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Medical Malpractice Update

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Policy Prevails: The Illinois Supreme Court Declines to Expand Apparent Agency Claims Against Hospitals

Nearly 25 years ago, the Illinois Supreme Court issued its opinion in *Gilbert v. Sycamore Mun. Hosp.,* that determined that apparent agency claims could be brought against hospitals for the negligent care provided by non-employee physicians if the patient did not know, or had no reason to know, that the physician was an independent contractor. *See Gilbert v. Sycamore Mun. Hosp*., 156 Ill.2d 511 (1993). In 2016, the Illinois Appellate Court First District expanded the supreme court's *Gilbert* decision by allowing an apparent agency claim against a hospital to survive summary judgment when the alleged apparent agent was an independent, non-related clinic in *Yarbrough v. Northwestern Memorial Hospital*, 2016 IL App (1st) 141585. On December 29, 2017, the supreme court reversed the appellate decision in *Yarbrough*, finding that the policy considerations that guided the court in the *Gilbert* case were not present. *Yarbrough v. Northwestern Mem'l Hosp*., 2017 IL 121367, ¶ 43.

Yarbrough Facts

Plaintiff Christina Yarbrough (Yarbrough) presented to Erie Family Health Center (Erie) in Chicago to undergo a pregnancy test. *Yarbrough*, 2017 IL 121367, ¶ 3. After learning she was pregnant, Yarbrough spoke with an Erie staff member who stated that if Yarbrough received prenatal care from Erie, she would undergo ultrasounds and deliver her baby at Northwestern Memorial Hospital (NMH). *Id*. ¶ 6. During this visit, Yarbrough received brochures regarding prenatal classes at NMH. *Id*.

Yarbrough received prenatal care from Erie and delivered her baby prematurely at NMH. *Id*. ¶¶ 8-10. In her subsequent lawsuit, she alleged that she received negligent prenatal care at Erie and also that Erie was NMH's apparent agent. *Id*. at ¶ 12. At her deposition, she testified that she was under the impression that Erie and NMH were the same entity because she was told she would "most likely" deliver her baby at NMH if she received prenatal care from Erie. *Yarbrough,* 2016 Il App (1st) 141585, ¶ 18.

Appellate Court Decision and the *Gilbert* Test

NMH filed a motion for summary judgment on the apparent agency claim, which was denied by the trial court. *Id*. ¶ 1. The First District denied NMH's petition for leave to appeal, but was directed by the Illinois Supreme Court to answer the following certified question:

> Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore Mun. Hosp*.

> 156 Ill.2d 511 [190 Ill.Dec 758, 622 N.E.2d 788] (Ill. 1993), and its progeny for the acts of employees of an unrelated, independent clinic that is not a party to the present litigation?

Id. The appellate court answered in the affirmative, finding that a hospital could be liable "for the acts of employees of an independent clinic that is not a party to the litigation, assuming that the plaintiff establishes the elements of apparent authority as set forth in *Gilbert*." *Id*. ¶ 46.

In *Gilbert*, the Illinois Supreme Court held that a hospital could be liable for the apparent agency of non-employee physicians who provided negligent medical care in the emergency room. *Gilbert*, 156 Ill. 2d at 522. The supreme court "stress[ed] that liability attaches to the hospital only where the treating physicians is the apparent or ostensible agent of the hospital. If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable." *Id*. at 522.

The *Gilbert* court articulated a test that has since been used by Illinois courts to determine whether apparent agency applies in a claim against a hospital. *See, York v. Rush-Presbyterian-St. Luke's Med. Ctr*., 222 Ill.2d 147, 174 (2006). The *Gilbert* test has three factors:

> 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 an 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.

Gilbert, 156 Ill.2d at 525 (*quoting Pamperin v. Trinity Memorial Hosp*., 144 Wis. 2d 188, 208 (1988)). In reaching its decision in *Yarbrough*, the appellate court compared the facts of the case before it to the three *Gilbert* factors and found that "a hospital may be liable under the doctrine of apparent agency for the acts of employees of an independent clinic that is not a party to the litigation." *Yarbrough*, 2016 IL App (1st) 141585 at ¶¶ 48-66.

