IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Kylie Flores,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 3152
	)	
Ottawa Regional Hospital & Healthcare Center d/b/a OSF Saint Elizabeth Medical Center, OSF Healthcare System, Presence Central and Suburban Hospitals Network d/b/a Presence Saint Joseph Medical Center, Nicholas Reinhart, D.O., Elliot Nacke, M.D., Shahid Masood, M.D., and Frederick Alexander, M.D.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

To hold a hospital liable for the acts or omissions of independent contractors under the apparent agency doctrine, a plaintiff must prove the hospital held out the independent contractors as employees, the hospital knew of such representations and acquiesced in them, and the plaintiff relied on those representations. Here, the plaintiff provided sufficient evidence to establish questions of material fact as to the "holding out" and "justifiable reliance" elements. The defendants' motion for partial summary judgment must, therefore, be denied.

Facts

On April 13, 2016, Kylie Flores sustained a dog bite to her dominant left forearm and hand. She initially treated at the Emergency Department of OSF Saint Elizabeth Medical Center where Dr. Nicholas Reinhart closed her wounds. Reinhart then discharged Flores with a prescription for oral antibiotics and pain medication. Shortly thereafter, Flores presented to the Emergency Department at Palos Community Hospital ("PCH") complaining of increasing pain. PCH discovered that Flores' health insurance did not cover inpatient treatment at PCH; consequently, Flores was transferred to Presence Saint Joseph Medical Center ("PSJMC").

Flores arrived at PSJMC at 11:15 p.m. Shortly after midnight on April 14, 2016, a PSJMC nurse called Dr. Shahid Masood, an internist, who

entered several telephone orders, including orders to admit Flores, administer intravenous medications, order lab work, and initiate routine consultations for pain management/anesthesia, infectious diseases, and orthopedic surgery. Around 7:00 a.m., Masood examined Flores and placed an order for intravenous antibiotics, which were administered at 9:17 a.m. Masood asked Dr. Frederick Alexander, an infectious disease physician, to consult on the case. Alexander examined Flores between 9:20 and 10:20 a.m. and ordered intravenous antibiotics by 10:50 a.m.

At 12:46 p.m., Flores signed PSJMC's "Consent to and Conditions for Treatment" form ("General Consent form") providing in relevant part:

> **CONSENT TO TREATMENT**
>
> I, the individual whose signature appears below, either on my own behalf or on behalf of the person identified above (whom I am legally authorized to represent), hereby authorize and voluntarily consent to all care, treatment, and other related services (including, for example, diagnostic procedures, tests, radiology, anesthesia, emergency care, the administration of fluids and medications, and other nursing, medical, and surgical treatment and care) that may be ordered, requested, directed, or provided by my physicians or any emergency room physicians, or their associates, assistants, or designees (including consulting physicians), or carried out at the request or direction of any of the foregoing individuals by members of Presence Health's medical staffer other of Presence Health's personnel. . . .
>
> I understand that I am free to select any primary or attending physician to provide care, treatment, or other services to me. If I do not know of a qualified physician to select, I understand that one option that I have is to request Presence Health's assistance in identifying physicians authorized to practice at Presence Health in the specialty area that I require, but I agree that by providing any such assistance, Presence Health is not endorsing or recommending any particular physician. . . .
>
> **PHYSICIAN EMPLOYMENT STATUS**
>
> *I acknowledge and understand that most physicians who provide physician services at Presence Health are not employees or agents of Presence Health, but instead are independent medical practitioners and independent contractors who have privileges to care for patients at Presence Health facilities.* I understand that each of these medical practitioners exercises his or her own independent medical judgment and is solely responsible for the care, treatment, and services that they order, request, direct, or provide. *I acknowledge that these practitioners are not subject to the supervision or control*

of Presence Health. I acknowledge that the employment or agency status of physicians 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 physician providing me with physician services be an employee of Presence Health. I also understand that I will receive, and am solely responsible for payment of a separate bill from each of these independent practitioners, or groups of practitioners, for care, treatment, or services provided. *By marking my initials on the line immediately below, I acknowledge that I fully read and understood this paragraph and have had all of my questions or concerns regarding the employment status of my physicians satisfactorily answered by Presence Health. . . .*

ACCEPTANCE AND SIGNATURE

I represent that I, as either the person identified above or such person's legal representative, have read and understand, and am duly authorized to accept and execute, these terms and conditions, *and have initialed the above paragraph regarding physician employment status.* Any questions that I've had have been satisfactorily answered. I hereby accept and agree to be bound by all of the above terms and conditions and I agree that a copy of this document may be used in the place of the original in enforcing any rights hereunder.

