Unpacking Apparent Agency: Framing Your Cases from the Outset to Win a Motion for Summary Judgment

by Jaclyn Kurth

With the past year and a half behind us, a top priority for many professionals is a nice, long vacation. I am not talking about the quick trip up north or the long weekend to the next state over. I am talking about the two-week, leave-the-country, delete-your-email-app-from-your-phone trip. This, in my mind, rouses a legal corollary: how do you pack your suitcase for a trip like this? I posit that you start with the big items. You pull the suitcase from its pandemic storage space, find your passport, and grab your travel-sized amenities. This is the easy part, the no-brainers of packing for an extended trip.

What happens next, however, is more instructive. What we do next when we pack for a long trip, is work our way to the items that require more thought. As the departure day approaches, we narrow our list until we are left with those very specific items that require a special trip to the store. In fact, if we did not pack this way, we would undoubtedly forget something, leaving us to pay a four times mark-up for it at the airport or out of the country.

I suggest we start treating apparent agency the way we pack for an extended trip. Too often, plaintiffs' attorneys get a medical malpractice case in with strong liability, but weak vicarious liability. Often times, there involves a pre-cursory look through the medical records to see what facts can support apparent agency. We give ourselves pieces to get us by until the dispositive motion deadline – "well, he was wearing hospital scrubs, right?" or "my client was virtually unconscious when she signed that…" These are all relevant points, but I suggest it is not best practice to comb through the medical records for pieces and cross the motion for summary judgment bridge when you get to it.

In this article, I lay out my approach – which starts with an immediate, thorough analysis of the big items. When those are squared away, I narrow my inquiry to the arguments that support apparent agency. Finally, I then focus my case from the start on those items which I know I will need to run to the store for – or in our line of work, run to our legal research database of choice. With this approach, we can create a checklist to frame our apparent agency cases from the very beginning. This way, when we arrive to our dispositive motion destination, we unpack and realize we have everything we need to win the motion on apparent agency.

I. Laying It All Out: The Big Items

Most plaintiffs' medical malpractice attorneys are familiar with the overarching law on apparent agency, but starting here helps get us in the habit of always starting with our fundamental elements. The seminal case in Illinois on apparent agency is *Gilbert v. Sycamore Municipal Hospital*, a case which stemmed from alleged emergency room malpractice.[1] *Gilbert* is still considered good law. This case established that in order for a hospital to be vicariously liable under the doctrine of apparent agency, a plaintiff must show: 1) the hospital or its agent acted in a manner that would lead a reasonable person to conclude that the physician 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 on the conduct of the hospital or its agent.[2]

Since *Gilbert*, courts have regularly referred to the first two elements as "holding out," which "require the plaintiff to present some evidence that [defendant doctors'] actions created the appearance of authority and that defendant [hospital] had knowledge of it."[3] The court in *Gilbert* stated that this element is satisfied when the hospital does not inform the plaintiff that treatment is rendered by an independent contractor.[4] Likewise, *Gilbert* also concluded that, under no circumstances will apparent agency liability attach if the plaintiff knew or reasonably should have known that the treating physician was an independent contractor.[5] Therefore, the long line of cases dealing with consent forms with an independent contractor disclaimer goes directly to the "holding out" element of an apparent agency claim.[6]

The third element has also since been referred to as "justifiable reliance" which is satisfied if a plaintiff relied upon the hospital to provide complete care, rather than relying on one specific physician.[7] This element is usually met if a plaintiff does not designate which physician they want to see, but rather arrive to the hospital itself for care or by referral.[8] Importantly, a plaintiff need not show that he/she would have gone to a different hospital if he/she

was aware of the treating physician's independent contractor status.[9]

As the Illinois Supreme Court later noted in *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, *Gilbert* also provided the lens with which plaintiffs' attorneys should encourage courts to view hospitals when deciding a motion for summary judgment on apparent agency. *Gilbert* specifically noted that hospitals today form a competitive network which requires them to advertise "full service" or "complete care." Thus, the Illinois Supreme Court has stated, "imposition of vicarious liability…may 'encourage hospitals to provide better supervision and quality control over the independent physicians working in their facilities.'"[10]

