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## The IDC Monograph

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# Agency Law in the Hospital Setting: Evolution, Developments and Practice Pointers

## Introduction and Overview of Illinois Agency Law

Under Illinois common law, a hospital may be held vicariously liable for a physician's tort if a plaintiff can establish the existence or appearance of an agency relationship between the hospital and physician. The hospital could be vicariously liable for the physician's alleged medical malpractice, or even a physician's intentionally tortious conduct, assuming the plaintiff can prove that such conduct was within the scope of the physician's employment. Since the 1990s, the law concerning hospital-physician vicarious liability has developed in various ways, requiring hospitals to take certain measures to avoid liability for a non-employed, independent physician; most notably necessitating hospitals to become more explicit in their written disclaimers of agency. Recent developments in case law, however, may require hospitals to become more creative in protecting themselves from vicarious liability.

Under Illinois law, a principal may be held vicariously liable for the alleged torts of its agent pursuant to two distinct doctrines: (1) actual agency (traditionally known as *respondeat superior*), which requires proving a principal-agent relationship with direct evidence of express authority, or circumstantial evidence of implied authority; and (2) apparent agency.[1]

The doctrine of actual agency—traditionally known as *respondeat superior*—requires showing that: (1) a principal-agent or employer-employee relationship existed; (2) the principal/employer controlled or had the right to control the conduct of the alleged agent/employee; and (3) the alleged conduct fell within the scope of the agency or employment.[2] The first element, the actual-agency relationship, depends on the authority granted to the agent by the principal.[3] There are two species of authority by which the plaintiff may prove an actual-agency relationship: (i) express authority (*i.e.*,

direct evidence of the authority granted to the agent, such as an employment agreement or a power of attorney);[4] and (ii) implied authority (circumstantial evidence of the alleged principal retaining the right to control the manner of the alleged agent's work).[5]

To establish apparent agency, a plaintiff must prove that: (1) the principal or its agent acted in a manner that would lead a reasonable person to conclude that the allegedly negligent individual was an agent of the principal; (2) if the alleged agent created the appearance of agency, the plaintiff must also prove that the principal had knowledge of and acquiesced in the acts of the agent; and (3) the plaintiff acted in reliance upon the conduct of the principal or its agent, consistent with ordinary care and prudence.[6] "Under the doctrine, a principal can be held vicariously liable in tort for injury caused by the negligent acts of his apparent agent if the injury would not have occurred but for the injured party's justifiable reliance on the apparent agency."[7] Apparent agency is "rooted in the doctrine of equitable estoppel."[8] "The idea is that if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party reasonably relies on the apparent agency and is harmed as a result."[9]

This monograph surveys recent legal developments in agency law through the context of medical-negligence cases where agency between a hospital and a physician is at issue. In such cases, plaintiffs cannot prove actual agency based on a theory of express authority due to the lack of a direct employer-employee relationship between the hospital and physician. In the absence of direct evidence of agency, plaintiffs have two alternative routes for establishing the hospital's vicarious liability: (1) the doctrine of apparent agency; and (2) actual agency proven through circumstantial evidence of implied authority.

*Fese v. Presence Centr. and Suburban Hosp. Network*, 2023 IL App (2d) 220273, is the most recently published appellate opinion regarding vicarious liability in the hospital-physician context.[10] Both apparent agency and implied authority were at issue in *Fese*. Thus, in addition to other recent appellate decisions, this monograph will examine apparent agency and implied authority primarily through the lens of the Illinois Appellate Court Second District's holding in *Fese*, considering its impact on hospital liability in Illinois.

## Actual Agency and Implied Authority in the Hospital-Physician Context

Proving the first element of actual agency, establishing the necessary relationship between the principal and agent, depends on proving actual authority. "'[A]ctual authority may be either express or implied.'"[11]

In a hospital-physician relationship, an actual-agency relationship depends on whether the hospital has the right to control the physician's exercise of medical judgment in delivering care to patients.[12] Many physicians practicing at hospitals are not directly employed by the hospital.[13] Consequently, in medical-negligence cases against non-employed physicians, plaintiffs cannot prove actual agency against the hospital on a theory of express authority. Rather, the physician is considered an independent contractor.[14] Generally, a principal is not liable for the acts of an independent contractor.[15]

But a plaintiff can negate the contractor's independent status and prove actual agency through a theory of implied authority, where the principal retains sufficient control over the independent contractor's work.[16] Whereas express authority is direct evidence of authority granted by the hospital to the physician, "implied authority is actual authority proved circumstantially by evidence of the agent's position."[17] In other words, the plaintiff advancing a theory of implied authority argues that even though the parties may have intended to create an independent contractor relationship, that intent is not dispositive in light of other evidence that demonstrates the existence of an agency relationship.[18]

"The primary consideration in determining the existence of implied authority is not the intent of the parties, or whether the physician is an employee or independent contractor, but rather the degree of control the principal retains over

performance of the contractor's work."[19] Put simply, "[t]he type of evidence necessary to sustain a claim of implied agency typically consists of facts from which a jury can infer 'control.'"[20] Consequently, it is generally difficult for a plaintiff to prove implied-actual agency where the physician is allegedly negligent for the care rendered to a patient because "the decision to treat a patient in a particular manner is generally a medical question entirely within the discretion of the treating physician and not the hospital."[21] The circumstantial evidence of implied authority must be viewed in the context of all the evidence. Thus, for instance, in *Buckholtz v. MacNeal Hosp.*, the facts that the physicians practiced at MacNeal Hospital and wore MacNeal identification badges was not sufficient circumstantial evidence to create a question of fact as to actual agency[22] (rather, as discussed below, facts such as these are relevant to an apparent-agency claim).

In the absence of express authority and evidence of the hospital's direct control over the physician's medical judgment, plaintiffs have pointed to hospital bylaws, physician-held administrative positions within the hospital, and physician-service agreements to prove *respondeat superior* through implied authority. In support, plaintiffs often cite to an appellate decision from 1987, *Barbour v. S. Chi. Cmty. Hosp.*,[23] where the plaintiff alleged that the physician (although not paid by the hospital) was appointed by the hospital's board of directors as chief of the obstetrics-and-gynecology department; acted pursuant to the board's orders; and that the board implemented hospital policy through the physician's administrative obligations. Thus, the court held that these agency allegations were sufficient to withstand the defendants' motion to dismiss because the facts alleged supported the inference that hospital's board had control over the physician and could remove him from his position if he failed to properly perform his duties.[24]

But over three decades later, plaintiffs' reliance on *Barbour*, and its holding regarding the sufficiency of the pleadings, has not held up well among case law concerning a more advanced procedural posture. More recent case law—including, as discussed below, the recent decision in *Fese*[25]—has found *Barbour* distinguishable and unpersuasive in finding hospital bylaws, physician administrative titles, and service agreements insufficient to raise a question of fact on implied authority.[26]

Although this monograph focuses on claims of an actual-agency relationship between a hospital and physician based on implied authority, it should be remembered that, as discussed above, implied authority only pertains to establishing the first element of actual agency. The plaintiff must also prove that the alleged conduct fell within the scope of the agency.[27] In the medical negligence context, the scope-of-agency element depends on the nature of the physician's alleged conduct and whether it was consistent with the agent's training; the purpose for which the hospital employed the agent; and in furtherance of the business of the hospital. For example, a phlebotomist disclosing a patient's private medical information at a bar after work hours,[28] and a physician's alleged sexual assault of a patient during an examination in the hospital,[29] were not within the scope of agency.[30]

## Apparent Agency in the Hospital-Physician Context

In 1993, the Illinois Supreme Court in *Gilbert v. Sycamore Mun. Hosp.*[31] recognized that a hospital may be vicariously liable for the negligence of a treating physician under the doctrine of apparent agency and set forth the elements for proving such a claim. For a hospital to be liable under the doctrine of apparent authority, a plaintiff must show that: (1) the hospital, or the physician, acted in a manner that would lead a reasonable person to conclude that the physician was an employee or agent of the hospital; (2) where the acts of the alleged 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.[32]

Pursuant to the Civil Justice Reform Amendments of 1995 (the "Reform Act"), the Illinois legislature added a code section, 735 ILCS 5/2-624, that set forth pleading requirements for medical-negligence claims based on apparent agency,

which were stricter than the requirements set forth by the Illinois Supreme Court in *Gilbert*. "In any action, whether in tort, contract, or otherwise," where "the plaintiff seeks damages for bodily injuries or death by reason of medical, hospital, or other healing art malpractice, to state a claim based upon apparent or ostensible agency," § 2-624 required a plaintiff to plead "with specific facts" and prove "by a preponderance of the evidence" three "elements."[33] First, "that the alleged principal *affirmatively* represented to the party that the alleged agent was the alleged principal's actual agent,"[34] rather than simply holding out or creating the appearance of agency. The second statutory element was consistent with the third *Gilbert* element: "that the party reasonably relied upon the alleged principal's representations that the alleged agent was the alleged principal's actual agent."[35] The third element under § 2-624 was not expressly enumerated in *Gilbert* but was consistent with the doctrine's traditional rationale: "that a reasonable person would not have sought goods or services from the alleged principal if that person was aware that the alleged agent was not the alleged principal's actual agent."[36]

The Illinois Supreme Court, however, declared the Reform Act unconstitutional, including § 2-624, in *Best v. Taylor Mach. Works*.[37] Thus, the *Gilbert* decision remains the primary legal authority for pleading and proving apparent agency in the medical-malpractice context.