(Emphasis added). As a result of her injury, Flores was unable to initial beneath the heading, "**PHYSICIAN EMPLOYMENT STATUS**," instead, the form notes: "verbal given." Similarly, beneath the "**ACCEPTANCE AND SIGNATURE**" provision, the form notes: "patient was unable to sign due to a dog bite verbal consent given per patient."

Around 3:30 p.m. Dr. Elliot Nacke, an orthopedic hand surgeon, evaluated Flores. Nacke then reevaluated Flores at 6:50 p.m. and at 7:08 a.m. on April 15, 2016. Alexander evaluated Flores again around 11:04 a.m. At 5:23 p.m., Nacke reevaluated Flores and found the infection had spread. At 5:30 p.m., Flores signed a "**CONSENT FOR SURGERY, ANESTHESIA AND OTHER MEDICAL PROCEDURES** " ("Surgical Consent form") in which she consented to the "irrigation and debridement of the left forearm." The form further specifies:

2. I understand that this surgery/procedure or other medical treatment is to be performed by: Dr. Nacke, and such assistants and associates as may be selected by him/her and by Presence Saint Joseph Medical Center.

3. ***I understand that all practitioners who perform a surgery/procedure on me or provide treatment to me are***

INDEPENDENT PRACTITIONERS and not employees or agents of Presence Saint Joseph Medical Center, except for those practitioners who clearly and explicitly identify themselves as facility employees by wearing an identification badge with the facility name. I understand that each practitioner is solely and exclusively responsible for the exercise of his/her own medical judgment.

Flores also marked an "X" beneath the third provision requesting the patient or legal representative's signature.

Flores was immediately taken to the operating room. Surgery revealed necrotizing fasciitis and required excision of significant amounts of skin, subcutaneous tissue, and muscle along her forearm and hand. Around midnight on April 16, 2016, after the surgery, Nacke transferred Flores to Loyola University Medical Center ("Loyola") to receive a higher level of care. Flores remained at Loyola until April 22, 2016, and subsequently underwent several additional surgeries to her left arm and hand.

On March 28, 2018, Flores filed her complaint against the defendants. Counts one through eight, ten, and twelve sound in medical negligence and are directed against Ottawa Regional Hospital & Healthcare, OSF Healthcare System, OSF Multi-Specialty Group, Reinhart, Nacke, Masood, Alexander, PSJMC, Presence Legacy Association, and Presence Healthcare Services, respectively. Flores alleges the defendants negligently failed to: (1) close a severe dog bite; (2) obtain wound cultures to detect infection; (3) consult with appropriate physicians regarding the proper course of treatment; and (4) properly diagnose and treat her injury and condition. Counts nine, eleven, and thirteen sound in institutional negligence against PSJMC, Presence Legacy Association, and Presence Healthcare Services, respectively. Flores alleges the defendants negligently failed to: (1) establish and enforce policies, procedures, and protocols to ensure prompt physician evaluation, consultation, and treatment; (2) ensure adequate staffing for a Level II Trauma Center; and (3) comply with the Level II Trauma Center Designation Criteria contained in section 515.2040 of Chapter I of the Illinois Public Health Code.

The case proceeded to discovery. In her deposition, Flores stated that PCH transferred her to PSJMC because it accepted her insurance. Flores explained that she arrived at PSJMC around midnight but was not able to see a doctor until the following morning despite the increasing pain and redness surrounding her wound. Flores testified that she did not request any particular physicians at PSJMC.

Nacke, Masood, and Alexander were also deposed. Masood explained that PSJMC admitted Flores as an unassigned patient and that he became her attending physician because he was on call. All three doctors testified they were independent contractors and not PSMJC employees. Each testified they had never previously met Flores and never discussed the terms of their employment with her. Masood and Nacke both testified they wear identification badges with their photographs, names, and a "Presence Saint Joseph" label. Alexander testified he wears an identification badge only stating his name. Nacke testified that he generally wears scrubs in the hospital while Masood testified he typically wears a dress shirt and pants. Alexander testified he typically wears a gray coat and would not have worn anything stating his practice group's name.

Marilyn DeBerry, the nursing clinical operations manager, testified in her deposition that in 2016, PSJMC was a medical center that could provide complete medical care to patients.