With the framework of these two elements, the first step in your case should be to determine if neither, one, or both elements will be an issue. For example, if you take a preliminary look through the medical records and see a signed consent form with an independent contractor disclaimer, this may be problematic in establishing the first element. Or, if in the first few discussions with your client you learn that he/she sought out a specific neurosurgeon, this could lead to difficulty prevailing on justifiable reliance. Establishing which element is likely to be problematic will aid in building an apparent agency argument from the beginning. This is the no-brainer phase, however, and winning the motion will come down to how you tailor the case through pleadings, written discovery, and depositions.

II. Narrowing it Down: The Fact-Intensive Analysis

Once the big items are checked off the list and there is a preliminary determination of which element or elements will undoubtedly crop up in a later motion, you can work to create a checklist so-to-speak of which common arguments are available to your case to increase the likelihood you will succeed on a motion. Again, this should be done before drafting a complaint, or at the very least before sending out written discovery and starting depositions. The next step is intended to frame out the bulk of a motion argument, since the elements above will likely be obvious in regards to how they apply to your case.

A. Holding Out

As mentioned, the most common issue in modern apparent agency cases is when a client has signed a consent form at the defendant hospital which disclaims the treatment provided by an independent contractor. Courts have continuously held that consent forms are not dispositive but are an "important factor."[11] The first case to decide this issue was *James by James v. Ingalls Memorial Hospital*. The court in *James* established that a signed consent form "may make proving of [the holding out element] extremely difficult."[12] A recurring quote courts use in consent form cases, however, is that "there certainly could be situations

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in which a patient signs a consent form containing such a disclaimer but additional facts exist that would create a triable issue of fact as to whether the hospital held the defendant out as its agent."[13] This generally leads the courts to perform an in-depth analysis of the consent forms in any given case. Following the courts' lead, this should be the next item you look for if there is reason to believe a defendant physician is an independent contractor.

For this process, you can generally lump consent forms into three categories: 1) forms that make no mention of physicians as independent contractors; 2) forms that are ambiguous as to how they refer to independent contractors; and 3) forms that are not ambiguous as to how they refer to independent contractors. The focus of this section will be on the latter two, since finding a consent form without an independent contractor disclaimer is too good to be true. By now, nearly all hospitals have some mention of independent contractors in their consent forms. If you find the rare hospital that does not, this will make your holding out argument far better, since there is a strong claim that plaintiff did not know his/her physician was an independent contractor. This leaves two categories of consent forms that I colloquially refer to as ambiguous and unambiguous consent forms. I will address each of these respectively.

Ambiguous consent forms frequently arise when a plaintiff signs a consent form with a disclaimer that has language such as "I understand that *some or all* of the physicians who provide medical services to me are not employees." There is a solid body of case law in this area which lends to an argument that if a consent form has this language, plaintiff did not know of the independent contractor's status and therefore, holding out is satisfied.[14] A consent form may also be rendered ambiguous, however, by virtue of contradictory provisions in one consent form. For example, in *Spiegelman v. Victory Memorial Hospital*, the form first read that "hospital employees will attend to my medical needs as may be necessary," but the same form later read that "the Emergency Department physician and my attending physician are independent contractors and not agents or employees of [the hospital]."[15] As a result, the court found that plaintiff established holding out due to conflicting paragraphs in a consent form, which could allow a jury to find that the form was confusing.[16]

For every case that provides case law favorable to plaintiffs on ambiguous consent forms, there is another case that provides case law favorable to defendants on unambiguous consent forms.[17] Therefore, if you are in the position wherein your client signed a disclaimer which reads – in big and bold font – that "the physicians treating me are *not* employees of the hospital but are rather independent contractors exercising their own medical judgment," then you are left to make the argument that, as mentioned, a consent form is not dispositive and the application of various fact-intensive factors (listed below) weigh in favor of apparent

agency.