Since *Gilbert*, courts have restated the apparent agency elements by combing the first two *Gilbert* elements to become the "holding out" element.[38] Accordingly, courts typically analyze apparent agency pursuant to two elements: (1) the "holding out" element; and (2) the reliance element.[39]

First, the "holding out" element requires proof that the hospital held the physician out as its agent, or the physician held himself out as an agent and the hospital knowingly acquiesced to such conduct. The "holding out" element is "satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors."[40] Conversely, the plaintiff fails to satisfy the "holding out" element on summary judgment "if the evidence shows that the patient was placed on notice of the independent contractor status of the physicians."[41]

Factors supporting the "holding out" element include whether the hospital held itself out as a provider of medical services in general; whether the care and treatment was provided on the hospital's campus; and whether the institution bills the patient directly for the services of individual physicians. Another factor includes hospital marketing and advertising campaigns. For example, in *Petrovich v. Share Health Plans of Ill.*, the Illinois Supreme Court allowed an apparent agency claim against a health maintenance organization ("HMO"), where the HMO allegedly marketed itself directly to consumers and advertised a list of physicians as "our physicians."[42] More recently, in *Hammer v. Barth*, the Illinois Appellate Court First District held that the hospital's website created a question of fact on "holding out" to defeat the hospital's motion for summary judgment, where the hospital's advertising touted its clinical leadership and highly qualified physicians.[43]

The most significant factor is whether the hospital provided a consent form containing an unambiguous disclaimer of agency. Although not dispositive, a signed consent form is given significant weight and is "almost conclusive" in defeating apparent agency on the "holding out" element.[44] Recently, Illinois courts have given more deference to consent forms, holding that a clear and unambiguous consent form, disclaiming agency in definite terms, negates the "holding out" element and should result in summary judgment for the hospital.[45]

In *Frezados v. Ingalls Mem'l Hosp.*, the plaintiff failed to satisfy the "holding out" element because he signed a consent form that included an explicit acknowledgment that the "physicians providing services to me at Ingalls, such as … Emergency Department and Urgent Aid physicians … are not employees, agents or apparent agents of Ingalls but are independent medical practitioners." The form contained no contradictions or exceptions to that language, could not be reasonably misconstrued, and indicated that the patient would receive a separate bill from the treating physicians. The

plaintiff attempted to overcome the form's apparent agency disclaimer by claiming that his pain prevented him from reading the form prior to signing it. The court rejected this argument:

> a holding to the contrary would drastically diminish the value of independent contractor disclaimers. Nearly everyone who seeks emergency treatment is in some physical or emotional distress, and were we to hold that such distress could operate to nullify provisions in an otherwise duly signed treatment consent form, hospitals would always be required to proceed to trial on claims of vicarious liability.

More recently, in *Prutton v. Baumgart*,[46] the Illinois Appellate Court Second District upheld summary judgment for the hospital on the plaintiff's apparent agency claim. The Secon District noted that although the hospital's advertising featured the independent physician's name and photograph, this evidence could not be viewed in isolation. Rather, the Second District concluded that the hospital's advertising did not create a genuine issue of material fact to preclude summary judgment for the hospital given the clarity of the disclaimers in the consent forms.[47]

In *Delegatto v. Advocate Health and Hosp.*, the Illinois Appellate Court First District affirmed summary judgment in the defendant hospital's favor, agreeing with the Second District's *Prutton* decision that a consent form which "communicated that all physicians were independent contractors did not need to specifically identify a physician by name."[48] Determinative was a paragraph in the consent form that very explicitly stated: "'all physicians . . . furnishing services to me . . . are independent contractors and are not employees or agents.'"[49] Instead of stopping there, however, the First District went on to examine other factors regarding the consent form's clarity of non-agency. For example, the First District noted that the phrase "all physicians" also contained a specific reference to subgroups of physicians of medical providers. The complete phrase read: "'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.'"[50] The First District encouraged hospitals to use this sort of sub-grouping language in their consent forms.[51] In other words, according to *Delegatto*, the more specificity the better.[52]

*Frezados*, *Prutton*, *Delegatto*, and other relatively recent appellate decisions illustrate how an unambiguous consent form will have a fatally dispositive effect on a plaintiff's apparent agency claim and support summary judgment in favor of the hospital. More recently, as discussed below, *Fese* raises a unique question where, despite an unambiguously worded consent form, an emergency-room patient is unable to review and sign the form, and instead, the patient's spouse signs the form. What weight does the consent form and the hospital's efforts to effectively disclaim agency have in that scenario? As explained below, according to *Fese*, the spouse-signed consent form cannot be enforced against the patient to warrant summary judgment for the hospital.

The second element of apparent agency is that the patient must have relied on the conduct of the hospital or its agent, consistent with ordinary care and prudence. As further discussed below, a plaintiff satisfies the reliance element if the evidence shows the patient relied on the hospital to provide medical care, rather than on a specific physician.[53] This standard for determining the reliance element also applies where the patient was unconscious or a child, relying on others to get them to the hospital for treatment. In such circumstances, it cannot be said that the patient relied on or sought treatment from a specific physician in contrast to the hospital.[54]

## *2023 Apparent Agency Appellate Decisions in the Hospital-Physician Context*

*Fese* is the most recently published appellate decision ruling on apparent agency. It addresses both elements of apparent agency in a unique context. Because the patient is preoccupied with emergency treatment, the patient's spouse signs the consent form. Then, despite having acknowledged the hospital's disclaimer, the spouse brings a wrongful death claim, pleading apparent agency against the hospital.

Two more recent, unpublished appellate decisions issued since *Fese* illustrate the current state of apparent-agency law, the hospitals' efforts to avoid liability and procure early summary judgment, and potential trends among the courts. Neither of the following two post-*Fese* opinions cited *Fese*.

First, in *Stelzer v. Nw. Cmty. Hosp.*, the Illinois Appellate Court First District affirmed summary judgment for the hospital, relying on case law discussed above regarding the near-dispositive effect of an unambiguous consent form.[55] In *Stelzer*, the First District affirmed the circuit court's grant of partial summary judgment to the hospital, holding that the hospital was not vicariously liable for the alleged medical negligence of two physicians under the doctrine of apparent agency. Prior to his catheterization procedure and heart surgery, the plaintiff signed consent forms containing language in bold, capital letters: "**MY PHYSICIANS, ALLIED PROFESSIONALS ARE NOT NCH** [the hospital's] **EMPLOYEES/AGENTS**"; and directly thereunder: "My care will be managed by physicians who are not employed by or acting as agents of NCH but have privileges at these facilities." In addition, the plaintiff signed a surgical consent form prior to heart surgery, which expressly identified the surgeon and said: "The above physician, the anesthesiologist, if applicable, their assistants, and their physician groups, are not employees or agents of the hospital, but are independent contractors."[56] Surveying precedent, the First District rejected the plaintiff's arguments that the form was too ambiguous. Therefore, having determined the consent form was sufficient to put the plaintiff on notice of the physicians' independent status, the plaintiff was precluded from raising a question of fact on any other basis.[57] Thus, *Stelzer* confirms continuation of the recent trend toward giving dispositive weight to an unambiguous consent form, all else being equal.

More recently, the Illinois Appellate Court Fifth District in *Bilbrey v. Garcia* illustrated how other factors can diminish the weight given to a hospital's consent form. The Fifth District in *Bilbrey* essentially raised the bar regarding informing the patient of the independent contractor status of its physicians.[58] The dissent in *Bilbrey* correctly points out that the Illinois Supreme Court has identified the issue as whether the hospital held itself out "as a provider of emergency room care without informing the patient that the care is provided by independent contractors."[59] The dissent further draws the clear distinction between "informing" the patient and "effectively communicat[ing] the information" which the Fifth District described as "mak[ing] sure the patient is aware of the information."[60]

The majority's opinion requiring "effective communication" conflicts with prior case law. In *Mizyed v. Palos Cmty. Hosp.*, the plaintiff's daughter testified that she had not read the admission forms completely before encouraging her father [a non-English speaking plaintiff] to sign.[61] The Illinois Appellate Court First District found that the hospital had no reason to doubt that she had fully read and understood the forms and accurately communicated them to her father before he signed, indicating his understanding and consent.[62] Therefore, in *Mizyed*, the First District made it clear that the burden on the hospital is to simply provide the information rather than ensure that the patient understands the information, seemingly in contrast to the Fifth District in *Bilbrey*.

Moreover, in *Bilbrey*, the Fifth District not only raised the bar concerning the level of communication required to inform the patient of the independent contractor status but also shortened the window in which the forms must be signed.[63] The Fifth District reconstructed the timeline during which the plaintiff was admitted, tested, treated, and discharged from the hospital.[64] The Fifth District dissected the medical records and deposition transcripts to map the timeline of the plaintiff's treatment and determined that several violations of the standard of care occurred before the admission paperwork was completed.[65] The Fifth District's notion that the admission paperwork must be completed before the alleged malpractice constitutes a significant increase in severity as compared to prior precedent.[66]

## The *Fese v. Presence Central and Suburban Hospitals Network* Decision

Joseph Fese died at Presence Central and Suburban Hospitals Network, d/b/a Presence Mercy Medical Center ("Presence"), under the care of Dr. Daniel J. Irving.[67] Following Fese's death, his wife, Pamela Fese (the "wife" or "plaintiff"), sued Presence, Dr. Irving and Dr. Irving's employer, CEP America-Illinois, PC ("CEP"), the company that provided emergency medical and administrative services at Presence.[68] Fese's wife argued Dr. Irving was negligent in treating Fese and that Dr. Irving was Presence's apparent or implied actual agent, thus making Presence and CEP vicariously liable for Dr. Irving's negligence.[69] The circuit court found Dr. Irving was not Presence's actual or apparent agent and granted Presence's motion for summary judgment.[70]

As to implied actual agency, CEP, in its role of providing such services to Presence, appointed Dr. Irving as medical director of the emergency department and an agreement controlled the relationship, including his status as an independent contractor.[71] However, Presence had no right to control Dr. Irving's patient care decisions nor did it have the right to terminate him with respect to his patient care or clinical services.[72] As such, the circuit court found no actual agency.[73]

As to apparent agency, the circuit court focused on the language of the consent form signed by Fese's wife to determine its applicability.[74] Specifically, the circuit court found the consent form was not unclear, confusing or ambiguous.[75] It was short, concise and had appropriately titled paragraphs.[76] The practitioner employment status paragraph was the only paragraph with its own signature line requiring consent to the practitioners' status as independent contractors.[77] Fese's wife signed the consent form, therefore attesting to her understanding.[78] Finding no issues with the consent form or the method of signing, the circuit court found there was no apparent agency.

