IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

DECEMBER 2018

IN THIS ISSUE

This article discusses a recent Illinois Supreme Court decision addressing the issue of whether a hospital could be held liable under the doctrine of apparent agency for the conduct of employees of an unrelated and independent clinic.

Illinois Supreme Court Holds Hospital Not Liable Under the Doctrine of Apparent Agency

ABOUT THE AUTHORS

Mark D. Hansen is a shareholder in the Peoria, Illinois office of Heyl, Royster, Voelker and Allen. He has extensive experience in complex injury litigation, with an emphasis in medical malpractice, professional liability, and product liability. He can be reached at mhansen@heylroyster.com.

Richard K. Hunsaker is a shareholder in the St. Louis office of Heyl, Royster, Voelker & Allen and currently serves as that office's Managing Partner. He focuses his practice in the areas of medical malpractice and professional liability. He can be reached at rhunsaker@heylroyster.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

Robert G. Smith, Jr.
Vice Chair of Publications
Lorance & Thompson, P.C.
rgs@lorancethompson.com

*The **International Association of Defense Counsel** serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

w: www.iadclaw.org p: 312.368.1494 f: 312.368.1854 e: mmaisel@iadclaw.org

In its recent ruling in the case of *Yarbrough v. Northwestern Memorial Hospital*, 2017 IL 121367, the Illinois Supreme Court reversed the holding of the Illinois First District Appellate Court that a hospital could be found liable under the doctrine of apparent agency for the negligence of an independent family practice clinic that was not sued by the plaintiffs. *Yarbrough* involved a case in which the First District held that Northwestern Memorial Hospital could be found vicariously liable for negligence ascribed to a party that had not been sued, Erie Family Health Center. Erie Family Health Center is a Federally Qualified Health Center that relies upon federal grants and Medicaid cost reimbursement. It does not require medical insurance. Instead, its purpose is to serve populations with limited access to health care.

Background

The plaintiff (Yarbrough) alleged that Erie Family Health Center employees were the actual or apparent agents of Northwestern Memorial Hospital. Yarbrough had asked an unnamed staff person at Erie where she would deliver her baby. She was informed that she would have her ultrasounds done at Northwestern Medicine Prentice Women's Hospital and would probably deliver her baby at Northwestern Memorial Hospital. During this same visit, Yarbrough received informational materials regarding tours of the hospital's birthing/delivery area, having the installation of an infant car seat inspected at Northwestern Memorial Hospital, and attending birthing classes at Northwestern Memorial Hospital. Based upon this information, Yarbrough believed that Erie and Northwestern Memorial Hospital were one-and-the-same entity, particularly because she was told that she would give birth at the hospital.

On an interlocutory appeal, the First District found that a hospital could be held liable for the conduct of employees affiliated with an unrelated, independent clinic that is not a party to the action against the hospital.

The First District rejected Northwestern's argument that a prior case, *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511 (1993), was inapplicable in this case because the alleged negligent conduct did not occur at the hospital. The appellate court held that nothing in the *Gilbert* decision limits a plaintiff from recovering against a hospital "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." *Yarbrough v. Northwestern Memorial Hospital*, 2016 IL App (1st) 141585, ¶ 40 (quoting *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 727 (1st Dist. 1997)). The appellate court also held that a plaintiff is not required to name the individual physician or his or her employer as a defendant in order to hold the hospital vicariously liable as the principal.

Supreme Court Analysis

The Illinois Supreme Court reversed the First District, noting that the plaintiff sought treatment at Erie Family Health Center, but was seeking to impose liability on Northwestern Memorial Hospital. The court observed that Erie is neither owned nor operated by Northwestern. While Erie Family Health receives some charitable financial and technical assistance from Northwestern, Erie Family Health is a Federally Qualified Health Center that relies heavily on federal grants and Medicaid reimbursement to provide underserved communities with primary and preventative care regardless of an individual's ability to pay. Erie's employees are considered federal employees, and suits against Erie or its employees can only be maintained under the Federal Torts Claim Act. Erie does not utilize the Northwestern name. There is no Northwestern-related branding or the use of Northwestern's trademark purple color by Erie Family Health. As such, the Supreme Court found the First District's reliance on the *Malanowski* decision to be misplaced, noting that unlike *Malanowski*, the care outside of the hospital did not occur at a hospital affiliated clinic or practice.

In reversing the First District, the Illinois Supreme Court reiterated that the doctrine of implied agency remains viable and applicable to modern health care scenarios where there has been consolidation of practices and clinics under a hospital or system name in order to achieve cost savings. The court stated that in order to establish liability under the doctrine of apparent authority, a plaintiff must show that: "(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." *Yarbrough*, 2017 IL 121367, ¶ 69.