Once the most "important factor" is analyzed, courts will generally shift their analysis to the more narrow, specific facts of a case. Regardless of whether you have an ambiguous or unambiguous consent form, you should cite all arguments available to your case to bolster your position. Some factors gleaned from the body of apparent agency case law reviewed for this article include:

- Whether the independent contractor physician wears lab coats or scrubs with a hospital logo on it.[18]
- Whether the independent contractor physician wears a name tag or badge which identifies him/her as a hospital employee.[19]
- Whether the independent contractor physician teaches residents at the hospital's medical school.[20]
- Whether the independent contractors generally discusses his/her employment status with patients.[21]
- Whether the consent form disclaimer includes a statement that the plaintiff will be billed separately for physician treatment.[22]
- Whether the consent form contains numerous provisions that hide the independent contractor disclaimer, or otherwise make the disclaimer less visible.[23]
- Whether the consent form disclaimer is the largest section and is located right above the signature line.[24]
- Whether your client signed numerous identical consent forms prior to experiencing the negligent treatment or procedure.[25]
- Whether the consent form contains generic language, rather than clear language such as "independent contractor" and "not employed."[26]
- Whether the hospital posted signs in waiting rooms and other common areas to inform patients that physicians were independent contractors.[27]
- Whether the consent forms were signed after the negligent acts occurred and/or by the patient him/herself.[28]

This list can be realized through careful pleading, written discovery, and discovery depositions. As stated, if you complete this analysis early on, you can tailor your case to make more of these arguments available. If you wait until defendant files a motion for summary judgment to determine what arguments are available, then you may have missed the opportunity to glean facts that support the doctrine of apparent agency. You may be considering, can't I just attach an affidavit to my response establishing some of these factors? I have yet to find a case where the court rewards this approach, which is another reason to establish the available arguments in the early stages of a case.[29]

B. Justifiable Reliance

Like consent forms, the justifiable reliance element has seen common

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court considerations; namely, whether the plaintiff was referred to a physician that is an independent contractor and what the hospital advertised. In the *James* case, the court attempted to narrow the justifiable reliance element set forth in *Gilbert*, but a later decision made clear that a plaintiff "need only show under *Gilbert* that his reliance on a particular case was justifiable."[30] In general, the mere fact that a plaintiff saw a physician by referral will not establish justifiable reliance.[31] Two strong cases for plaintiffs in the realm of referrals are *York v. El-Ganzouri* and *York v. Rush-Presbyterian-St. Luke's Medical Center*, an appellate-supreme court duo.

In *York*, plaintiff was a retired physician who chose an orthopedic surgeon at Rush to perform a knee surgery. Plaintiff alleged that he relied on his son, who was a medical resident at Rush, to choose a specific anesthesiologist for the procedure.[32] During the spinal epidural procedure, plaintiff alleged that the anesthesiologist negligently inserted the needle into the spine, causing right leg immobility and numbness, loss of bowel and bladder control, and loss of sexual function.[33] This anesthesiologist was an independent contractor.[34] Through the appellate and supreme courts, defendants argued *inter alia* that plaintiff could not establish justifiable reliance when his son, who chose the anesthesiologist, was well-aware of that physician's status as an independent contractor.[35] Even under these circumstances, the court still found that plaintiff relied on the hospital rather than selecting a specific physician, thus establishing justifiable reliance.[36]

Another significant factor under the auspices of justifiable reliance is whether the hospital advertises itself as a full-service facility.[37] Whether or not a plaintiff sees the advertisements is irrelevant.[38] Instead, courts will consider the substance of the ads and their effect on the public. More specifically, "the hospital cannot have it both ways. It cannot advertise it has the best doctors in the community and then tell a jury that there is no evidence that emergency department doctors were not its employees."[39] Thus, another step that I complete early in a case, is to search the defendant hospital for online advertisements. For example, one area hospital in a number of my cases proudly touts "*we* employ leading physicians who truly care about their patients and their work." This material is supportive of justifiable reliance and, as such, I make it my practice to screenshot these ads and save them in my client's file.