Thus, in *Fese*, the Second District addressed three different agency issues on summary judgment: (1) the wife's authority to sign a treatment-consent form on behalf of her husband; (2) whether a question of fact as to the "holding out" and reliance elements of apparent agency precluded summary judgment for the hospital; and (3) circumstantial proof of actual agency/implied authority based on the physician's administrative functions, the hospital's bylaws, and the service agreement between the hospital and the physician's practice group.[79]

## Apparent Agency in *Fese*

As to both elements of apparent agency, Presence relied solely on the consent form signed by Fese's wife, the plaintiff, arguing that it precluded a question of fact. Thus, the primary question in *Fese* was whether the consent form signed by the wife precluded her from proving the elements of apparent agency: (1) a "holding out" of agency either by the hospital, or by the allegedly negligent physician with the hospital's acquiescence; and (2) reasonable reliance by the patient or his wife on the hospital's conduct. Accordingly, the Second District first assessed whether the wife had actual authority (express or implied) to sign the consent form for her husband.[80]

### *Consent Form*

To nullify the consent form, Fese's wife argued that it was unenforceable because she was not her husband's agent with actual authority to sign on his behalf. She did not hold power of attorney; their relationship as husband and wife does not create an agency relationship; and Fese did not say anything at the hospital about signing any documents on his

behalf. Although the wife testified that she signed the consent form on Fese's behalf, she also testified that she could not recall when or where she signed the form, nor could she recall Fese asking her to sign any document.[81]

The Second District held that Fese's wife was not an agent with authority to sign the form on his behalf.[82] Thus, factual issues remained as to the circumstances of how the consent form was signed. First, there was no evidence or deposition testimony as to *when* or *where* his wife executed the consent form. Thus, the record was unclear whether Fese was present when his wife signed it or that he was even aware of it.[83] Second, the record lacked evidence of any action by Fese to confer authority on his wife. There was no evidence that Fese was asked about the consent form or said anything about it at any time while he was in the emergency room.[84]

The Second District acknowledged that his wife admitted during her deposition that she signed the consent form on Fese's behalf, but emphasized that the actual authority of the agent can only come "from the principal, not the agent."[85] In other words, "Pamela cannot attest to her status as Joseph's agent; rather, we must look to Joseph's statements or conduct to assess whether he authorized her to act on his behalf. As noted, there is no evidence that Joseph, via his words or conduct, addressed the consent form or delegated to Pamela authority to sign it on his behalf and there was no evidence that he was even present when Pamela signed the form."[86]

In reaching its conclusion, the Second District relied on an analogy to *Curto v. Illini Manors, Inc.*,[87] another case where a wife's authority to sign on behalf of her husband was at issue in a different context. Whereas *Fese* concerned an emergency room, immediately necessary treatment, and the patient's wife signing a consent and disclaimer, *Curto* involved a wife executing a contract with a nursing home to admit her husband, on whose behalf she signed as the responsible party. She also executed an arbitration agreement, which she signed as resident representative.[88] The wife sued the nursing home after her husband died. The nursing home moved to enforce the arbitration agreement, arguing that the wife had authority to sign based on theories of actual and apparent agency. The Illinois Appellate Court Third District held in *Curto* that the wife was not her husband's agent and, thus, the arbitration agreement was not enforceable against him. In addressing the nursing home's actual-agency argument, the Third Circuit ruled that the fact of marriage was insufficient to convey actual authority, and the record otherwise lacked evidence to show that the husband gave his wife express authority to make legal decisions on his behalf. Further, the Third District found there was no implied authority where there was no evidence indicating the husband was present or directed his wife to sign the arbitration agreement as his representative, nor was there any indication that he knew she signed it and agreed to or adopted her signature as his own.[89] *Fese* adopted this reasoning in finding a question of fact as to the wife's actual authority to sign the consent on her husband's behalf.[90]

Unlike in *Fese*, however, the Third District in *Curto* also looked to whether apparent agency applied to authorize the wife's execution of the arbitration agreement. The Third Circuit held that apparent agency did not apply to the wife because there was no evidence that the husband held out his wife to the nursing home as his apparent agent for purposes of the arbitration agreement.[91] The Third Circuit observed that an "agent's authority may be presumed by the principal's silence if the principal knowingly allows another to act for him as his agent."[92] But in *Curto*, like in *Fese*, there was no such evidence of the husband's knowledge.

The Third Circuit's reasoning in *Curto* for finding that apparent agency did not apply to the wife--a lack of evidence regarding the husband's conduct and knowledge--was essentially the same basis as its finding that actual agency did not apply. Thus, the same finding likely would have been made in *Fese* if the Second District had explicitly analyzed apparent agency as *Curto* did. Nonetheless, bearing in mind that apparent agency is based on principles of estoppel and equity, there is something fundamentally unfair about a wife asserting apparent agency on a wrongful death claim against a hospital, alleging that the hospital did not sufficiently disclaim agency, when she herself reviewed and signed the consent form on the basis that she was the patient's spouse and representative.

The context in *Curto* is distinguishable from *Fese*. Curto involved the wife's execution of an arbitration agreement, whereas in *Fese*, the wife executed a consent to emergency treatment and a disclaimer. The emergency context of *Fese* arguably presents different facts relevant to the appearance of a spouse's authority. Although the distinction may be immaterial at the summary judgment stage because questions of fact exist in either context, it is notable nonetheless that the Second Circuit in *Fese* did not attempt to discuss a case more similar than *Curto*.

In *Curto*, the Third Circuit briefly addressed a case from the medical-treatment context, finding it distinguishable.[93] In *Strino v. Premier Healthcare Assoc., P.C.*,[94] the parents claimed medical negligence against the obstetrician that delivered their baby by caesarean section. The defendants argued that apparent agency applied to the wife's execution of the arbitration agreement.[95] The jury found the mother was contributorily negligent due to the father's decision to decline the use of forceps for a vaginal delivery.[96] On appeal, the parents claimed that the agency instruction was error, but the Illinois Appellate Court First District court disagreed, finding that an agency relationship existed based on the father's refusal to allow the doctor to use forceps, the mother's presence in the operating room, and her silence when the doctor requested her permission to use forceps.[97] Similar facts were not present in *Curto*.[98] *Strino* illustrates facts that would support an agency finding against a spouse, such as in *Fese*.

## *"Holding Out"*

Having framed the circumstances of the consent form's execution, the Second Circuit in *Fese* turned to the elements of the wife's apparent agency claim.[99] The Second Circuit explained that the "holding out" element is "satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors."[100] Conversely, the plaintiff fails to satisfy the "holding out" element on summary judgment "if the evidence shows that the patient was placed on notice of the independent contractor status of the physicians."[101]

Citing recent case law, the Second Circuit observed that signing a consent to treatment form that contains clear and unambiguous independent-contractor-disclaimer language "is an important factor to consider" and "significant enough to be deemed 'almost conclusive'" because it tends to prove the patient was on notice of the physician's independent status.[102]

The Second District agreed with the circuit court that the language in the form was sufficient to convey "actual notice that Dr. Irving was an independent contractor."[103] The question was: *who did it convey notice to?* Since the record only confirmed that the wife signed it, but there was no evidence that Fese was aware of the disclaimer or authorized his wife to sign on his behalf, the signature was only enforceable against the wife, not Fese, the patient.

The Second District looked to the nature of the causes of action alleged. Fese's wife pleaded three counts against Presence, seeking recovery for medical negligence under (1) the Wrongful Death Act, (2) the Survival Act, and (3) the Family Expense Act. The wife's claim under the family expense statute was brought "individually." Because "'the right of action arises out of the injury to the person of another, it is not an action for damages for injuries but is an action for damages arising from the spouse's liability under the family expense act.'"[104] Thus, because the wife signed the consent form, the wife could not establish the "holding out" element for purposes of maintaining her family-expense claim on apparent agency. The Second District, therefore, found that the circuit court appropriately granted Presence summary judgment on that count.[105]

In contrast, the Second Circuit explained "that wrongful death and survival actions must be brought by, and in the name of, the representative or administrator of the decedent's estate, not individually by a beneficiary." Thus, for these claims, the decedent husband was the focus. Since the consent form was unenforceable against the husband, the Second Circuit held that "the consent form is of no import" to the Wrongful Death Act and Survival Act claims "because, as

discussed above, neither Joseph nor his agent executed it."[106] Therefore, a question of fact remained as to the "holding out" element for apparent agency on these claims.

