Health Law

By: Roger R. Clayton, Maureen R. De Armond and Daniel P. Hiser*
Heyl, Royster, Voelker & Allen
Peoria

What Every Litigator Needs to Know About Apparent Agency

It has now been more than a decade since the Illinois Supreme Court announced its holding in Gilbert v. Sycamore Mun. Hosp., 156 Ill. 2d 511, 622 N.E.2d 788 (1993). This landmark case declared that a hospital could be held vicariously liable under the doctrine of apparent authority for the negligence of a physician who was not a hospital employee. To date, legislative attempts to create statutory requirements for such apparent agency claims have failed. See Best v. Taylor Mach. Works, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997) (holding the latest statutory alternative, 735 ILCS 5/2-624, unconstitutional). Thus, Gilbert remains the enduring standard for these claims. This article provides a brief review of Gilbert, as well as an overview of recent cases seeking to interpret, clarify, or expand it.

Gilbert and the Doctrine of Apparent Agency

In an effort to create uniformity across Illinois on this matter, the Gilbert court addressed the issue of a hospital’s potential vicarious liability for the negligence of a physician acting as an apparent agent. The Gilbert court began by discussing its observations concerning the realities of modern hospital care. Relying heavily on cases from other states, notably Wisconsin and New Jersey, the Supreme Court explained that patients seeking medical help through emergency rooms today are unaware of the status of the various professionals working there; they rely heavily on the reputation of the hospital itself, and they would naturally assume attending staff to be employees of the hospital, unless given notice otherwise. Gilbert, 156 Ill. 2d at 521 (citing Arthur v. St. Peters Hosp., 169 N.J. Super. 575, 583, 405 A.2d 443 (1979).

The Gilbert court continued, noting that emergency room patients in modern-day hospitals, who are unaware that professionals providing treatment may not be employees or agents of hospital, should not be prohibited from seeking compensation from any hospital offering emergency room care. Gilbert, 156 Ill. 2d at 522 (citing Pamperin v. Trinity Meml. Hosp., 144 Wis. 2d 188, 423 N.W.2d 848 (1988). The Supreme Court then concluded that “liability attaches to the hospital only where the treating physician is the apparent or ostensible agent of the hospital. If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable.” Gilbert, 156 Ill. 2d at 522.

Though Gilbert addressed emergency room negligence, the Gilbert test is applicable to claims based on the negligent conduct of physicians wherever it occurs. Malanowski v. Jabamoni, 293 Ill. App. 3d 720, 727, 688 N.E.2d 732 (1st Dist. 1997). The Malanowski court held: “we discern nothing in the Gilbert opinion which would bar a plaintiff, who could otherwise satisfy the elements for a
claim based on apparent agency, from recovering against a hospital merely because the negligent conduct of the physician did not occur in the emergency room.” *Id.* Thus, while some apparent agency cases do focus on emergency room negligence, others, including some of the cases discussed below, analyze the acts of radiologists, anesthesiologists, neurologists, and other medical specialists and hospital professionals.

### The Gilbert Test

The *Gilbert* court set forth a three-prong test that courts should apply in cases where apparent authority may be at issue: (1) **Holding Out:** the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the allegedly negligent physician was an employee or agent of the hospital; (2) **Appearance of Agency:** the acts of the physician created the appearance of authority, the plaintiff must prove that the hospital had knowledge of and acquiesced in those acts; and (3) **Justifiable Reliance:** the plaintiff acted in reliance upon the conduct of the hospital or its agent. *Gilbert*, 156 Ill. 2d at 525. Illinois plaintiffs must be able to satisfy all three prongs to successfully hold a hospital vicariously liable on an apparent agency claim. *Robers v. Condell Med. Ctr.*, 344 Ill. App. 3d 1095, 1097, 801 N.E.2d 1160 (2d Dist. 2003) (citing *Churkey v. Rustia*, 329 Ill. App. 3d 239, 245, 768 N.E.2d 842 (2d Dist. 2002)).

