2020), the Fifth District held that a genuine issue of material fact existed as to whether the obstetrician who provided maternity and delivery care to plaintiff was an apparent agent of the defendant hospital.

Factual Background

This case arose after Crystal Williams, the plaintiff, was pregnant with twins and began having contractions. *Williams*, 2019 IL App (5th) 180046, ¶ 3. Williams called the office of her obstetrician, Dr. Tissier, and was instructed to go to St. Elizabeth's Hospital. *Id.* Upon arrival, Williams was admitted and taken to the operating room for delivery. *Id.* Dr. Tissier delivered Twin A without difficulty, however, Twin B (Jerrin) was in a persistent transverse lie. *Id.* Dr. Tissier attempted to rotate Jerrin in utero into the vertex position without success, and later performed a vaginal footling breech extraction. *Id.* During this procedure, Jerrin's umbilical cord compressed. *Id.* Consequently, Jerrin suffered permanent cognitive deficits, movement and seizure disorders, dysarthria, vision and hearing loss, and disfigurement. *Id.* ¶¶ 3-4.

Williams filed a malpractice action against St. Elizabeth and others, alleging that Dr. Tissier was acting as an apparent agent of St. Elizabeth at the time of Jerrin's delivery. *Id.* ¶¶ 4-5. St. Elizabeth moved for summary judgment, arguing that Williams could not satisfy the "holding out" element of apparent agency. *Id.* ¶ 6. Attached to St. Elizabeth's motion were thirteen "Consent for Treatment" forms (consent forms) Williams executed over a seven-year period (including one executed on the day of her delivery); each advised Williams that treating physicians at St. Elizabeth were independent contractors. *Id.* ¶ 7. St. Elizabeth further argued that Williams could not establish the "reliance" element of apparent agency because Williams specifically intended for Dr. Tissier to deliver her twins. *Id.* ¶ 8. St. Elizabeth attached portions of Williams' deposition in which she testified: (1) that Dr. Tissier was her prenatal physician for two prior pregnancies; (2) that she scheduled appointments by calling Dr. Tissier's office and attended appointments there; and (3) that she went to St. Elizabeth at the direction of Dr. Tissier's office. *Id.*

Williams challenged the validity of St. Elizabeth consent forms, arguing that the independent contractor disclosure in each form was "buried" within a two-page, 16-paragraph document printed in 8-point font, which contained several unrelated subjects, and was ambiguously entitled "Consent for Treatment/Guarantee and Assignment." *Id.* ¶¶ 10-11. While the forms identified certain specialties as independent contractors such as emergency room physicians, radiologists, and anesthesiologists, they did not explicitly include obstetricians. *Id.* ¶ 11. Thus, Williams argued that there were no provisions that clearly and unequivocally identified Dr. Tissier as an independent contractor. *Id.* ¶ 13. Williams also testified that during her pregnancy, Dr. Tissier recommended St. Elizabeth for the delivery. *Id.* ¶ 14. Williams

reviewed St. Elizabeth's website and noted that Dr. Tissier was listed as one of its doctors. *Id.* Accordingly, Williams believed Dr. Tissier was an employee of St. Elizabeth. *Id.* Williams concluded that her deposition, along with St. Elizabeth consent forms and marketing materials, established genuine issues of material fact as to the "holding out" and the "reliance" elements of apparent agency. *Id.*

The trial court granted St. Elizabeth's motion and found it unlikely that a patient, having executed a "clear and unambiguous" independent contractor disclosure on 13 occasions, could reasonably believe Dr. Tissier was an employee of the St. Elizabeth and concluded that Williams could not establish her reliance on a purported agency relationship between Dr. Tissier and St. Elizabeth. *Id.* Plaintiff filed a timely appeal. *Id.* ¶ 22.