The Second Circuit did not cite any analogous case law when concluding that a consent form signed by the patient's representative was insufficient to preclude apparent agency;[107] perhaps this is because *Fese* is relatively unique among apparent-agency case law in that respect. The Second Circuit could have cited the relatively recent decision in *Fragogiannis v. Sisters of St. Francis Health Serv., Inc.*, also a wrongful death case. In summarizing the evidence in *Fragogiannis*, the First District stated: "a *third party signing a consent form* after the negligence has occurred and after the patient is brain dead would not inform any unsuspecting patient that the four doctors that treated the individual were independent contractors."[108] In *Fragogiannis*, the patient was brain dead by the time her son signed the consent form with disclaimer language. Affirming judgment on a jury verdict for the plaintiff, the court held that the consent form did not preclude apparent agency because (1) the "after-the-fact 'consent' is, as a matter of law, insufficient to abrogate a vicarious link between the hospital and the attending physician, and (2) like in *Fese*, "there was no evidence offered as to how [the son] could have legally bound his mother by his signature."[109] *Fragogiannis*, however, did not analyze the son's authority to sign as *Fese* did. Instead, consistent with *Fese*, the court in *Fragogiannis* relied more on the fact that the consent was signed after the care at issue and, therefore, had no legal effect on the plaintiff's apparent-agency claim.

## *Reliance*

Having determined there was no question of fact on the "holding out" element, the *Fese* court turned to the final factor--whether the patient reasonably relied on the conduct of the hospital or its agents.[110] The Second Circuit noted that a plaintiff satisfies the reliance element if she shows reliance upon the hospital to provide medical care, rather than upon a specific physician.[111] For example, where the evidence shows the patient would have gone to any hospital recommended by the patient's primary physician, case law has held that the reliance element cannot be established and the plaintiff's apparent-agency claim fails as a matter of law.[112]

Presence relied on *Steele v. Provena Hosp.*, a relatively recent holding from the Illinois Appellate Court Third District, which illustrates that a consent form is not only relevant to the "holding out" element but can also defeat the "reliance" element and permit judgment for the hospital.[113] In *Steele*, the plaintiffs alleged apparent agency in a wrongful death claim against the hospital and emergency-room physician related to the 20-year-old decedent's allegedly undiagnosed chickenpox. The circuit court entered judgment on a jury verdict for $1.5 million in favor of the plaintiffs and against the defendants, denying the hospital's motion for judgment notwithstanding the verdict. On appeal, the hospital argued that the signed consent form precluded the plaintiffs from establishing both elements of apparent agency, including the reliance element.[114] First, the Third District agreed with the trial court that unclear language in the consent form (that "'most physicians who provide physician services at Provena Health are not employees or agents of Provena Health, but instead are independent medical practitioners and independent contractors'") did not negate the "holding out" element.[115] Second, however, the Third District held that although the patient did not disclaim an agency relationship, the patient *did* effect a disclaimer of her reliance on any such relationship, based on the following language from the form: "'I acknowledge that the employment or agency status of physicians who treat me is not relevant to my choice of Provena Health for my care.'"[116] Therefore, the Third District held that the "plaintiff failed to sustain her burden of proving [the patient's] reliance on *Provena* and that a judgment *n.o.v.* should have been granted by the trial court."[117]

Thus, in *Fese*, Presence again pointed to its consent form, arguing that language similar to that in *Steele* was sufficient to preclude the plaintiff from establishing the reliance element.[118] The relevant language from Presence's consent form provided:

> I acknowledge that the employment or agency status of Practitioners who treat me is not relevant to my selection of Presence Health for my care, and I neither require nor is it my expectation that any Practitioner providing me with Practitioner services be an employee of Presence Health.[119]

The Second Circuit, however, found *Steele* distinguishable.[120] In *Steele*, the form was the sole evidence available, "as there was no evidence that the decedent who signed the form 'made any observations or statements relative to' the doctor's relationship with the hospital."[121] Whereas in *Fese*, the decedent's wife and two children "testified that it was their understanding that Joseph was taken to Presence simply because it was the closest hospital," and "there was no evidence that Joseph was taken to Presence to be treated by a specific provider or that he requested such."[122]

In addition, the Second Circuit reiterated in *Fese* that "as to the estate, the consent form is not operative, because Pamela was not authorized to sign it."[123] Thus, as with the "holding out" element, a fact issue remained on the reliance element, precluding summary judgment on the apparent-agency aspect of the wife's wrongful death and survival claims.

Having fully analyzed the elements of apparent agency, the Second District concluded "that the trial court erred in granting Presence summary judgment as to Pamela's wrongful death and survival claims."[124] But the Second District did not stop there. Rather, it also addressed the plaintiff's implied-authority/actual-agency theory of vicarious liability.

## Affirming Summary Judgment for the Hospital on Implied Authority

Although the Second District in *Fese* sustained the plaintiff's/wife's apparent-agency claim, it also analyzed the wife's invocation of the doctrine of *actual* agency premised on a theory of implied authority.[125] The wife argued "that Dr. Irving's position as medical director, in the hospital's governing body, and his control over the emergency room created a factual question about whether he was the hospital's implied agent."[126] The wife cited the hospital's bylaws. Although Dr. Irving was employed by a private-practice group (CEP), he also served as the hospital's medical director for the emergency department, for which he held administrative responsibilities, including scheduling emergency-department staffing and serving on the hospital's medical-executive committee. Pursuant to Presence's bylaws, the medical director monitored care provided in the emergency room, had supervisory authority over those practicing there, and was subject to removal by the hospital.

In further support of implied authority, the wife cited an addendum to the service agreement between the CEP practice group and the hospital, providing "that the medical director supervises special medical and technical procedures, coordinates quality assurance, assures that all hospital practitioners operate in accordance with hospital policies, assists in preparing the emergency room's budget, schedules appropriate coverage in the emergency room, and participates in long-range planning for the hospital." The plaintiff noted that the agreement also required the medical director to follow Presence's policies and to enter service contracts with all insurance programs Presence requires.[127]

Based on this record, the wife argued that Presence exercised sufficient control over Dr. Irving to negate Dr. Irving's independent-contractor status, including by retaining the right to discharge Dr. Irving and by allowing him to manage its emergency room. She argued that Dr. Irving's degree of control over Presence's emergency room effectively rendered him a representative of the institution and, thus, its implied-actual agent, sufficient to raise a question of fact as to actual agency.[128]

The Second District disagreed, affirming the grant of summary judgment in Presence's favor.[129] First, the Second District ruled that the bylaws were immaterial: "Presence's bylaws state that the membership and/or clinical privileges of practitioners engaged under a contractual agreement are subject to the terms of their contractual agreement, which

governs over the bylaws;" and the section of the bylaws addressing clinical departments and duties of department chairpersons did not include the emergency department. Thus, the court explained, "the agreement is the relevant document."[130] But the agreement did not provide Presence with sufficient control to constitute implied authority. The agreement provided "that a practitioner's relationship with Presence is as an independent contractor and that Presence does not have control or direction over the manner or method by which CEP, through the practitioners, performs services under the agreement." Moreover, pursuant to the agreement, Presence did not have direct authority to discharge Dr. Irving; all such authority to remove or replace the physician remained with the practice group. Furthermore, pursuant to the agreement, Dr. Irving was appointed medical director of the emergency department by CEP and was compensated by CEP, not Presence.[131]

Contrary to the plaintiff's characterization, the Second District explained that the physician's duties as medical director were distinct from his primary duties and actions as a physician providing the care at issue to the decedent.[132] The Second District parenthetically cited several cases to explain its reasoning, including two relatively recent holdings from the First District.[133]

First, the Second District cited *Magnini v. Centegra Health Sys.*, which stands for the proposition that bylaws and holding an administrative position within the hospital are insufficient to establish actual agency without specific evidence of the hospital's right to control the physician's medical decisions. In *Magnini*, one of the defendant physicians was a department director at the hospital and a member of an independent bariatric surgery group, with which the hospital had a services agreement. The plaintiff cited these facts and the medical-staff bylaws, arguing that such evidence showed the hospital exercised sufficient control over how the physician provided medical care to patients. Both the circuit court and Illinois Appellate Court First District disagreed, and on appeal, the First District affirmed summary judgment for the hospital. Addressing the physician's medical directorship, the First District noted that the medical director was an administrative position, that the agreement stated that those administrative services were distinct and separate from any patient care services, and that the agreement contained the standard independent contractor language, adding that the hospital "'shall neither have, nor exercise any control, over the methods by which Director shall perform responsibilities.'"[134] The provider-services agreement contained the same language as the medical director agreement. The First District emphasized that under both agreements, the physicians retained exclusive control over treatment decisions. The agreement explicitly stated that the director was an independent contractor and that the hospital did not have control over methods by which he performed his responsibilities. In addition, the First District rejected the plaintiff's reliance on the bylaws because all the policies and procedures in the bylaws related to matters collateral to patient-care decisions; such decisions remained exclusively within the physician's control, and the plaintiff failed to produce any evidence to the contrary. Accordingly, neither the agreement nor the bylaws could negate the parties' express intent that the physicians remain independent contractors.[135]