1. **Holding Out**

   In *James v. Ingalls Meml. Hosp.*, 299 Ill. App. 3d 627, 701 N.E.2d 207 (1st Dist. 1998), the First District affirmed summary judgment for the defendant hospital based upon the unambiguous language contained in a signed consent form. In this case, the plaintiffs sought to hold the hospital vicariously liable for the malpractice of an attending obstetrician/gynecologist. The plaintiff had read and signed an “Emergency Care/Hospitalization Consent, Authorization for Release of Information and Assignment of Benefits” form shortly after her admission, which included the following disclaimer:

   The physicians associated with SEA and the physicians on staff at this hospital are not employees or agents of the hospital, but independent medical practitioners who have been permitted to use its facilities for the care and treatment of their patients. I have had the opportunity to discuss [sic] this form, and I am satisfied I understand its contents and significance. I may withdraw my consent at any time. *James*, 299 Ill. App. 3d at 629.

   The *James* court noted that while it did not find the existence of an independent contractor disclaimer in a consent form always dispositive on the issue of “holding out,” such a formality was an important factor to consider. *James*, 299 Ill. App. 3d at 633. The *James* court continued, noting that having a patient sign such a form with express language would make it very difficult for a plaintiff to prove the first element of the *Gilbert* test. Ultimately, the *James* court concluded that the plaintiff had failed to meet this burden; she simply knew or should have known that the defendant physician was an independent contractor. *Id.*

   In *Churkey v. Rustia*, 329 Ill. App. 3d 239, 768 N.E.2d 842 (2d Dist. 2002), the Second District also upheld summary judgment in favor of defendants. The plaintiff claimed to have suffered permanent brain damage resulting from receipt of the wrong type of anesthesia and sued the hospital on an apparent agency theory. The court questioned whether the plaintiffs had “raised a genuine issue of material fact as to the first element of *Gilbert*; whether the hospital ‘held out’ [the defendant physician] as its agent.” *Churkey*, 329 Ill. App. 3d at 243. As in *James*, the plaintiff in this case had signed a consent form, this one clearly listed the anesthesiologist’s group as independent contractors. In its holding, the *Churkey* court explained that the plaintiff presented no specific facts to support her assertion that prior to her surgery she believed the anesthesiologist was an employee of the hospital.
The court noted that even though a plaintiff is not required to prove her case at the summary judgment stage, the court held that this plaintiff had not presented any factual basis that would arguably entitle her to judgment in her favor. *Churkey*, 329 Ill. App. 3d at 244-45. The *Churkey* court concluded that in light of the absence of facts showing that the hospital held out the anesthesiologist as its employee, combined with the signed consent form, it was clear that the plaintiff did not present any factual basis for her claims. *Churkey*, 329 Ill. App. 3d at 245.

In 2003, the Second District Court of Appeals decided *Robers v. Condell Med. Ctr.*, 344 Ill. App. 3d 1095, 801 N.E.2d 1160 (2d Dist. 2003). The *Robers* court evaluated whether the defendant hospital acted in a manner that would lead a reasonable person to conclude that the physician was an employee or an agent of the medical center. In this case, the physician sublet the office in a building that was owned by the defendant medical center. The medical center had no knowledge of the physician’s presence in their building, the physician was not on staff at defendant medical center, and he was not an employee of the hospital. The *Robers* court held that the fact that the defendant physician retained office space in a building owned and operated by the defendant hospital was not enough to create a genuine issue of material fact. Further, the *Robers* court held that no reasonable person would have believed that the physician was “an employee or agent” of the hospital simply because he leased space in a building bearing the hospital’s name. *Robers*, 344 Ill. App. 3d at 1098.

The *Robers* court distinguished the facts in its case from those in *McCorry v. Evangelical Hosps., Corp.*, 331 Ill. App. 3d 668, 771 N.E.2d 1067 (1st Dist. 2002). The hospital in *McCorry* published literature referring to physicians who worked at the hospital as its physicians and claiming that the expertise of those physicians made the hospital a desirable place to seek medical care. This list included defendant neurosurgeons who maintained an office connected to the hospital. The *McCorry* court found that the hospital held itself out as the principal for the defendants and subsequently overturned the motion for summary judgment which had been granted in favor of the defendant hospital. *McCorry*, 331 Ill. App. 3d at 672, 675.

