

Health Law

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Hospitals Beware: Apparent Agency Claims May Arise From Treatment Rendered at Offsite, Independent Clinics

In this column, we often write about new decisions affecting apparent agency claims because of the significant impact those decisions can have on litigation involving hospitals and other health care institutions. The recent decision in *Yarbrough v. Northwestern Memorial Hospital*, 2016 IL App (1st) 141585, *appeal allowed* (Nov. 23, 2016), is no exception, and could significantly expand the scope of potential apparent agency claims. Before *Yarbrough*, almost every apparent agency case related to services rendered by a health care provider somewhere within the hospital. The only exception was *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720 (1st Dist. 1997), where the court found the plaintiff could maintain an apparent agency claim against Loyola University for care rendered by an independent contractor at Loyola University Mulcahy Outpatient Center, an outpatient center owned and operated by Loyola.

The decision in *Yarbrough* goes further however, finding that a plaintiff may maintain an apparent agency claim against a hospital for treatment rendered at an offsite, independent clinic by employees of that independent clinic. This potentially expands apparent agency claims well beyond the hospital itself, to clinics or other facilities not owned by the hospital. All hospitals should take note of this decision and develop strategies for protecting against similar claims.

Background

Erie Family Health Center, Inc. (Erie) is a federally funded, not-for-profit clinic that is not owned nor operated by Northwestern Memorial Hospital (Northwestern). *Yarbrough*, 2016 IL App (1st) 141585, ¶ 5. Christina Yarbrough went to Erie after searching the internet for a clinic offering free pregnancy testing. After informing Yarbrough that she was pregnant, Erie healthcare workers asked Yarbrough where she would receive prenatal care. *Id.* They advised Yarbrough that if she obtained prenatal care at Erie, she would deliver at Northwestern and would receive additional testing, such as ultrasounds, at Northwestern. She was also given a pamphlet for scheduling tours and classes at Northwestern. In her complaint, Yarbrough alleged that she believed that if she received prenatal care from Erie, she would be receiving care from Northwestern-employed health care providers. *Id.*

When she was eight weeks pregnant, Yarbrough went to the emergency department at an unrelated hospital, where an ultrasound was performed. She was diagnosed with a bicornuate uterus, and that hospital informed Erie of the diagnosis. *Id.* ¶ 6. Days later, Erie performed a follow-up ultrasound and Erie's providers informed the plaintiff she had a shortened cervix, but not a bicornuate uterus. No other follow-up regarding this condition was performed and Yarbrough continued to receive prenatal care at Erie. *Id.* Yarbrough had her 20-week ultrasound at Northwestern and a physician employed by Northwestern Medical Faculty Foundation interpreted that ultrasound. *Id.* The plaintiffs also filed a claim against this interpreting physician and Northwestern Medical Faculty Foundation, which was unrelated to this appeal. *Id.* ¶ 8, n.1.

After the baby was delivered at 26 weeks, the plaintiffs filed a complaint alleging the premature delivery was the result of a failure to diagnose the bicornuate uterus. *Id.* In the complaint, the plaintiffs alleged that Erie and its providers were the apparent agents of Northwestern. *Id.* ¶ 8. In support of this claim, the plaintiffs alleged several “close ties” between Erie and Northwestern. *Id.* ¶ 9. These close ties, which the court ultimately found sufficient to defeat Northwestern’s motion for summary judgment as to the apparent agency claim, are set forth in detail below.

General Law Applicable to Apparent Agency Claims

The Illinois Supreme Court adopted the doctrine of apparent authority or apparent agency in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 525 (1993), holding that hospitals may be vicariously liable for negligent medical treatment rendered in the hospital by an independent contractor. The *Gilbert* court established a three-factor test a plaintiff must satisfy for the hospital to be liable for the acts of an independent contractor:

(1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

Gilbert, 156 Ill. 2d at 525.

The first two factors, typically grouped together by the appellate courts, are referred to jointly as the “holding out” factor, and the focus is whether the patient knew or should have known the physician was an independent contractor. *Lamb-Rosenfeldt v. Burke Med. Grp., Ltd.*, 2012 IL App (1st) 101558, ¶ 26. A hospital will not be liable if a patient knows or should have known that the treating physician was an independent contractor. *Gilbert*, 156 Ill. 2d at 522. If a patient “is in some manner put on notice of the independent status of the professionals with whom he might be expected to come into contact,” the hospital must prevail. *York v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 222 Ill. 2d 147, 182 (2006).