The *Fese* court also cited *Hammer v. Barth*, where the plaintiff alleged that the physician, who was employed by an independent surgery group, was an actual agent of the hospital. The plaintiff argued that the bylaws and service agreement enabled the hospital to control the physician's work.[136] On appeal, the First District affirmed the circuit court's award of summary judgment to the hospital on the issue of actual agency. The First District noted that the bylaws generally pertained to administrative matters, not a physician's exercise of medical judgment; "at most," such evidence showed "only control over the conduct and activities of [the hospital's] medical staff."[137] "Compliance with such review and regulation procedures in itself does not indicate control by Advocate over its physicians."[138] Similarly, the hospital's requirements and procedures for physician staff privileges, reappointment, and recertification did not equate to control over the physician's medical judgment sufficient to negate the physician's independent status. Likewise, although the hospital could terminate the agreement with the surgery group for reasons including unacceptable patient care by group-

member physicians, nothing in any of the agreements or bylaws allowed the hospital to directly terminate the physician's privileges for a violation of administrative duties. Finally, the First District noted that the medical-director services agreement stated that director duties were distinct and separate from general patient care services.[139] As in *Fese*, however, despite affirming summary judgment for the hospital on implied-actual agency, the court in *Hammer* also held that a genuine issue of material fact precluded summary judgment on the plaintiff's apparent-agency claim.[140]

Before concluding, the *Fese* court distinguished two cases cited by the plaintiff, including *Barbour v. S. Chi. Cmty. Hosp.* which, as discussed above, is frequently relied on by plaintiffs in similar cases.[141] *Magnini* and *Hammer* distinguished *Barbour*, both noting that unlike the plaintiff in *Barbour*, who alleged facts showing control over medical judgment in addition to being department chief, the plaintiffs in *Magnini* and *Hammer* did not provide specific facts to show the same.[142]

## The post-*Fese* Legal Landscape

Regarding theories of implied authority based on bylaws and service agreements, *Fese* puts further distance between plaintiffs and a triable issue of fact in holding hospitals vicariously liable for an actual-agency relationship with independent physicians. Such plaintiffs may be able to survive involuntary dismissal at the pleading stage based on *Barbour*. But *Fese* continues the more recent trend from *Magnini* and *Hammer* that upon summary judgment, medical-staff bylaws, physician-administrative positions within the hospital, and services agreements with independent practice groups are insufficient to establish actual agency in the absence of specific evidence of the hospital's direct control over the physician's exercise of medical judgment. Thus, Illinois hospitals should continue to structure their bylaws and service agreements in accordance with this case law; that is, hospitals should avoid retention of the right to directly terminate or compensate independent physicians, control independent physicians' recertification, and avoiding the distinction between a physician's administrative duties and patient-care decisions. In accordance with these cases, hospitals can keep the onus of physician staffing and termination decisions on the independent practice groups.

Regarding apparent agency, *Fese* raises more questions than answers, the most obvious being: what are hospitals to do to protect themselves from vicarious liability when there is no opportunity to provide a disclaimer to a patient preoccupied by emergency care? Prior to *Fese*, the primary concern for hospitals attempting to avoid liability for apparent agency was the clarity of their consent forms. Under the circumstances of *Fese*, however, it makes no difference how unambiguous a consent form and disclaimer are. In the absence of actual, express, implied, or apparent authority by the patient to the patient's spouse or representative, any signature by the spouse or representative has no legal effect when analyzing the elements of apparent agency. Even if the spouse reviewed the disclaimer and signed the consent form at the time of treatment, the spouse will not be estopped from bringing a wrongful death claim to recover damages for her/his loss of the patient's companionship.

Before discussing practical considerations, it is worth considering where *Fese* stands in the legal landscape with other recent cases, and its implications on trends in developing apparent-agency law. As discussed above, *Stelzer* continues the developing trend of Illinois courts consistently treating unambiguous consent forms as nearly dispositive. By reasoning that the executed consent form was unenforceable because there was no evidence that the patient was aware of it, *Fese* does not necessarily contradict this trend in consent form case law. Perhaps this trend can be extended in a new direction, giving consent forms more weight in negating the "holding out" element.

Returning to the Illinois Supreme Court's pronouncement of the apparent-agency elements in *Gilbert*,[143] it can be argued that the "holding out" element has been too narrowly interpreted by *Gilbert*'s progeny. A hospital's act in distributing the consent form and disclaimer language—whether it be to the patient, the spouse, or other representative—

arguably establishes that the hospital did not hold itself out as the physician's principal. The failure to review a disclaimer (whether it be in a consent form or on signs posted throughout the emergency department as in *Bilbrey*) should not create a question of fact. Pursuant to *Gilbert*, the issue is whether the hospital held itself "out as a provider of emergency room care *without informing* the patient that the care is provided by independent contractors."[144] The burden on the hospital is simply to provide the *information*, *i.e.*, an unambiguous disclaimer. *Gilbert* does not require the hospital to communicate the information or make sure the patient is aware of the information. Indeed, such a requirement is denied by subsequent case law, such as in cases where the plaintiff argued that he did not understand the consent form, or that it was never explained to him; the issue in such cases is whether the disclaimer was clear and unambiguous, not whether the patient had sufficient opportunity to review the form and its language.[145] As the First District observed in *Frezados v. Ingalls Mem'l*, "a holding to the contrary would drastically diminish the value of independent contractor disclaimers. Nearly everyone who seeks emergency treatment is in some physical or emotional distress, and were we to hold that such distress could operate to nullify provisions in an otherwise duly signed treatment consent form, hospitals would always be required to proceed to trial on claims of vicarious liability."[146]

The doctrine of apparent agency is grounded in principles of equity and estoppel.[147] "'The idea is that if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party reasonably relies on the apparent agency and is harmed as a result.'"[148] The estoppel rationale should not run only against the hospital. Rather, in cases like *Fese*, some mechanism of equity or law should apply to estop a wife, who reviewed and signed the hospital's consent form, from later claiming in a lawsuit that the hospital should be held liable for holding the physician out as its agent.

In contrast to *Stelzer*, *Bilbrey* and *Fese* may represent the start of a different trend of courts applying more scrutiny to all the available evidence upon summary judgment, leaning further towards a liberal construction of the record in the plaintiff's favor, and more inclined to identify a question of fact on the "holding out" and "reliance" elements. For example, the dissenting opinion in *Bilbrey* criticized the majority for "scouring the record to develop" the plaintiff's argument for them.[149] Consequently, hospitals and defense attorneys need to go beyond the consent form to defend against vicarious liability.

Assuming *Fese* remains good law, it is nearly impossible for hospitals to avoid apparent-agency claims related to patients who are brought into the emergency room in need of immediate treatment. The same applies generally to any patient in a hospital who is unconscious at the time of necessary treatment. If there is no evidence that the patient was made aware of the hospital's disclaimer before undergoing treatment, a triable question of fact will preclude summary judgment. What, then, can a hospital do to protect itself from liability when a patient in critical condition arrives in need of immediate emergency treatment; how and to whom should a hospital disclaim any notion of agency?

Hospitals should be advised regarding the sufficiency of consent forms in their emergency departments. In addition to bold, unambiguous language disclaiming any employment and agency relationship with physicians, consent forms should be supplemented and revised to address the concerns raised in *Fese*: the court was concerned about a lack of evidence regarding when and where the form was signed and whether the patient was present when the form was signed.

Based on *Fese*, apart from the necessity of an unambiguous written disclaimer, what matters is: time of signature (was it signed before the treatment at issue?); place of signature (was it signed in the patient's presence?); and the patient's knowledge of the disclaimer (if the patient did not read and sign the form, is there another reason why the patient should have been aware of the disclaimer?). In *Fese*, the wife's deposition testimony that she signed the consent form on behalf of her husband was insufficient due to her additional testimony that she could not recall other details.

Therefore, to the extent possible in such circumstances, it only helps to have the patient's spouse or representative verify in writing that he or she is executing the consent form on behalf of the patient. In such circumstances, hospitals

may need to employ staff to verbally disclaim agency at the time that the spouse/representative signs, and then having the spouse/representative attest to that fact with her signature; this may have been sufficient in *Fese* where the patient was at least conscious (albeit, frantic and struggling to breathe), but this may not be sufficient if the patient is unconscious. To the extent possible, it may be necessary for consent forms to include an attestation, confirming the patient's presence at the time of the spouse's signature, and verifying that the patient was at least verbally made aware of the disclaimer.

Outside of the consent form, a hospital can put up signage on the walls of the emergency room disclaiming agency, with language identical to that in the consent forms. But based on the recent unpublished decision in *Bilbrey*, such signage may not be sufficient to prevail on summary judgment.[150]

## Practice Pointers

### Lack of Apparent Agency or Ambiguous Application of Apparent Agency

#### *The Impact of Granting Hospital Privileges on Apparent Agency*

The Illinois Supreme Court in *Yarbrough* explicitly held that an apparent agency relationship is not created by granting a physician employed by another entity hospital staff privileges.[151] In explaining its reasoning for employing the apparent agency theory where patients receive treatment at hospitals, the supreme court has repeatedly focused on "the business of a modern hospital."[152] This is based on the notion that hospitals spend billions of dollars in advertising to persuade persons in need of medical treatment that they should obtain said treatment at a specific hospital.[153] As such, hospitals are in competition with each other.[154] In the supreme court's view, this places the patient in a precarious position.[155] In focusing on the "reasonable expectations of the public," the supreme court has noted that most persons receiving medical treatment are unaware that the medical providers working in those hospitals are not directly employed by the hospital.[156] The supreme court has explained that "appearances speak louder than words" and that unless put on notice of a medical provider's independent contractor status, the supreme court will find apparent agency where the hospital holds itself out and the patient justifiably relies on that "holding out."[157]