Recommendations

While the Illinois Supreme Court's holding is a positive development for hospitals and large practice groups, it is clear that the court continues to adhere to the *Gilbert* analysis. *Gilbert* generally makes a hospital responsible for the professionals working in the hospital where no notice has been given to patients that the professionals from whom care is provided are independent and unaffiliated. Moreover, the court considered what it termed the "realities of modern hospital care." In particular, a hospital will be considered the apparent principal of an independent caregiver where the hospital holds itself at as a provider of care and undertakes no effort to inform the patient that the care in question was provided by "independent contractors." The court noted specifically that the "realities" recognized in the *Gilbert* decision are "even more true today." Notably, the court observed that

hospitals have consolidated to improve their finances and also entered into "rebranding initiatives" which allow practice groups to use hospital logos while technically retaining their individual names.

It was very significant to the Illinois Supreme Court that the facility where the care was given was not owned by the hospital and did not display the hospital logo or branding symbol. With these factors in mind, it is very important to consider the following:

1. Is the doctor who is alleged to be an apparent agent part of a practice group which is affiliated with the hospital? For example, is the practice group which employs the physician owned by a corporate entity related to the hospital?
2. Does the practice group market itself as a physician group affiliated with the hospital?
3. Does the hospital list the physician on its website?
4. Has the hospital followed the dictates of *Gilbert*?

a. Has the patient been notified that physicians working in the hospital and providing care are not employees of the hospital and are independent contractors?
b. Has the hospital taken steps to overcome the presumption that those who provide care at the hospital are not agents or employees of the hospital?
c. There should be notifications contained in consents to be signed by the patient, signs posted throughout the hospital and conspicuous language contained on websites that physicians are *not* agents of the hospital but independent providers of care.

Conclusion

The *Yarbrough* decision is important because the outcome rests upon principles of fundamental fairness. In *Yarbrough*, Northwestern Memorial Hospital was clearly targeted for care provided at a remote and independent facility. However, the Illinois Supreme Court made it clear that it will continue to adhere to the principles articulated in the *Gilbert* decision and, where appropriate, look to the "realities of modern medicine" which include consolidation of practices under the ownership of or alignment with a particular hospital or group. *Gilbert* was issued twenty five years ago. A close analysis of *Yarbrough* reveals that the Illinois Supreme Court is sensitive to the fact that physicians have clearly become more aligned with large hospital organizations or practice groups closely affiliated with preferred networks which are promoted and marketed to the public. It is important to understand and evaluate business relationships and marketing initiatives when establishing policies designed to insulate a hospital from the acts of a physician or provider who seems to qualify as an independent contractor. Aggressive marketing and consolidation efforts on the business side of the equation will likely make it easier to convince a court to allow a claim of apparent agency.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

NOVEMBER 2018
Challenging the Plaintiff's Economic Expert
Erik W. Legg and Stephanie M. Rippee

OCTOBER 2018
Ex Parte Communications with Treating Physicians: Leveling the Playing Field
Joseph D. Piorkowski, Jr.

SEPTEMBER 2018
Illinois Appellate Court Considers Scope of Privilege Established by Patient Safety Act
Mark D. Hansen and Emily J. Perkins

JULY 2018
Illinois Appellate Court Issues Opinion Limiting Expert Testimony Regarding Proximate Cause and on Plaintiff's Use of Voluntary Dismissal to Avoid Directed Verdict and Retain Additional Experts
Mark D. Hansen and J. Matthew Thompson

JUNE 2018
Hospital's Reimbursement Rates Found to be Relevant to Determine Whether the Hospital's Charges are Reasonable
Robert G. Smith, Jr.

MAY 2018
Special Interrogatories: Be Careful What You Ask For
Mark D. Hansen and Tyler J. Pratt

APRIL 2018
Discovery of Electronic Medical Records, Audit Trails, and Metadata
David L. Brown, Jr. and Emily Slay Walters

MARCH 2018
$347 Million FCA Judgment Set Aside Under Escobar's Materiality Standard
Megan Hargraves

FEBRUARY 2018
Illinois Appellate Court Addresses Ex Parte Communications between Hospital Counsel and Formerly Employed Nurse
Mark D. Hansen and J. Matthew Thompson

JANUARY 2018
Physicians in Texas can Establish New Patients using Telemedicine Services under New Statute
Robert G. Smith, Jr.