Policy Considerations Prevail

While the appellate court's *Yarbrough* decision focused heavily on applying the facts of the case to the three *Gilbert* factors, the Illinois Supreme Court examined the policy underlying *Gilbert.* In *Gilbert,* the patient arrived at the defendant hospital's emergency room complaining of chest pain. *Gilbert*, 156 Ill.2d at 516. The emergency room doctor ran tests that revealed no sign of a heart condition. *Id*. at 517. The patient was discharged with pain medication, but died several hours later from a heart attack. *Id*. The plaintiff's estate brought suit against the emergency room doctor and the hospital, alleging that the hospital was liable for the doctor's negligence. *Id*. The doctor was not employed by the hospital, but rather was an independent contractor. *Id*. at 515. During his initial presentation at the defendant-hospital, the patient specifically requested a different doctor than the one who treated him. *Id*. at 516.

Before *Gilbert*, the appellate court had issued inconsistent decisions regarding whether a hospital could be liable under apparent agency principles for the negligence of an independent contractor physician. *Id*. at 519. In *Gilbert*, the supreme court determined that the appellate opinions finding a hospital could not be liable under apparent agency principles overlooked the realities of modern hospital care:

> [H]ospitals 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.

Id., *quoting Kashishian v. Port*, 167 Wis.2d 24, 38 (1992). Ultimately, the supreme court determined in *Gilbert* that the three factor test should be used to determine whether a hospital could be liable for the apparent agency of an independent contractor physician. *Id*. at 525. Applying the three factor test to the facts of that case, that the defendant hospital was not entitled to summary judgment on the apparent agency claim. *Id*. at 526.

In *Yarbrough*, however, the supreme court focused less on applying the three factor test and more on the justification underlying the *Gilbert* test. The policy underlying the *Gilbert* decision was simple—hospitals promote the quality of the treatment their physicians and staff provide to attract patients. *Id*. at 522. It would be unjust for a hospital to escape liability for negligent health care provided to patients in its care if the patients did not know, or had no reason to know, that the treating physician was not employed by the hospital. *Id*. at 521, *citing Arthur v. St. Peters Hosp.*, 169 N.J. Super.573, 583 (1979).

This rationale does not apply to cases like *Yarbrough*. The *Yarbrough* plaintiff testified that she thought Erie and NMH were one in the same because she was told that the Erie physician would deliver her baby at NMH. *Yarbrough*, 2016 IL App (1st) 141585, ¶ 18. The supreme court noted that nothing in *Gilbert* suggests that simply because a doctor has privileges at a hospital means the doctor can be considered the hospital's apparent agent. *Yarbrough*, 2017 IL 121367, ¶ 46.

In addition to the Erie physicians' privileges at NMH, there were other connections between Erie and NMH. *Id*. ¶ 5. NMH provided some financial and technical assistance to Erie, as Erie is a Federally Qualified Health Center that serves populations with limited access to health care. *Id*. ¶¶ 4, 5. The court noted that Erie did not use Northwestern's name, nor did it use Northwestern's trademark purple color. *Id*. ¶ 44. The supreme court "refuse[d] to read *Gilbert*" in a manner that allows apparent agency claims against a hospital for negligent care given by employees of an "unrelated, independently owned and operated clinic like Erie." *Id*. ¶ 47.

Conclusion

The Illinois Supreme Court's *Yarbrough* decision is helpful in defending hospitals against apparent agency claims. It is also an important reminder to make policy arguments as well as fact-based arguments. The appellate court reached its decision to allow the agency claim by applying the facts of the case to the *Gilbert* test. The supreme court reversed the appellate decision by analyzing the case in light of the underlying policy for *Gilbert*. In apparent agency claims, a hospital defendant should consider whether the purpose of *Gilbert* is fulfilled in light of the relationship between the hospital and the alleged apparent agent.

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