However, there are specific instances where the supreme court has refused to apply apparent agency. In *Yarbrough*, the plaintiff visited Erie Family Health Center (Erie), a "Federally Qualified Health Center" (FQHC) that was comprised of several clinics.[158] FQHCs, as the court described, are "community-based and patient-directed organizations that serve populations with limited access to health care."[159] Erie relied heavily on federal grants and Medicaid cost reimbursement to operate and provide care to persons no matter their ability to pay.[160] Erie was founded as a project between Northwestern Memorial Hospital (NMH) and "Erie Neighborhood House."[161] NMH was responsible for providing financial support to Erie as well as technological assistance and strategic support.[162] Any Erie-employed physician seeking privileges at NMH had to apply for such privileges in the same manner any other physician would be required to apply.[163] The plaintiff received treatment at Erie throughout her pregnancy.[164] While being treated, she allegedly was told that she did not have a bicornuate uterus.[165] Additionally, she was told that she would receive ultrasounds at NMH (which she did) and that she would likely deliver her baby at NMH.[166] Four months later, the plaintiff, by emergency caesarean section at NMH, gave birth to a premature baby and allegedly was told she did in fact have a bicornuate uterus.[167] This led to the filing of a two-count complaint, which among other things, alleged that Erie's employees were the actual or apparent agents of NMH.[168] In her complaint, the plaintiff alleged that the medical staff who treated her had

negligently failed to identify and address her issues surrounding her shortened cervix and bicornuate uterus, which she alleged, caused her to deliver her baby prematurely.[169]

The plaintiff contended she was never told that the healthcare providers at Erie were not employees of NMH.[170] The plaintiff further stated that she selected Erie based on the reputation of NMH and that she believed she would be receiving treatment from NMH medical persons.[171] NMH moved for partial summary judgment asserting that it did not hold Erie out as its agent.[172] Erie also contended that its employees did not hold themselves out as agents of NMH.[173] NMH argued that Erie was an independent facility which was federally funded.[174] Further, all Erie staff who treated the plaintiff were working within their scope as employees at Erie.[175] NMH's motion was denied and NMH moved to certify a question under Rule 308.[176] The certified question asked whether a hospital could be vicariously liable under the doctrine of apparent agency, as set forth in *Gilbert*, for the acts of employees of an unrelated, independent clinic which was not a party to the present litigation.[177] In reversing the Illinois Appellate Court First District's ruling regarding the certified question, the Illinois Supreme Court answered this question in the negative.[178]

Interestingly, NMH contended that *Gilbert* was inapplicable because the treatment at issue in that case did not occur in a hospital setting or a hospital or outpatient facility owned by NMH.[179] The supreme court struck down this argument immediately and pointed to *Petrovich.*[180] In *Petrovich*, the Illinois Supreme Court found that an HMO could be vicariously liable for the conduct of a participating independent contractor physician.[181] In holding the HMO liable under an apparent agency theory, the supreme court determined that the plaintiff proved that (1) the HMO held itself out as the provider of health care without informing the patient of the independent contractor status of the providers; and (2) that the patient justifiably relied on the conduct of the HMO because the patient looked to the HMO to provide the healthcare services and the patient did not look to a specific physician.[182] Thus, the supreme court had already applied apparent agency to independent contractors in a non-hospital setting.

The supreme court also examined *York*, where plaintiffs filed a medical malpractice action against Rush hospital asserting that the attending anesthesiologist was an apparent agent of Rush.[183] In examining the justifiable reliance prong, the Illinois Supreme Court noted that the plaintiff had selected Rush based on its reputation, that the anesthesiologist wore a lab coat and scrubs with Rush branding, that there was nothing in the consent form to suggest the anesthesiologist was an independent contractor, and because no one at Rush had ever put the plaintiff on notice that the anesthesiologist was an independent contractor.[184]

Nevertheless, the supreme court distinguished the factual situation in *Yarbrough* from that in *Gilbert, Petrovich,* and *York.* Specifically, the supreme court opined that in *Gilbert, Petrovich,* and *York*, the supreme court sought to protect a person seeking treatment from a hospital or HMO who is unaware that the person providing such treatment is not an employee or agent of the hospital or HMO.[185] Under that set of facts, the supreme court opined that a person should have the ability to seek compensation for negligent care.[186]

In finding that the employees of Erie were not apparent agents of NMH, the supreme court explained that Erie was not owned or operated by NMH, was an FQHC that relied heavily on federal grants and Medicare reimbursement, that the Erie employees were federal employees, and that Erie did not use the NMH name, branding, or colors.[187] Without more, merely granting staff members at Erie hospital staff privileges at NMH did not create an apparent agency relationship.[188]

Based on the supreme court's recitation of the case law, the supreme court will not find an apparent agency relationship where a patient seeks medical care from an independent physician, and then receives medical services from that physician in a hospital where it is clear that the physician was an independent contractor, or where a patient received services from an independent clinic. This forces practitioners to evaluate which came first, the physician or the hospital? However, the inquiry does not end there. If it is determined that the patient selected a specific physician, the next question

that must be examined is why the physician was selected. If the physician was selected because the physician holds himself or herself out as an employee or agent of a specific hospital or HMO, apparent authority may be found if the physician did nothing to expel the patient of the notion that they were employed by or an agent of that specific facility. However, where a physician is affiliated with a certain hospital or HMO, if that physician clearly and unambiguously communicates (preferably in writing) with the patient that they are an independent contractor, apparent authority likely will not be found because plaintiff will be unable to establish the "holding out" element required.

Further, while the supreme court has not specifically opined on what occurs in a factual scenario where a patient seeks medical care from a provider and then undergoes outpatient surgery at another outpatient facility, applying the law as outlined in *Petrovich* and most recently in *Fese,* if the plaintiff selects the physician and not the outpatient surgery facility, the facility does not hold itself out as employing the independent contractor physician, and the patient does not rely on the conduct of the surgery center to provide healthcare services, apparent agency will likely not be found.

## *Clear and Unambiguous Consent Forms*

As discussed above, Illinois courts also have held that where a physician consent form is clear enough to be unambiguous, the "holding out" requirement will not be found.[189] For instance, in *Lamb-Rosenfeldt v. Burke Med. Grp.*, the Illinois Appellate Court First District affirmed the finding that St. James Hospital was entitled to summary judgment based on clear and unambiguous language contained in a one-page Consent for Medical Treatment Form and an Authorization for Payment/Release of Responsibility Form.[190] The plaintiff alleged that her deceased mother received care from a physician, Dr. Burke, who was negligent in failing to diagnose the reoccurrence of her mother's lung cancer.[191] In her complaint, the plaintiff alleged that Dr. Burke was an employee or agent of both Burke Medical and St. James Hospital.[192]

Both Dr. Burke and the hospital denied Dr. Burke was an agent of the hospital.[193] However, during her deposition, Dr. Burke did explain that she was an attending physician, chief of staff, and vice president of the medical staff of the hospital.[194] She also stated that the decedent's medical appointments were at Burke Medical and that when Dr. Burke rendered care to decedent, she was self-employed by Burke Medical.[195] She denied ever telling the decedent she was employed by the hospital or that she was chief of staff at the hospital.[196] There was no evidence that the decedent knew either assertion.[197] Any payments received from the hospital were received from the hospital's medical staff fund, which was an entity distinct from the hospital.[198] Further, Dr. Burke's chief of staff position was administrative and did not include patient care.[199]

In the hospital's motion for summary judgment, the hospital argued that the decedent had a preexisting patient relationship with Dr. Burke before she was ever admitted to the hospital.[200] Further, the decedent knew or reasonably should have known that Dr. Burke was not an agent of the hospital and that she signed multiple consent forms which indicated Dr. Burke was not an agent of the hospital.[201] In fact, the decedent signed the Consent for Medical Treatment Form on seven occasions and the Authorization for Payment/Release of Responsibility Form twice.[202] The plaintiff contended that the consent forms were ambiguous and confusing because they contained provisions unrelated to the disclaimer.[203]

The First District noted that while the signing of a consent form was not dispositive of the "holding out" factor, it was an important factor that should be considered.[204] In finding the consent form was sufficient, the First District noted that the four-paragraph consent form, which the decedent signed on seven occasions, stated in bold print and capital letters that physicians were not employees of the medical center and that none of the attending physicians at the hospital were agents or employees of the hospital.[205] The section related to this disclaimer was the largest and was located directly

above the signature line.[206] Further, the consent form included phrases like "independent contractor" and "independent physician."[207] The form also indicated that the hospital's billing practices were separate from those of any physician and informed patients that they would receive separate bills from the physicians.[208] Thus, the First District held the language was clear and unambiguous and that the decedent knew or should have known that Dr. Burke was an independent contractor.[209]

While the signing of a consent form does not equate to an automatic "win" for a hospital or physician, the First District considers such a form to be highly relevant. If the language is clear and unambiguous and is appropriately placed, practitioners will have stronger arguments to support their defenses regarding the "holding out" element of a medical negligence claim under the doctrine of apparent authority.

Thus, in counseling clients regarding patient consent forms, the forms should:

1. Be one page or less.
2. Include the disclaimer statement in bold capital letters.
3. Orient the disclaimer statement directly above the patient signature line.
4. Include the key phrases "independent contractor" and/or "independent physician."
5. Be written in unambiguous language that informs the patient that the independent contractor or independent physician is not an employee or agent of the hospital.
6. Include language equivalent to "not responsible for" or "not legally liable for."
7. Be signed as early as possible.

**(Endnotes)**

1 *Wilson v. Edward Hosp.*, 2012 IL 112898, ¶ 18.

2 *Wilson*, 2012 IL 112898, ¶ 18 (citing *Oliveira-Brooks v. Re/Max Int'l, Inc.*, 372 Ill. App. 3d 127, 134 (1st Dist. 2007)).

