

Health Law

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A Comparison of *Delegatto* and *Brown*: Using Consent Forms to Obtain Summary Judgment on Apparent Agency

Consent forms play a critical role in protecting healthcare entities from lawsuits where apparent agency has been alleged. Two cases, *Delegatto v. Advocate Health & Hospitals*, 2021 IL App (1st) 200484, and *Brown v. Mercy Hospital and Medical Center*, 2021 IL App (1st) 200834-U, were recently released by the Illinois Appellate Court First District. Together, these opinions provide guidance to counsel in the construction and use of consent forms to obtain summary judgment on the issue of apparent agency.

Overview

In *Delegatto*, the plaintiff alleged that Silver Cross Hospital and Medical Center was vicariously liable for the death of the plaintiff's decedent due to the alleged medical negligence of an orthopedic surgeon and a physician assistant. *Delegatto*, 2021 IL App (1st) 200484, ¶¶ 1, 4. The plaintiff alleged that the surgeon and the physician assistant were employees and/or agents of Silver Cross, and that Silver Cross never informed the plaintiff's decedent that her medical care was being provided by non-employees. *Id.* ¶ 4.

The plaintiff's decedent consulted with the surgeon and the physician assistant at the surgeon's office located in the Illinois Spine and Scoliosis Center. *Id.* ¶ 6. During the consultation, she signed two patient forms—one which contained language that provided, "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.* According to her deposition testimony, the decedent wanted her procedure to be performed at Silver Cross and chose this orthopedic surgeon due to his affiliation with Silver Cross. *Id.* ¶¶ 7-9. Before the surgery she executed the required Silver Cross consent forms, including a "HOSPITAL SERVICES" 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. She executed a surgical consent form containing similar language. *Id.* ¶ 11.

Similarly, in *Brown*, the plaintiff filed a medical malpractice lawsuit against Mercy Hospital and Medical Center and two cardiologists based on theories of actual and apparent agency for the death of the plaintiff's mother. *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 1, 5. The plaintiff alleged that the physicians negligently recommended and performed a cardiac catheterization procedure on the plaintiff's decedent, which resulted in her death. *Id.* ¶¶ 4-5.

Like *Delegatto*, the plaintiff's decedent in *Brown* executed a consent form at the outset of her hospital admission and prior to her procedure. *Id.* ¶¶ 8-9. In addition, she signed four other consent forms in the months leading up to her procedure, when she had visited the defendant hospital. The consent forms were identical and provided the following language:

2. PHYSICIAN SERVICES: I understand and agree that [defendant] does not control or direct my physicians' independent medical judgement regarding the care and treatment of me. I understand that my physicians who provide services to me at [defendant] may not be employed or paid by [defendant]. Non-employed, independent medical contractors include, emergency department physicians, anesthesiologists, radiologists, pathologists, hospitalists, on-call and consulting physicians, surgeons, specialists, obstetricians/nurse midwives, gynecologists, pediatricians, neonatologists, cardiologists, other specialists and allied health providers working with these physicians. They have been permitted to use the hospital facilities and have chosen our facilities as the place they wish to treat and care for their private patients.

My decision to seek care from [defendant] is not based upon any understanding or representation or advertisement that the physicians who will be treating me are employees or agents of the hospital. If I wish to know if my physician is employed by the hospital, I will ask the physician. I have a right to select my own physician and the right to change any of my physicians at any time.

Id. ¶ 9. (Emphasis in original).

In both cases, the First District acknowledged the required elements to establish a claim for apparent agency. A plaintiff must plead and prove: (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. *Delegatto*, 2021 IL App (1st) 200484, ¶ 26; *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 19-21.

“Holding Out” Analysis

The first element of an apparent agency claim is referred to as “holding out,” and 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. *Delegatto*, 2021 IL App (1st) 200484, ¶ 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.*

The court in *Delegatto* found that the hospital's consent forms were clear and unambiguous. *Id.* ¶ 47. The court noted that it could have ended its analysis under the second element given the plaintiff's failure to satisfy the first element. *Id.* ¶ 50. In the interest of completeness, however, the court analyzed the remaining arguments. *Id.* In doing so, the court noted that the second element, the “appearance of authority,” is frequently grouped with the “holding out” element and are treated as one. *Delegatto*, 2021 IL App (1st) 200484, ¶¶ 27, 50. Therefore, the court recognized that the plaintiff was required to show evidence that the plaintiff's decedent had either actual or constructive notice of the defendant's status as an independent contractor. *Id.* ¶ 55.