III. Final Preparation: The Novel Issues

The big elements and narrow factors cited thus far represent a lion's share of what has been decided in the case law that exists today. Like any legal issue, there will be novel circumstances that arise. This is the final list of essentials that will need to be addressed before departing for the dispositive motion destination. For example, I recently went through the above steps and found that there was a provision in the consent form that I had not encountered before. This provision read "my decision to seek medical care is not based upon any understanding, representation, advertisement, media campaign, inference, presumption, or reliance that the physicians providing care and treatment to me are employees or agents of the hospital[.]"

I feared this meant I could not rely on the hospital's ads or representations to establish justifiable reliance. I spent a few hours researching and found that a recent First District Appellate Court case, *Hammer v. Barth*, disposed of a nearly identical advertising disclaimer. In that case, the court was inclined to follow the reasoning cited when courts first began deciding cases with an independent contractor disclaimer.[40] In *Hammer*, the court found that, in regards to advertising disclaimers, "although such language is an important factor to consider, it is not always dispositive on the issue…there can be situations in which a patient signs a consent form containing a disclaimer 'but additional facts exist [that can create] a triable issue of fact.'"[41] Therefore, I prepared myself on the last issue I could foresee based on my review of the elements, the consent forms, and the other factors often cited by courts. From there, I arranged the case accordingly.

IV. Conclusion

Whether or not you actually have a trip planned, I cannot say. What I hope to have established, though, is that apparent agency requires careful thought and planning, the same way a long trip requires such thought and planning. In the medical malpractice arena, the old adage of "if you are failing to plan, you are planning to fail" rings true in many circumstances, but especially in the context of apparent agency. If you take the time to consider, ahead of time, each item that is available, you are more likely to have a well-pled complaint, a series of exhaustive interrogatories, and a comprehensive deposition outline. If you keep a running list of those factors available to your case based on the defendant's answer to the complaint, answers to interrogatories, and answers in a deposition, then when a motion for summary judgment on apparent agency appears, you will have an exhaustive response already outlined – from broad elements to narrow factors – with ample support in the record.

Endnotes

1 *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (1993).

2 *Id.* at 524-525.

3 *Wallace v. Alexian Bros. Med. Ctr.*, 389 Ill. App. 3d 1081, 1086 (1st Dist. 2009).

4 *Gilbert*, 156 Ill. 2d at 525.

5 *Id.* at 522.

6 *James by James v. Ingalls Mem'l Hosp.*,

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299 Ill. App. 3d 627, 632 (1st Dist. 1998).

[7] *Wallace*, 389 Ill. App. 3d at 1086.

[8] *Scardina v. Alexian Bros. Med. Ctr.*, 308 Ill. App. 3d 359, 367 (1st Dist. 1999); *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 194 (2006) ("If a patient has not selected a specific physician to provide certain treatment, it follows that the patient relies upon the hospital to provide complete care – including support services such as radiology, pathology, and anesthesiology – through the hospital's staff.")

[9] *Scardinia*, 308 Ill. App. 3d at 367.

[10] *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d at 202, citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999).

[11] *James by James*, 299 Ill. App. 3d at 633.

[12] *Id.*

[13] *Spiegelman v. Victory Mem. Hosp.*, 392 Ill. App. 3d 826, 835 (1st Dist. 2009); citing *Churkey v. Rustia*, 329 Ill. App. 3d 239, 245 (2d. Dist. 2001).

[14] *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d at 197; *Schroeder v. Northwest Comm. Hosp.*, 371 Ill. App. 3d 584, 593-94 (1st Dist. 2006); *Hammer v. Barth*, 2016 IL App (1st) 143066, ¶24-25.

[15] *Spiegelman*, 392 Ill. App. 3d at 829.

[16] *Id.* at 837.