3 *Matthews Roofing Co. v. Cmty. Bank & Tr. Co. of Edgewater*, 194 Ill. App. 3d 200, 206 (1st Dist. 1990) ("The agent's authority can only come from his principal.").

4 *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 34; *Parker v. Symphony of Evanston Healthcare, LLC*, 2023 IL App (1st) 220391, ¶ 26.

5 *Patrick Eng'g, Inc.*, 2012 IL 113148, ¶ 34; *Buckholtz v. MacNeal Hosp.*, 337 Ill. App. 3d 163, 172 (1st Dist. 2003).

6 *Wilson*, 2012 IL 112898, ¶ 18; *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993); *see also* Ill. Pattern Jury Instr.-Civ., 105.10.

7 *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 213 (1996) ("Even if one concedes that McDonald's advertising and other conduct could entice a person to enter a McDonald's restaurant in the belief it was dealing with an agent of the corporation itself, that is not sufficient. In order to recover on an apparent agency theory, O'Banner would have to show that he actually did rely on the apparent agency in going to the restaurant where he was allegedly injured."); *see also Oliveira-Brooks*, 372 Ill. App. 3d 127 (finding no apparent agency in non-medical context).

8 *Patrick Eng'g, Inc.*, 2012 IL 113148, ¶ 35; *O'Banner*, 173 Ill. 2d 208, 213.

9 *O'Banner*, 173 Ill. 2d 208, 213.

[10] On September 27, 2023, the Illinois Supreme Court denied the defendants' petition for leave to appeal the Second District's decision in *Fese*. *Fese v. Presence Cent. & Suburban Hosps. Network*, No. 129736, 2023 WL 6443987, at *1 (Ill. Sept. 27, 2023).

[11] *Patrick Eng'g, Inc.*, 2012 IL 113148, ¶ 34 (quoting *Zahl v. Krupa*, 365 Ill. App. 3d 653, 660 (2d Dist. 2006)).

[12] *Hammer v. Barth*, 2016 IL (1st) 143066, ¶ 16.

[13] *Hammer*, 2016 IL (1st) 143066, ¶ 15 ("Traditionally, the relationship between a hospital and the physicians on its staff who are not employees is an independent one.").

[14] *Zajac v. St. Mary of Nazareth Hosp. Ctr.*, 212 Ill. App. 3d 779, 792–93 (1st Dist. 1991) (ruling negligence of physician may not be imputed to hospital if physician is not agent of hospital or acting under its direction).

[15] *Hammer*, 2016 IL (1st) 143066, ¶ 15 (citing *Petrovich v. Share Health Plan of Ill., Inc.*, 188 Ill. 2d 17, 31 (1999)).

[16] *Id.* ¶ 16.

[17] *Patrick Eng'g, Inc.*, 2012 IL 113148, ¶ 34.

[18] *Magnini v. Centegra Health Sys.*, 2015 IL App (1st) 133451, ¶ 30.

[19] *Hammer*, 2016 IL (1st) 143066, ¶ 16.

[20] *Buckholtz*, 337 Ill. App. 3d 163, 174 (1st Dist. 2003).

[21] *Id.* at 171–72.

[22] *Id.* at 173 (concluding the trial court should have granted a directed verdict for the defendant hospital on the issue of actual agency).

[23] *See Barbour v. S. Chi. Cmty. Hosp.*, 156 Ill. App. 3d 324, 328–30 (1st Dist. 1987).

[24] *Barbour*, 156 Ill. App. 3d at 328–330.

[25] *Fese v. Presence Cent. and Suburban Hosp. Network*, 2023 IL App (2d) 220273, ¶ 104 (discussed *infra*).

[26] *See, e.g.*, *Hammer*, 2016 IL App (1st) 143066, ¶ 21 (affirming summary judgment for the hospital on issue of actual agency but finding questions of fact remained as to the plaintiff's apparent-agency theory) (discussed *infra*); *Magnini*, 2015 IL App (1st) 133451, ¶¶ 40–42 (affirming summary judgment for the hospital) (discussed *infra*); *see also Terry v. OSF Healthcare Sys.*, 2018 IL App (3d) 160143-U, ¶¶ 24–27 (affirming summary judgment for the hospital on issue of actual agency but finding questions of fact remained as to the plaintiff's apparent-agency theory), *app. denied*, 98 N.E.3d 60 (Table) (Ill., May 30, 2018).

[27] *Wilson*, 2012 IL 112898, ¶ 18 (citing *Oliveira-Brooks*, 372 Ill. App. 3d 127, 134).

[28] *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 167–68 (2007).

[29] *Hoover v. Univ. of Chi. Hosps.*, 51 Ill. App. 3d 263, 267 (1st Dist. 1977).

[30] In contrast, allegations that the hospital's agents engaged in a conspiracy to hide evidence, allegedly so the hospital could continue to receive government benefits, were held to be sufficient for purposes of pleading scope of agency. *See Golbert v. Aurora Chi. Lakeshore Hosp., LLC*, No. 19-cv-08257, 2021 WL 952528, at *12 (N.D. Ill. Mar. 11, 2021) (applying Illinois law).

[31] *See Gilbert v. Sycamore Muni. Hosp.*, 156 Ill. 2d 511 (1993).

[32] *Gilbert*, 156 Ill. 2d at 525.

[33] 735 ILCS 5/2-624 (1995).

[34] *Gilbert*, 156 Ill. 2d at 525 (emphasis added).

[35] *Id.*

[36] *Id.*

[37] *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367 (1997).

[38] *See McIntyre v. Balagani*, 2019 IL App (3d) 140543, ¶ 109.

[39] *Gore v. Provena Hosp.*, 2015 IL App (3d) 130446, ¶ 19 (restating the apparent agency elements as two elements).

[40] *McIntyre v. Balagani*, 2019 IL App (3d) 140543, ¶ 109 (citing *Gilbert*, 156 Ill. 2d 511, 525).

[41] *McIntyre*, 2019 IL App (3d) 140543, ¶ 109 (citing *Wallace v. Alexian Bros. Med. Ctr.*, 389 Ill. App. 3d 1081, 1087 (1st Dist. 2009)).

[42] *See Petrovich v. Share Health Plan of Ill., Inc.*, 188 Ill. 2d 17, 31 (1999).

[43] *Hammer*, 2016 IL (1st) 143066, ¶¶ 25–26.

[44] *Steele v. Provena Hosps.*, 2013 IL App (3d) 110374, ¶ 131.

[45] *See, e.g.*, *Mizyed v. Palos Cmty. Hosp.*, 2016 IL App (1st) 142790; *Gore v. Provena Hosp.*, 2015 IL App (3d) 130446; *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558; *see also Wallace v. Alexian Bros. Med. Ctr.*, 389 Ill. App. 3d 1081 (1st Dist. 2009); *Churkey v. Rustia*, 329 Ill. App. 3d 239 (2d Dist. 2002); *James by James v. Ingalls Mem'l Hosp.*, 299 Ill. App. 3d 627 (1st Dist. 1998).

[46] *See Prutton v. Baumgart*, 2020 IL App (2d) 190346.

[47] *Prutton*, 2020 IL App (2d) 190346, ¶ 55.

[48] *See Delegatto v. Advocate Health & Hosps.*, 2021 IL App (1st) 200484, ¶ 37 (upholding summary judgment in favor of the defendant hospital based on clarity of consent form language which could only mean no physician was excluded from its non-agency provision).

[49] *Delegatto*, 2021 IL App (1st) 200484, ¶¶ 36–37 (quoting the consent form).

[50] *Id.* ¶ 9.

[51] *Id.* ¶¶ 38–41.

[52] *See id.* ¶¶ 46–47 (ruling there is no ambiguity, and no agency relationship, when "[i]t is sufficient that the consent form set forth the relationship between the physician and the hospital with enough clarity that the consenting patient is on notice.").

[53] *Hammer*, 2016 IL App (1st) 143066, ¶ 27 (discussing Illinois Supreme Court precedent regarding the reliance element, citing *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 193–94 (2006) and *Gilbert*, 156 Ill. 2d at 525; *see, e.g.*, *Hammer*, 2016 IL App (1st) 143066, ¶ 31 (holding the reliance element was satisfied where the "plaintiff presented evidence that she and her husband did not know Dr. Barth, nor did they select Dr. Barth for treatment at Advocate."); *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 33 (finding no question of fact on the reliance element where the evidence indicated the patient would have gone to any facility recommended by her personal physician); *Butkiewicz v. Loyola Univ. Med. Ctr.*, 311 Ill. App. 3d 508, 509, 514 (1st Dist. 2000) (finding no question of fact on the reliance element where the evidence showed the plaintiff sought treatment from the hospital because his personal physician instructed him to do so).

[54] *See, e.g.*, *Nosbaum v. Martini*, 312 Ill. App. 3d 108, 122 (1st Dist. 2000) (concerning a child patient and the choice to go to the hospital for treatment was made by the child's parent); *Monti v. Silver Cross Hosp.*, 262 Ill. App. 3d 503, 507–08 (3d Dist. 1994)

(concerning an unconscious patient where her husband and paramedics took her to the hospital in reliance on its provision of complete emergency care).

[55] *See Stelzer*, 2023 IL App (1st) 220557–U.

[56] *Id.* ¶ 21.

[57] *Id.*

[58] *Bilbrey v. Garcia*, 2023 IL App (5th) 220278-U, ¶ 75 Citing *Gilbert*, 156 Ill. 2d at 525 (emphasis added).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Mizyed v. Palos Cmty. Hosp.*, 2016 IL App (1st) 142790, ¶ 52, 58 N.E.3d 102, 115.

