

Medical Malpractice Update

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Apparent Agency and Patient Consent Forms—A Cautionary Tale

In Illinois, hospitals can be vicariously liable not only for the acts of employees and actual agents, but also the actions of independent contractors. *See generally Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (1993). To proceed on such theory, a plaintiff must show

(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.”

Gilbert, 156 Ill. 2d at 525. The first two factors are known as the “holding out” requirement, and the third factor is referred to as the “justifiable reliance” requirement. *See id.*

In the context of an apparent agency claim, hospitals are not liable if a patient knew, or should have known, of a physician’s independent contractor status. *Id.* at 522. To limit potential vicarious liability under an apparent agency theory, some hospitals provide patients with consent forms containing disclosures about the independent contractor status of physicians within the hospital. Such consent forms can be successful in shielding a hospital from vicarious liability. *See Steele v. Provena Hosps.*, 2013 IL App (3d) 110374, ¶ 131 (2013) (noting that consent forms are “almost conclusive” in determining whether a hospital is vicariously liable for an independent contractor). Despite this, a recent appellate court decision appears to raise the bar, requiring hospitals to provide more than a blanket statement about the independent contractor status of all physicians within the hospital. Instead, the court in *Williams v. Tissier* found a genuine issue of material fact as to the issue of apparent agency because the hospital’s consent forms did not state that the patient’s specific physician was an independent contractor. *Williams v. Tissier*, 2019 IL App (5th) 180046, ¶ 59.

Williams v. Tissier

Plaintiff, Crystal Williams, sued Dr. Bradley Tissier, OB GYN Care, LLC, and St. Elizabeth’s Hospital (St. Elizabeth’s) after complications occurred during the labor and delivery of her twins at St. Elizabeth’s. *Williams*, 2019 IL App (5th) 180046, ¶ 1. After she began having contractions, plaintiff called the office of her physician, Dr. Tissier, and she was instructed to go to St. Elizabeth’s. *Id.* ¶ 3. As planned, Dr. Tissier delivered plaintiff’s twins. *Id.* Plaintiff’s first baby was delivered without complication, but her second child was in a persistent transverse lie. *Id.* Because of this, Dr. Tissier performed a vaginal footling breech extraction, which caused compression of the umbilical cord resulting in serious, permanent injuries to the infant. *Id.*

In her complaint, plaintiff alleged that Dr. Tissier was negligent in his attempt to perform a vaginal breech delivery of her child. *Id.* ¶ 4. She claimed that the hospital was vicariously liable for Dr. Tissier’s actions because he was an apparent agent of St. Elizabeth’s. *Id.* ¶ 5. Thereafter, St. Elizabeth’s filed a motion for summary judgment. *Id.* ¶ 6. The hospital argued it did not hold out Dr. Tissier as its agent or employee because plaintiff signed thirteen Consent for Treatment forms over several years that advised her that physicians providing her treatment were independent contractors. *Id.* ¶ 7. St. Elizabeth’s also argued that plaintiff relied on Dr. Tissier to deliver her twins—not the hospital. *Id.* ¶ 8. In support, the hospital pointed to the fact that Dr. Tissier had been plaintiff’s doctor for years prior to the incident, provided her prenatal care for previous pregnancies, that she attended appointments at his office and went to the hospital that Dr. Tissier’s office directed her to go to. *Id.* In opposition, plaintiff argued that there were genuine issues of material fact about whether St. Elizabeth’s actions would lead a reasonable person to conclude that Dr. Tissier was the hospital’s agent or employee. *Id.* ¶ 9. Ultimately, the trial court granted the hospital’s motion for summary judgment. *Id.* ¶ 22.

On appeal, the appellate court analyzed the *Gilbert* factors to determine whether there was a genuine issue of material fact regarding apparent agency. *Id.* ¶¶ 33-57. After examining the “holding out” requirement, the court found that plaintiff provided sufficient evidence to create a material issue of fact as to whether St. Elizabeth’s held out Dr. Tissier as its agent. *Id.* ¶ 46. The court discussed the consent form signed by plaintiff, which the hospital argued was evidence that it did not hold out Dr. Tissier as its agent or employee. *Id.* ¶¶ 39-46. The Consent for Treatment form, in relevant part, stated the following:

I further understand that the physicians on the staff of this hospital, including the attending physician(s), are not employees or agents of the hospital, but rather, are independent contractors, who may have been granted the privilege of using its facilities for the care and treatment of their patients. Physicians on staff at this hospital, including, but not limited to, emergency room physicians, pathologist, radiologists, anesthesiologist, medical students, and other hospital-based physicians, my attending physician and consulting physicians are not employees or agents of this hospital. I recognize that these physicians exercise their own independent medical judgment and they are not subject to the supervision or control of his hospital with respect to my treatment.

Id. ¶ 10.

In reviewing the form’s language, the court found that the form (1) was not in bold type, capital letters, or plainly visible, (2) was in small font, (3) was buried in between other paragraphs, (4) was not near the signature line, and (5) was not clear and concise because it did not specifically state that plaintiff’s physician was an independent contractor, although the form stated that “attending physicians” and “physicians on the staff” were independent contractors. *Id.* ¶¶ 39-41. The court concluded that the form did not notify plaintiff of Dr. Tissier’s independent contractor status because it did not contain “clear, concise, and express language.” *Id.* ¶ 41. The court also indicated that plaintiff signed multiple forms, but St. Elizabeth’s Consent for Treatment form was the only one that included the independent contractor disclosure. *Id.* ¶ 46. Lastly, the court noted that there was a variety of “other evidence” that supported its conclusion that a material issue of fact existed as to whether St. Elizabeth’s held out Dr. Tissier as its agent. *Id.* ¶¶ 48-52.

Next, the court analyzed the “justifiable reliance” requirement, finding that plaintiff reasonably relied on the conduct of St. Elizabeth’s. *Id.* ¶¶ 55-57. The court found it significant that plaintiff testified that Dr. Tissier told her St. Elizabeth’s “had a good birthing center,” that she visited St. Elizabeth’s website and saw Dr. Tissier listed as one of its physicians,



that not all consent forms signed by plaintiff contained the independent contractor disclosure, and that St. Elizabeth's advertised its "comprehensive array of healthcare services" on its website. *Id.* ¶ 55.

Because the court found that plaintiff presented sufficient evidence to show a material issue of fact as to the *Gilbert* factors, the appellate court reversed and remanded the trial court's decision on the issue of apparent agency. *Id.* ¶ 59. Subsequently, the defendants filed a leave for appeal, which the Illinois Supreme Court denied. *Williams v. Tissier*, 144 N.E. 3d 1209 (Ill. 2020)

Conclusion and Suggestions for Hospitals

After analyzing *Williams*, hospitals should take necessary steps to ensure consent forms have independent contractor disclosures that contain clear, precise, and express language. Consent forms should include disclosure language that is in large font, printed in bold and capital letters, near the signature line, and not hidden between paragraphs within the form. Significantly, after this case, forms should also specifically state that the *patient's* physician is an independent contractor to avoid any potential argument that the hospital did not make that fact clear. While it is still too soon to know whether other courts will follow this precedent, *Williams* is important for hospitals to consider when drafting and revising consent forms. Doing so may limit exposure for actions or omissions of independent contractors based upon apparent agency arguments.

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