Fifth District's Analysis

The Fifth District reversed the trial court's ruling, holding that there were genuine issues of material fact concerning whether Dr. Tissier was the apparent agent of St. Elizabeth. *Id.* ¶¶ 59-60. In doing so, the court applied the Illinois Supreme Court's analysis in *Gilbert v. Sycamore Municipal Hospital*. *Id.* ¶¶ 27-28. In *Gilbert*, the court established that a plaintiff must prove the following elements:

> (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 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. (quoting *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993) (internal quotations omitted)).

The court in *Gilbert* concluded that a plaintiff may satisfy the "holding out" element by showing that the hospital held itself out as a provider of care without informing the patient that the care was provided by an independent contractor. *Id.* ¶ 28 (citing *Gilbert*, 156 Ill. 2d at 525). The "justifiable reliance" element may be satisfied if the plaintiff relied upon the hospital itself to provide care, rather than upon a specific physician. *Id. ¶*29. Thus, unless a patient knew or should have known that the physician providing treatment was an independent contractor, the hospital may be held liable. *Id*. ¶ 30. (citing *Petrovich v. Share Health Plan of Illinois, Inc*., 188 Ill. 2d 17, 31 (1999)).

With these authorities as a backdrop, the Fifth District first analyzed St. Elizabeth's consent forms. *Williams*, 2019 IL App (5th) 180046, ¶¶ 31-46. The court distinguished the consent forms from those of the defendant-hospital in *Lamb-Rosenfeldt v. Burke Med. Grp., Ltd*., 2012 IL App (1st) 101558, the Illinois Appellate Court First District case relied upon by the trial court. *Williams*, 2019 IL App (5th) 180046, ¶ 35. Unlike St. Elizabeth's consent forms, the forms in *Lamb* were a single page in which the independent contractor disclosure was in all capital letters and bold type. *Id*. Conversely, St. Elizabeth's disclosure was nestled in fine print and contained no express language stating that obstetricians such as Dr. Tissier were independent contractors. *Id.* ¶ 39-41. Thus, the fact Williams executed the form was not dispositive to the "holding out" element as it was in *Lamb-Rosenfeldt*. *Id.* ¶ 46.

The court acknowledged and concluded that St. Elizabeth held itself out as providing prenatal care, noting St. Elizabeth's online marketing materials, various items in Dr. Tissier's medical records listing that his office was located at St. Elizabeth's Office Park, and a photograph of a sign at St. Elizabeth's Office Park listing Dr. Tissier and his practice

as outpatient service providers. *Id.* ¶¶ 48-51. The court held that there were genuine issues of material fact regarding the "holding out" element of apparent agency based on Williams' testimony that Dr. Tissier recommended St. Elizabeth and that she reviewed its website thereafter. *Id.* ¶ 51-52.

With respect to the "reliance" element, the court held that the longstanding physician-patient relationship between Williams and Dr. Tissier did not preclude Williams' claim that she relied on St. Elizabeth for care. *Id.* ¶¶ 53-54 (citing *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 193 (2006)). The court noted that St. Elizabeth thoroughly promoted and publicized its specialized neonatal program, staff, and equipment on its website, and Williams thereby believed it would be a good hospital to deliver her twins. *Williams*, 2019 IL App (5th) 180046, ¶ 55. Therefore, a reasonable jury could infer that "these specialized services were important to plaintiff if she were to have complications while delivering the twins." *Id.*

Conclusion

In an effort to avoid liability based on a theory of apparent agency, counsel should advise healthcare entities that they should take steps to ensure they do not "hold out" independent contractor physicians as employees. As noted in the *Williams* decision, consent forms should "clearly and unequivocally" advise that certain physicians are independent contractors. Furthermore, hospitals should refrain from posting biographies or photographs of independent contractor physicians so that the plaintiff cannot later state that he/she relied on a purported agency relationship. Plaintiffs will continue to assert medical negligence under an agency theory until healthcare entities undergo these proactive measures.

About the Authors

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, 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 Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the chapter on Trials in the IICLE Medical Malpractice Handbook.

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