[63] *Bilbrey*, 2023 IL App (5th) 220278-U, ¶ 17.

[64] *Id.*

[65] *Id.*

[66] *See Fragogiannis v. Sisters of St. Francis Health Servs., Inc.*, 2015 IL App (1st) 141788, ¶ 20 (holding that the signature on the form at issue did not provide adequate notice when it was signed by a third party after patient was brain dead.)

[67] *Fese*, 2023 IL App (2d), ¶¶ 1, 8.

[68] *Id.* ¶¶ 1, 8.

[69] *Id.*

[70] *Id.* ¶¶ 61-62.

[71] *Id.* ¶ 61.

[72] *Id.*

[73] *Fese*, 2023 IL App (2d), ¶ 61.

[74] *Id.* ¶ 62.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Fese*, 2023 IL App (2d) 220273, ¶¶ 1, 60–63.

[80] *Id.* ¶¶ 67–74.

[81] *Id.* ¶ 69.

[82] *Id.* ¶ 71.

[83] *Id.*

[84] *Id.* ¶¶ 71, 74.

[85] *Fese*, 2023 IL App (2d) 220273, ¶ 74.

[86] *Id.*

[87] *See Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888 (3d Dist. 2010).

[88] *See Fese*, 2023 IL App (2d) 220273, ¶ 72 (discussing *Curto*, 405 Ill. App. 3d at 895).

[89] *Curto*, 405 Ill. App. 3d at 894–95.

[90] *Fese*, 2023 IL App (2d) 220273, ¶ 72.

[91] *Curto*, 405 Ill. App. 3d at 896.

[92] *Id.*

[93] *Id.*

[94] *See Strino v. Healthcare Assoc., P.C.*, 365 Ill. App. 3d 895 (1st Dist. 2006).

[95] *Strino*, 365 Ill. App. 3d at 902.

[96] *Id.*

[97] *Id.* at 902.

[98] *See Curto*, 405 Ill. App. 3d at 896.

[99] *See Fese*, 2023 IL App (2d) 220273, ¶¶ 75–82.

[100] *Fese*, 2023 IL App (2d) 220273, ¶ 78.

[101] *Id.* (citing *Wallace v. Alexian Bros. Med. Ctr.*, 389 Ill. App. 3d 1081, 1087 (1st Dist. 2009)).

[102] *Id.* ¶ 79 (quoting *Steele v. Provena Hosps.*, 2013 IL App (3d) 110374, ¶ 131).

[103] *Id.* ¶ 82.

[104] *Id.* ¶ 80 (quoting *Janetis v. Christensen*, 200 Ill. App. 3d 581, 588 (1st Dist. 1990)).

[105] *Id.* ¶ 82.

[106] *Fese*, 2023 IL App (2d) 220273, ¶ 80.

[107] *See id.* ¶ 81.

[108] *See Fragogiannis v. Sisters of St. Francis Health Servs., Inc.*, 2015 IL App (1st) 141788, ¶ 22 (emphasis added).

[109] *Fragogiannis*, 2015 IL App (1st) 141788, ¶ 22.

[110] *See Fese*, 2023 IL App (2d) 220273, ¶¶ 77, 83–90.

[111] *Id.* ¶ 84 (citing *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993)).

[112] *See, e.g.*, *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 33.

[113] *See Steele v. Provena Hosps.*, 2013 IL App (3d) 110374, ¶ 141 (reversing judgment for the plaintiff and entering judgment notwithstanding the verdict for the defendant; holding that language constituted clear disclaimer of decedent's reliance on hospital

for care; statement gained more weight when taken in conjunction with additional acknowledgements that most providers were independent contractors), *app. denied*, 3 N.E.3d 802 (Table) (Ill. Jan. 29, 2014).

[114] *See Steele*, 2013 IL App (3d) 110374, ¶¶ 132–141.

[115] *Id.* ¶¶ 137–139 (quoting the consent form).

[116] *Id.* ¶ 141 (quoting the consent form).

[117] *Id.*

[118] *Fese*, 2023 IL App (2d) 220273, ¶ 88.

[119] *Id.* ¶ 87 (quoting the form).

[120] *Id.* ¶¶ 88–89.

[121] *Id.* ¶ 88 (quoting *Steele*, 2013 IL App (3d) 110374, ¶ 131).

[122] *Fese*, 2023 IL App (2d) 220273, ¶ 89.

[123] *Id.*

[124] *Id.* ¶ 90.

[125] *See id.* ¶¶ 91–105.

[126] *Id.* ¶ 92.

[127] *Id.* ¶¶ 95–96.

[128] *Fese*, 2023 IL App (2d) 220273, ¶ 97.

[129] *Id.* ¶¶ 98–105.

[130] *Id.* ¶ 99.

[131] *Id.* ¶ 100.

[132] *See id.* ¶¶ 101–02 (discussing Dr. Irving's deposition testimony).

[133] *Id.* ¶ 103.

[134] *Magnini v. Centegra Health Sys.*, 2015 IL App (1st) 133451, ¶ 41 (quoting the agreement).

[135] *See Magnini*, 2015 IL App (1st) 133451, ¶¶ 40–42.

[136] *Hammer*, 2016 IL App (1st) 143066, ¶¶ 17, 20.

[137] *Id.* ¶ 21.

[138] *Id.*

[139] *Id.*

[140] *See id.* ¶¶ 22–33.

[141] *See Fese*, 2023 IL App (2d) 220273, ¶ 104.

[142] *See Hammer,* 2016 IL App (1st) 143066, ¶¶ 18, 20–21; *Magnini*, 2015 IL App (1st) 133451, ¶¶ 40–42.

[143] *See Gilbert*, 156 Ill. 2d 511 at 525.

[144] *Id.* at 525 (emphasis added).

[145] *See Mizyed*, 2016 IL App (1st) 142790, ¶ 51 ("[T]he case law discussing the 'holding out' element under *Gilbert* clearly does not require that the hospital ensure actual notice to defeat an apparent agency claim. Our court has stated that the 'focus' of the 'holding out' element is 'whether or not "the patient knows, or should have known, that the physician is an independent contractor."'") (quoting *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 26 (quoting *Gilbert*, 156 Ill. 2d at 524) (emphasis in *Mizyed*); *Gore*, 2015 IL App (3d) 130446, ¶ 31.

[146] *Frezados*, 2013 IL App (1st) 121835, ¶ 24; *see also Gore*, 2015 IL App (3d) 130446, ¶ 36 (stating the same in rejecting the plaintiff's public-policy argument against the consent form and affirming summary judgment for the hospital).

[147] *Gore*, 2015 IL App (3d) 130446, ¶ 36.

[148] *York v. Rush–Presbyterian–St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 187 (2006) (quoting *O'Banner*, 173 Ill. 2d at 213).

[149] *Bilbrey*, 2023 IL App (5th) 220278-U, ¶ 65 (Vaughan, dissenting).

[150] *But see Bilbrey*, ¶ 35, where even though the language on the signs was "sufficient to inform patients that emergency room physicians were not employees or agents of the hospital," the court still found a question of fact; plaintiff said she did not see the signs even though they were posted throughout.

[151] *Yarbrough,* 2017 IL 121367, ¶ 47.

[152] *Id.* ¶ 23.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* ¶ 24.

[157] *Yarbrough,* 2017 IL 121367, ¶ 25.

[158] *Id.* ¶ 4.

[159] *Id.* ¶ 4.

[160] *Id.* ¶ 4

[161] *Id.*

[162] *Id.* ¶ 5.

[163] *Yarbrough,* 2017 IL 121367, ¶ 5.

[164] *Id.* ¶ 6, ¶ 8-9.

[165] *Id.* ¶ 8.

[166] *Id.* ¶ 6, ¶ 9-10.

[167] *Id.* ¶ 10.

[168] *Id.*

[169] *Yarbrough,* 2017 IL 121367, ¶ 12.

[170] *Id.*

[171] *Id.* ¶ 4

[172] *Id.* ¶ 13.

[173] *Id.* ¶ 13.

[174] *Id.* ¶ 13.

[175] *Yarbrough,* 2017 IL 121367, ¶ 13.

[176] *Id.* ¶ 14.

[177] *Id.* ¶ 19.

[178] *Id.* ¶ 49.

[179] *Id.* ¶ 20.

[180] *Id.* ¶ 33.

[181] *Yarbrough,* 2017 IL 121367, ¶ 33.

[182] *Id.* ¶ 34.

[183] *Id.* ¶ 35.

[184] *Id.* ¶ 36.

[185] *Id.* ¶ 43.

[186] *Id.* ¶ 43.

[187] *Yarbrough,* 2017 IL 121367, ¶ 44.

[188] *Id.* ¶ 46.

[189] *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 31.

[190] *Id.* ¶ 6.

[191] *Id.* ¶ 8.

[192] *Id.*

[193] *Id.* ¶ 10.

[194] *Id.*

[195] *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 11.

[196] *Id.* ¶ 12.

[197] *Id.* ¶ 31.

[198] *Id.* ¶ 12.

[199] *Id.*

[200] *Id.* ¶ 31.

[201] *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 15.

[202] *Id.* ¶ 6.

[203] *Id.* ¶ 19.

[204] *Id.* ¶ 27.

[205] *Id.* ¶ 28.

[206] *Id.* ¶ 30.

[207] *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 46.

[208] *Id.* ¶ 30.

[209] *Id.* ¶ 30.

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