The court concluded that the consent forms executed by the plaintiff's decedent on three separate occasions clearly and unambiguously informed her that "all physicians" were independent contractors and were therefore sufficient to put her on notice of the surgeon's relationship to Silver Cross. *Id.* ¶ 55. The court further noted that the surgeon'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. *Id.* Based on these facts, the plaintiff could not show an appearance of authority because the plaintiff failed to show that plaintiff's decedent was not sufficiently notified of the defendant's independent contractor status. *Id.*

In *Brown*, the court noted the existence of a signed treatment consent form which expressly provided that the physicians on staff at the hospital were not employees or agents of the hospital. *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 23-24. In addition, First District noted that the Illinois Supreme Court declared, if "the patient is in some manner put on notice of the independent status of the professionals with who [s]he might be expected to come into contact[,] the hospital cannot be held vicariously liable. *Id.* (citing *York v. Rush-Presbyterian—St. Luke's Medical Center*, 222 Ill. 2d 147, 182 (2006)).

In *Brown*, the court carefully analyzed the consent forms and concluded that they clearly notified the decedent that the two defendant-physicians were independent contractors, despite plaintiff's arguments that the decedent did not read or understand the consent forms and that the forms were ambiguous. *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 10, 26-28. The court noted that plaintiff signed and initialed on more than one occasion and that the language contained in the consent forms was clear and unambiguous that consulting physicians, including specialists and cardiologists, were not employees of defendant. *Id.* ¶ 44. Furthermore, even though the first paragraph of the consent forms provided that physicians who provide services "may not be employed" by defendant, the court noted that Section 2 inherently and clearly notified the plaintiff's decedent that the physicians were independent contractors when read in its entirety. *Id.* ¶ 26. The court also noted that the consent form placed the burden on the patient to follow up with the physician if there were any questions regarding the physician's employer. Because the plaintiff failed to satisfy the holding out component of her apparent agency claim, the court concluded its analysis of the apparent agency claim, noting that the failure to satisfy the first element renders summary judgment appropriate and there exists no need to address the remaining elements. *Id.* ¶ 45 (citing *Wallace v. Alexian Bros. Medical Center*, 389 Ill. App. 3d 1081, 1085-86 (1st Dist. 2009)).

Conclusion

Brown and *Delegatto* provide us with insight into the courts' focus when analyzing apparent agency claims—particularly with regard to the use of consent forms. While consent forms are not dispositive on the issue of "holding out," as shown in these decisions, they are critical with regard to the issue of notice. Proper wording can appropriately position these claims for summary judgment. Plaintiffs will inevitably have difficulty establishing the holding out element of an apparent agency claim if defense counsel can provide evidence that a consent form, which expressly provides that certain physicians on staff at the hospital are not employees or agents of the hospital, has been executed by the patient. All medical facilities should consider comparing their consents to those used by the facilities in *Brown* and *Delgado*.



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Ann Barron is a Shareholder at *Heyl, Royster, Voelker & Allen, P.C.* and serves as the Co-Chair of the Appellate Department. Ms. Barron handles medical malpractice, environmental and commercial litigation pending in state and federal court. Before joining Heyl Royster, she served as in-house counsel at Valero in San Antonio, Texas, where she managed complex environmental, commercial, class action and tort litigation. After graduating from the University of Illinois College of Law in 1994, Ms. Barron began her legal career serving as a law clerk to the Honorable James D. Heiple of the Illinois Supreme Court. After her clerkship, she worked for two law firms in the St. Louis area. She represented clients in environmental, class action, commercial, and personal injury matters pending throughout the country. Ms. Barron has represented clients before the Seventh Circuit Court of Appeals, the Illinois Supreme Court and various appellate courts in Illinois and Missouri.

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