2. Appearance of Agency

The *McCorry* court also briefly discussed the issue of appearance of agency. *McCorry* explained that under *Gilbert*, a court must determine whether the appearance of agency led to the relationship between the plaintiffs and the allegedly negligent defendant physician. In *McCorry*, the court held that the fact that the plaintiff’s personal physician referred him to the neurosurgeon consultation was not, in itself, sufficient to require judgment in favor of the hospital. *McCorry*, 331 Ill. App. 3d at 673-74 (citing *Scardina v. Alexian Bros. Med. Ctr.*, 308 Ill. App. 3d 359, 719 N.E.2d 1150 (1st Dist. 1999)). The *McCorry* court also considered that the plaintiff had presented evidence that “the hospital advertised itself in a manner that might lead a reasonable person to conclude that the hospital accepted responsibility for its choice of doctors to give the advertised health care, and thus that the doctors acted as the hospital’s agents.” *McCorry*, 331 Ill. App. 3d at 675. Further, defendant hospital presented no evidence that it had informed the plaintiff that the neurosurgeon was an independent contractor. Along this line of reasoning, some courts, such as the Fourth District in *Kane v. Doctors Hosp.*, 302 Ill. App. 3d 755, 762, 706 N.E.2d 71 (4th Dist. 1999), purport that under *Gilbert* no requirement exists that a plaintiff must make a direct inquiry into the status of physicians working in a hospital. Instead, the burden is on the hospitals to put their patients on notice if an attending professional is an independent contractor.

3. Justifiable Reliance

The *James* court also discussed the third prong of the *Gilbert* test, which requires a patient’s justifiable reliance upon the conduct of the hospital or its agent. In *James*, the First District held that the plaintiff failed to meet her burden in establishing the element of reliance because she did not in
fact rely on any representations of the hospital or the doctor in going to Ingalls Memorial Hospital. James, 299 Ill. App. 3d at 635. The compelling facts mentioned in reaching this conclusion were that the plaintiff admitted in her deposition that she went to Ingalls because it was very near to her home, that she would have gone there even if she had known that the emergency room physicians were not employees of Ingalls, and that she went there because she thought public aid required her to see a physician at that particular hospital. These admissions were read by the court as dispositive in their finding that there was no material fact as to whether the plaintiff acted in reliance upon the conduct of the hospital or its agent, as required by Gilbert. James, 299 Ill. App. 3d at 635.

The McCorry court also examined the justifiable reliance prong of the Gilbert test. Here, the court criticized an earlier First District case, Butkiewicz v. Loyola Univ. Med. Ctr., 311 Ill. App. 3d 508, 724 N.E.2d 1037 (1st Dist. 2000). In Butkiewicz the court had affirmed summary judgment for the defendant hospital charged with responsibility for its radiologist’s negligence because the plaintiff’s personal physician referred him to the hospital for treatment. In that case the plaintiff had explicitly testified that he did not trust the hospital and he trusted only his personal physician. The court in McCorry found that the Butkiewicz court had focused improperly on the plaintiff’s reasons for choosing the hospital, rather than the plaintiff’s reasons for accepting treatment from the allegedly negligent physician. The McCorry court found that Butkiewicz misapplied Gilbert, and had used reasoning inconsistent with what had been adopted by the Supreme Court in Gilbert. In clarifying the justifiable reliance prong, the McCorry court explained that if a plaintiff shows that he relied in part on the hospital when he accepted treatment from an allegedly negligent doctor, he has met the reliance element of the proof needed to hold the hospital liable under the theory of apparent agency. McCorry, 331 Ill. App. 3d at 674-75.

In Scardina v. Alexian Brothers Medical Center, 308 Ill. App. 3d 359, 719 N.E.2d 1150 (1st Dist. 1999), the court essentially made it easier for the plaintiffs to satisfy the justifiable reliance prong of the Gilbert test. Here, the First District held that nothing in Gilbert suggested that a plaintiff must make an independent determination of whether to rely on a particular hospital for treatment. Citing Kane, the Scardina court explained that the fact that a plaintiff originally went to a hospital due to an appointment made by a personal physician was inconsequential to the plaintiff’s ability to establish the reliance element. Ultimately, the Scardina court held that without more, the mere fact that a personal physician sent the plaintiff to a particular hospital did not, as a matter of law, preclude the plaintiff’s reliance on that hospital to provide for his care. Scardina, 308 Ill. App. 3d at 366.