Apparent Agency with an Offsite, Independent Clinic

The *Yarbrough* court first rejected the idea that liability for apparent agency is limited to treatment at a hospital, or even a facility owned by a hospital. Instead, the court found that the “key determinant” is whether the hospital’s conduct caused the patient to rely upon the hospital for treatment, rather than the physician. *Yarbrough*, 2016 IL App (1st) 141585, ¶ 40. In doing so, the court relied almost exclusively on *Malinowski*, which found nothing that would bar an apparent agency claim “merely because the negligent conduct of the physician did not occur in the emergency room or some other area within the four walls of the hospital.” *Id.* ¶ 37, 40 (citing *Malinowski v. Jabamoni*, 293 Ill. App. 3d 720, 727 (1st Dist. 1997)).

The *Yarbrough* court itself noted that in *Malanowski*, the allegedly negligent acts occurred at “an outpatient clinic owned and operated by Loyola University of Chicago (Loyola) called the ‘Loyola University Mulcahy Outpatient Center.’” *Yarbrough*, 2016 IL App (1st) 141585, ¶ 38 (citing *Malinowski*, 293 Ill. App. 3d at 722). The *Yarbrough*

court further acknowledged keys to the *Malanowski* court’s determination included that “the outpatient center bore Loyola’s name, it held itself out as a direct provider of health care services, it had introduced the decedent to [the alleged apparent agent physician], the decedent was also treated by other physicians at the center, and payment for [the alleged apparent agent physician’s] services were made to the outpatient center.” *Yarbrough*, 2016 IL App (1st) 141585, ¶ 39 (citing *Malinowski*, 293 Ill. App. 3d at 728). Yet, the *Yarbrough* court rejected Northwestern’s argument that *Malanowski* was distinguishable, given that Erie was a separate corporate entity from Northwestern and not located in a Northwestern-owned facility. *Yarbrough*, 2016 IL App (1st) 141585, ¶ 40. Instead, the court found that the plaintiff could proceed with a claim that “there were such close ties between [Northwestern] and Erie, despite being separate entities located in separate facilities, that material issues of fact exist[ed] regarding the elements of apparent authority.” *Id.*

Applying *Gilbert* to the *Yarbrough* Facts

The court found that material questions of fact existed as to whether Northwestern and Erie held themselves out as having such close ties that a reasonable person would conclude that an agency relationship existed, and whether *Yarbrough* reasonably relied upon Northwestern or Erie. *Id.* ¶ 50.

With regard to the first two factors, jointly referred to as the “holding out” factor, the court recited a number of unique facts revealed during discovery that supported a “holding out,” including:

- Northwestern promoted itself as a community-oriented hospital that collaborates with neighborhood centers, including Erie, to make quality health care available to the needy;
- Northwestern publicized its relationship with Erie on its website and in its annual reports, community service reports, and other press releases;
- Northwestern promoted that 11.2% of babies delivered at Northwestern in 2006 received prenatal care at Erie and that 100% of prenatal patients at Erie delivered at Northwestern;
- Northwestern’s website contained a link to Erie’s website and represented that Erie was one of “Our Health Partners” and promoted a formal, longstanding affiliation with Erie;
- two Northwestern representatives sit on Erie’s board;
- Erie was founded “as a project of volunteer physicians from Northwestern Memorial and Erie Neighborhood House”;
- collaborative efforts between Northwestern and Erie in providing care in the areas of diabetes and women’s health and promotion of these efforts; and
- Northwestern continuously contributed financially to Erie, provided information technology assistance to Erie, and did not charge Erie patients for care at Northwestern.

Id. ¶¶ 52-53.

The court also pointed to an affiliation agreement between Northwestern and Erie under which Northwestern was to be the primary site for acute and specialized hospital care for Erie patients. The affiliation agreement also called for a Northwestern representative to sit on Erie’s board, the creation of a community advisory committee, appointment of Erie’s executive director to the committee, and joint marketing efforts relating to the affiliation. *Id.* ¶ 53.

Further, the court pointed to actions by Erie that could support the holding out element. Yarbrough testified that at her initial appointment at Erie, she was told that if she received her prenatal care from Erie, she would deliver at and receive additional testing at Northwestern. She was also given pamphlets about delivering at Northwestern. The court also found it significant that Erie’s providers did not explicitly tell Yarbrough they were not employed by Northwestern. *Id.* ¶ 54. Finally, Erie’s website promoted Northwestern as “Our Partner,” indicated that Erie partnered with Northwestern (among other hospitals) to offer specialized medical care not available at Erie, and stated that all Erie physicians had faculty status at Northwestern University Feinberg School of Medicine. At least one Northwestern official acknowledged knowing about Erie’s website discussing the affiliation, but that Northwestern never told Erie to promote the affiliation. *Id.* ¶ 55.

