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Like Elvis, Has Apparent Agency Left the Building?

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Hospitals Beware

A hospital can be held vicariously liable under the *doctrine of apparent agency* for the acts of employees of an unrelated, independent clinic which is not a party to the litigation, if the plaintiff can establish the elements of apparent agency. Until now, virtually all apparent agency cases involved conduct of healthcare providers working within some physical part of a contiguous hospital complex. The limited exceptions include the case of *Malanowski v. Jabamoni,* 293 Ill. App. 3d 720 (1st Dist. 1997), where Loyola University of Chicago was held vicariously liable for treatment provided by an independent contractor at Loyola University Mulcahy Outpatient Center, an outpatient center owned and operated by Loyola. In ***Yarbrough v. Northwestern Memorial Hospital***, 2016 IL App (1st) 141585, the First District Appellate Court extended the reach of apparent agency well beyond "the four corners of the building."

The Law of Apparent Agency

In reaching its decision the appellate court, citing *Gilbert v. Sycamore Municipal Hospital,* 156 Ill. 2d 511 (1993), recounted the factors a plaintiff must establish to hold a hospital liable under the doctrine of apparent authority for acts of an independent contractor:

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.

Yarbrough, 2016 IL App (1st) 141585, ¶ 33, (citing *Gilbert*, 156 Ill. 2d at 525).

The first two elements, which are frequently grouped together, have been referred to as the "holding out" factor. The focus in this regard is on whether the patient knew or should have known the healthcare provider was an independent contractor. A hospital cannot be vicariously liable if a patient

knows or should know that the healthcare provider is an independent contractor. Liability will only attach to the hospital where the jury finds that the treating healthcare provider is the apparent agent of the hospital.

Apparent Agency Beyond the "Four Walls" of a Hospital

Northwestern Memorial Hospital (Northwestern) contended that the doctrine of apparent agency did not apply because the conduct at issue did not occur at the hospital, but instead occurred at an unrelated, independent clinic (Erie Family Health Center) which was a separate corporate entity. The court summarily dismissed this argument citing the *Malanowski* court which reasoned that there was "nothing in the *Gilbert* opinion which would bar a plaintiff, who could otherwise satisfy the elements for a claim based on apparent agency, from recovering against a hospital merely because the negligent conduct of the physician did not occur in the emergency room or some other area within the four walls of the hospital." *Malanowski,* 293 Ill. App. 3d at 727. The court emphasized that the key determination under *Gilbert* is whether the plaintiff can demonstrate that the hospital's conduct led the plaintiff to rely upon the hospital for treatment, rather than on a particular physician. *Yarbrough,* 2016 IL App (1st) 141585, ¶ 40.

Apparent Agency When the Apparent Agent is Not a Defendant

There is no requirement that the apparent agent be named as a defendant. In *Yarbrough* neither Erie nor the individual healthcare providers at Erie were named as defendants. The court held that their absence as defendants in the lawsuit did not bar recovery against the hospital under a theory of apparent agency. Accordingly, the court held that a hospital may be held liable under the doctrine of apparent agency for the acts of employees of an independent clinic, when neither the employees nor the independent clinic are a party to the litigation, if the plaintiff can establish the elements of apparent authority as set forth in *Gilbert*. The court specifically held that courts may apply *Gilbert* outside of the "four walls" of the hospital and a plaintiff is not required to name the individual healthcare provider or the employer as a defendant in order to hold the principal/hospital vicariously liable. *Id.* ¶ 45.

Apparent Agency and the *Yarbrough* Facts

Under the unique facts before the court in *Yarbrough*, the court noted that the plaintiffs had raised a question of fact regarding the "holding out" and reliance elements under *Gilbert* and their apparent authority claim contained issues of fact subject to a jury's determination.

With respect to "holding out" the court heavily relied upon the following facts:

- The hospital held itself out as a "full-service hospital;"
- The hospital promoted itself as a community-oriented hospital that collaborated with neighborhood centers, including Erie, to make healthcare available to those in need;
- The hospital publicized its relationship with Erie on its website, annual reports, community service reports, and other press releases;
- The hospital promoted that 11.2% of babies delivered at the hospital in 2006 received prenatal care at Erie;

- 100% of prenatal patients at Erie delivered at the hospital;
- The hospital'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 affiliations with Erie;
- Two hospital representatives sat on Erie's board;
- Erie was founded "as a project of volunteer physicians from Northwestern Memorial and Erie Neighborhood" House; and
- The hospital continuously contributed financially to Erie, provided information technology assistance to Erie and did not charge Erie patients for care given at the hospital.

Id. ¶ 52.

Significantly, the relationship between the hospital and Erie involved an affiliation agreement wherein the hospital was the primary site for acute and specialized hospital care. The affiliation agreement also called for a the hospital representative to sit on Erie's Board of Directors, the creation of a community advisory committee and appointment of Erie's executive director to the committee. The agreement also provided for joint marketing efforts related to the affiliations. *Id.* ¶¶ 52-53.

With respect to Erie's actions which would constitute "holding out," Yarbrough testified that Erie's staff informed her that if she were treated at Erie she would be likely to receive additional testing at Northwestern and ultimately deliver at Northwestern. They also provided her with information about delivering at Northwestern. No one told Yarbrough the healthcare providers at Erie were Northwestern employees; she testified that no one informed her that they were not part of Northwestern. In addition, 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 court noted that whether Yarbrough actually observed these indicia of "holding out" on the websites of Northwestern and Erie and in the written materials was not determinative. Whether a patient actually observes a hospital's advertisements is not relevant to the objective inquiry into the "holding out" factor under *Gilbert*. *Id.* ¶ 56. The third element of apparent authority, reasonable reliance, is established where the plaintiff acts in reliance upon the conduct of the hospital or its agent consistent with ordinary care and prudence. *Id.* ¶ 58 (citing *Gilbert*). The court noted that the critical issue is whether the plaintiff was seeking care from the hospital itself or looking to the hospital merely as a place for her personal physician to provide care.

Yarbrough did not have a prior relationship with any healthcare provider at Erie. Yarbrough testified that she went to Erie because it was a local clinic offering free pregnancy testing. It was her impression that Erie and Northwestern were the same entity and that Erie and Northwestern were working together. Yarbrough testified that her decision for treatment was influenced by the fact that she would deliver at Northwestern if she received prenatal care at Erie. Her impression was that Northwestern was "a very good hospital, very big, very well-known in the city." *Id*. ¶ 60.

Based upon the foregoing, the court found that Yarbrough's testimony raised an issue of material fact regarding whether there was reasonable reliance.

Beware the Expansion of Apparent Agency

The *Yarbrough* decision arose from an interlocutory appeal. As a consequence, the case was remanded to the trial court for further proceedings consistent with the court's holding.

Clearly, there is a "Whole Lotta Shakin' Goin' On" in the world of apparent agency as evidenced by the fact that we have addressed a new apparent agency case in each edition of the *Medicolegal Monitor* in 2016. From a defense perspective, there is reason to be "All Shook Up."

This case serves as a warning to all hospitals, especially regional hospitals which affiliate with small, rural, independent healthcare facilities and independent contractors in an effort to provide support to those facilities and make quality care more accessible to the general public. Be careful what your website says and what your affiliation is because "apparently" no good deed will go unpunished!

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