An additional case addressing the third prong of the Gilbert test dates back to 1994. Monti v. Silver Cross Hosp., 262 Ill. App. 3d 503, 637 N.E.2d 427 (3d Dist. 1994). The Monti court had the opportunity to discuss the complicating factor, in reference to justifiable reliance, of an unconscious patient. In this case the plaintiff was thrown from a horse, rendered unconscious, and taken to an emergency room by ambulance. Silver Cross Hospital had only one neurosurgeon on staff, who had informed the hospital in writing that all emergency room patients with closed head trauma should be transferred to Loyola Medical Center because he would be unavailable during the time at issue. The plaintiff in this case was not transported as directed until 12 hours after she originally arrived at Silver Cross. In applying the Gilbert test, the Monti court addressed the perplexing application of the justifiable reliance prong to a case where the plaintiff was unconscious during her entire stay at defendant hospital. If taken too literally, the Gilbert test would seem to preclude any unconscious patient from recovering on the theory of apparent agency, because they could not justifiably rely on the hospital to provide complete emergency room care, rather than upon a specific physician, if they were unconscious. The Monti court quickly precluded such outcomes by permitting the element of justifiable reliance to be transferred from unconscious patients to those persons responsible for them. The Monti court held that those responsible for the plaintiff sought care from Silver Cross, and thus, a
jury could find that they, rather than the plaintiff, had relied upon the fact that complete emergency room care would be provided through the hospital staff. *Monti*, 262 Ill. App. 3d at 507-08.

**Wheaton’s Reverse Apparent Agency Theory**

One final case worth mentioning is *Wheaton v. Suwana*, 341 Ill. App. 3d 929, 793 N.E.2d 978 (5th Dist. 2003). In this case, the plaintiff presented a unique argument and use of the *Gilbert* doctrine, arguing that a treating physician should be stopped from making the argument that he was a hospital employee, and should instead be found to be an independent contractor. The plaintiff in *Wheaton* was compelled to advance this argument because the hospital in question was a local public entity subject to the Local Governmental and Governmental Employees Tort Immunity Act (“Act”) (745 ILCS 10/1-101 et seg.), which mandated a one-year statute of limitations for malpractice claims. The plaintiffs had filed their complaint against the defendant physician after that statute had expired, resulting in their initial suit being dismissed as untimely. If this defendant physician was found to be an independent contractor, the Act would not apply and the statute of limitations would be two years, thus eliminating the issue of timeliness. Consequently, the plaintiff argued that because the physician exercised his own professional judgment in treating patients, he could not properly be found to be a hospital employee since he was not subject to the hospital’s control. The *Wheaton* court rejected this argument, finding that simply because an employee exercises independent professional judgment in carrying out his or her job duties, does not mean the employer automatically lacks the required control to establish an employment relationship. *Wheaton*, 341 Ill. App. 3d at 937.

However, the *Wheaton* court did not close the door on future plaintiffs pursuing this reverse apparent agency theory. The plaintiff’s weakness in this case was the compelling evidence that the defendant physician was clearly a salaried employee of the hospital, not the novel legal theory the plaintiff had pursued.

**Conclusion**

Though medical malpractice will likely remain an important legislative topic, until the Illinois legislature enacts an alternative to *Gilbert* that passes constitutional muster, *Gilbert* will likely continue to set forth the test Illinois courts will apply in apparent agency situations. While the Supreme Court has shown little interest in altering this seminal case, it will be ever important to monitor the appellate courts as they meddle, even if only slightly, with *Gilbert*’s boundaries and application.

**ABOUT THE AUTHORS:** Roger R. Clayton is a partner in the Peoria office of Heyl, Royster, Voelker and Allen where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of IDC, the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, a board member of the Illinois Association of Healthcare Attorneys, and the current president of the Illinois Society of Healthcare Risk Management.

Maureen R. De Armond is an associate with the firm of Heyl, Royster, Voelker & Allen. Ms. De Armond earned her undergraduate degrees from the University of Northern Iowa in 1995 and 1999 and received her J.D. from the University of Iowa in 2004. While attending law school, she was a student writer and note editor for the *Journal of Transnational Law and Contemporary Problems*.

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