The court found it irrelevant whether Yarbrough actually observed any of these indicia of “holding out.” The court found this to be an objective, rather than subjective inquiry. *Id.* ¶ 56. This is peculiar, because the court immediately turned to the third *Gilbert* factor—whether “the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.” *Id.* ¶ 58 (citing *Gilbert*, 156 Ill. 2d at 525). Yarbrough admitted at her discovery deposition that no one at Erie or at Northwestern told her they were part of the same entity or had a special connection. *Yarbrough*, 2016 IL App (1st) 141585, ¶¶ 18, 21. The plaintiff even admitted that if she had gone to another physician who told her she would likely deliver at another hospital, she would have been happy with that as well. *Id.* ¶ 21.

Yet, finding sufficient evidence to proceed to trial on this factor, the court focused on Yarbrough’s initial visit to Erie. Yarbrough testified to being told that if she received prenatal care at Erie, she would most likely deliver at and receive additional testing at Northwestern, and she was given pamphlets about delivering at Northwestern. *Id.* ¶ 60. Yarbrough testified that is when she chose Erie, and she was under the impression that Erie and Northwestern were the same entity, most likely because of the physician’s delivery privileges at Northwestern. Yarbrough testified that her belief was reaffirmed when she was sent to Northwestern for her 20-week ultrasound. *Id.* The court found there was an issue of fact because “Yarbrough indicated that her decision to utilize Erie for prenatal treatment was not based on her desire to receive treatment from a particular doctor at Erie or Erie itself, but was instead based on her expressed preference for a particular hospital, *i.e.*, [Northwestern], which she deemed to be a ‘very good’ hospital.” *Id.* ¶ 61.

The court distinguished these facts from a situation where the “patient went to the defendant hospital because his long-time personal physician directed him to, even though he did not like that hospital, and the patient trusted his physician completely and would have done ‘whatever he told [me] to do.’” *Id.* ¶ 63 (citing *Butkiewicz v. Loyola Univ. Med. Ctr.*, 311 Ill. App. 3d 508, 512-14 (1st Dist. 2000)). Luckily, this appears to be *dicta* because it would be a very troubling standard for the court to espouse. Whether a plaintiff thinks a hospital is a good or bad hospital has nothing to do with whether the actions of a hospital or actions of an alleged apparent agent caused a patient to believe the alleged apparent agent was a hospital employee.

Conclusion

Yarbrough presents a troubling extension of the apparent authority doctrine. In *Gilbert*, the Illinois Supreme Court was concerned about a situation where “the public is generally unaware of whether the staff in an emergency room is comprised of independent contractors or employees of the hospital, and absent a situation where a patient is somehow put on notice of a doctor’s independent status, a patient generally relies on the reputation of the hospital and reasonably

assumes that the staff is comprised of hospital employees.” *Yarbrough*, 2016 IL App (1st) 141585, ¶ 32 (citing *Gilbert*, 156 Ill. 2d at 521).

The same concern is not implicated when a patient presents to an independent clinic that is not located in a building owned by the hospital. Under such circumstances, there is no reason for a patient to generally rely upon the reputation of the hospital or assume the staff is comprised of hospital employees. Moreover, the hospital has much less opportunity to control what information is conveyed or not conveyed to a patient about any relationship with the hospital.

Additionally, the courts should encourage institutions to assist clinics like Erie that provide critical medical services to those in need. Exposing institutions to liability for contributions and participation in clinics like Erie will only discourage future participation, creating an even greater shortage of care for the under-served.

Fortunately, the Illinois Supreme Court recently granted Northwestern’s Petition for Leave to Appeal. *Yarbrough v. Northwestern Mem. Hosp.*, No. 121367, 65 N.E.3d 847 (Table) (Nov. 23, 2016). Hopefully, the Illinois Supreme Court will recognize the unfair burden placed on hospitals by such an expansion of the apparent authority doctrine, and reverse the appellate court’s decision.

However, hospitals should understand the factors that were significant to the appellate court’s determination that this apparent agency claim could proceed to trial. If a hospital has a relationship with a clinic similar to that between Erie and Northwestern, it should take steps to protect itself from liability for the clinic’s actions. For instance, if an affiliation agreement exists, the hospital might insist that the clinic include in its consent to treatment that none of the clinic’s providers are employees of the hospital. The hospital should also consider what it and the clinic are allowed to publicize about the relationship between the two, including on their respective websites.

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