[17] *See e.g. James,* 299 Ill. App. 3d at 627; *Churkey,* 329 Ill. App. 3d at 239; *Wallace,* 389 Ill. App. 3d at 1081; *Lamb v. Rosenfeldt v. Burke Med. Group, Ltd.*, 2012 IL App (1st) 101558; *Frezados v. Ingalls Mem. Hosp.*, 2013 IL App (1st) 121835, ¶5; *Gore v. Provena Hosp.*, 2015 IL App (3d) 130446, ¶30.

[18] *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 31(1st Dist. 2004), *see also York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d at 183, citing *Gilbert*, 156 Ill. 2d at 521 ("[T]he appearance to a patient that a physician is an employee of the hospital 'speaks much louder than the words of whatever private contractual arrangements the physicians and the hospital may have entered into, unbeknownst to the public, in an attempt to insulate the hospital from liability for the negligence, if any, of the physicians.'"); *Hammer*, 2016 IL App (1st) 143066, ¶25 ("[T]he fact that plaintiff did not testify that she or her husband actually saw [the doctor] wearing her [hospital] lab coat or badge does not preclude plaintiff from establishing the holding out or reliance elements of her apparent agency claim.").

[19] *Hammer*, 2016 IL App (1st) 143066, ¶25.

[20] *Id.*

[21] *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d at 197-98.

[22] *Wallace*, 389 Ill. App. 3d at 1088; *Lamb*, 2012 IL App (1st) 101558 at ¶P30.

[23] *Spiegelman*, 392 Ill. App. 3d at 837.

[24] *Spiegelman*, 392 Ill. App. 3d at 837; *Lamb*, 2012 IL App (1st) 101558 at ¶30.

[25] *Wallace*, 389 Ill. App. 3d at 1088.

[26] *Lamb*, 2012 IL App (1st) 101558 at ¶30.

[27] *Frezados*, 2013 IL App (1st) 121835,

¶17.

[28] *Fragogiannis v. Sisters of St. Francis Health Servs.*, 2015 IL App (1st) 141788, ¶22 ("Suffice it to say that 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."), *but see Prutton v. Baumgart*, 2020 IL App (2d) 190346, ¶51(…meaning the plaintiff was far from the final stage of labor when she signed the forms. This case is readily distinguishable from *Fragogiannis*[.]")

[29] *James*, 635. *Wallace*, 389 Ill. App. 3d at 1089. An equally unsuccessful argument is that the plaintiff was in shock or pain while signing the consent. *Wallace*, 389 Ill. App. 3d at 1090 ("She never stated…that her "limited education" prevented her from understanding the consent form…or that she did not read [the child's] consent form in full or failed to ask questions about it because she was in shock."); *Frezados*, 2013 IL App (1st) 121835, ¶23-24 ("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.").

[30] *Scardinia*, 308 Ill. App. 3d at 367.

[31] *Scardinia*, 308 Ill. App. 3d at 366 ("The mere fact that Dr. Rinke sent plaintiff to Alexian Brothers, without more, does not lead us to conclude as a matter of law that plaintiff did not rely on Alexian Brothers to provide for his care.").

[32] *York v. El-Ganzouri*, 353 Ill. App. 3d at 6.

[33] *Id.* at 5.

[34] *Id.*

[35] *Id.* at 24. Defendants also argued that plaintiff could not establish holding out regardless of an ambiguous consent form because as a retired independent contractor himself, he knew or should have known that the anesthesiologist was an independent contractor. In addition, plaintiff had received numerous prior surgeries at Rush. Plaintiff received separate billing for the physicians, which defendants argued was another indicator to plaintiff that he was receiving treatment from an independent contractor. Plaintiff stated his wife handled his billing.

[36] *Id.*

[37] *Spiegelman*, 392 Ill. App. 3d at 839; *Hammer*, 2016 IL App (1st) 143066, ¶26.

[38] *Spiegelman*, 392 Ill. App. 3d at 839.

[39] *Id.* at 841.

[40] *Hammer*, 2016 IL App (1st) 143066, ¶33.

[41] *Id.*, citing *Churkey*, 329 Ill. App. 3d at 245.

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