On November 17, 2021, PSJMC filed its motion for partial summary judgment as to the counts alleging that Nacke, Masood, and Alexander were actual or apparent agents. The parties fully briefed the motion.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). "In light of the standard, the trial court does not have any discretion in deciding the matter." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992).

A defendant moving for summary judgment may disprove a plaintiff's case in one of two ways. First, the defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law; this is the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Second, the defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), followed *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to

establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

Regardless of the approach, if the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist.* No. 1, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.* On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

Here, the defendants' motion follows from the second method of summary judgment. The defendants argue Flores does not have sufficient evidence to prove the doctors were the defendants' actual or apparent agents. That argument tracks the legal principle that a hospital may be held vicariously liable based on an agency relationship between the hospital and a physician. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 518 (1993). An agency relationship exists if a principal is bound by its agent's actions and if the agent has authority to act on the principal's behalf. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 660 (2d Dist. 2006).

An agent's authority may be actual or apparent. *Id.* "Proof of actual agency, or respondeat superior, requires a showing that (1) a principal/agent, master/servant, or employer/employee relationship existed; (2) the principal controlled or had the right to control the conduct of the alleged employee or agent; and (3) the alleged conduct of the agent or employee fell within the scope of the agency or employment. *See Oliveira-Brooks v. Re/Max Int'l, Inc.*, 372 Ill. App. 3d 127, 134 (1st Dist. 2007). Here, it is undisputed the defendant physicians were not actual agents of PSJMC.

Illinois has long recognized the doctrine of apparent authority, which refers to another type of an agency relationship. A principal will be bound by the authority actually given to another as well as by the authority that appears to have been given. *Yarbrough v. Northwestern Mem. Hosp.*, 2017 IL 121367, ¶ 27. Apparent authority in an agent is the authority the principal knowingly permits the agent to assume, or the authority the principal holds out the agent as possessing. *Gilbert*, 156 Ill. 2d at 523-24. It is the authority a reasonably prudent person, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. *State Security Ins. Co. v. Burgos*, 145 Ill. 2d 423, 431-32 (1991). If a principal creates the appearance of authority, the principal cannot deny the agency to the prejudice of an innocent party who has relied on the agent's apparent authority. *Union Stock Yard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 157 Ill. 554, 565 (1895).

Whether an agent is authorized to act is a question of fact. *Petrovich v. Share Health Plan*, 188 Ill. 2d 17, 33 (1999) (citing *Gilbert*, 156 Ill. 2d at 524). Whether a person has notice of the lack of an agent's authority or is put on notice by circumstances is also a factual question. *Schoenberger v. Chicago Transit Auth.*, 84 Ill. App. 3d 1132, 1138 (1st Dist. 1980). Under the apparent authority doctrine, therefore, a hospital may be held vicariously liable for a physician's negligence, regardless of whether the physician is an independent contractor, unless the patient knows or should have known the physician was an independent contractor. *Gilbert*, 156 Ill. 2d at 524.

For a hospital to be liable under the doctrine of apparent authority, a plaintiff must show: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude the individual who is alleged to be negligent was the hospital's employee or agent; (2) if the agent's acts create the appearance of authority, the plaintiff must also prove the hospital knew of and acquiesced in them; and (3) the plaintiff relied on the hospital or agent's conduct consistent with ordinary care and prudence. *Id.* at 525. The first two elements encompass the so-called "holding out" element of apparent agency. *Williams v. Tissier*, 2019 IL App (5th) 180046, ¶ 28. The "holding out" element does not require a showing that a hospital made an express representation that the allegedly negligent person was an employee. *Gilbert*, 156 Ill. 2d. at 525. Rather, it is enough if the hospital holds itself out as a care provider and does not inform the patient that an independent contractor is providing the care. *Id.*

As to the third element, the so-called "reliance" element, courts have determined that a plaintiff's apparent agency claim is satisfied if the plaintiff reasonably relied on a hospital and not a specific physician to provide medical

care. *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 194 (2006) (citing *Gilbert*, 156 Ill. 2d at 525). The critical distinction is whether the plaintiff sought care from the hospital or looked to the hospital as the place where a specific physician would provide medical care. *Id.* at 151.

The defendants argue they explicitly did not hold out the defendant-doctors as employees. For evidence, the defendants rely on the General Consent form that Flores executed on April 14, 2016, at 12:46 p.m. That form provides, in part, that:

> **PHYSICIAN EMPLOYMENT STATUS**
>
> *I acknowledge and understand that most physicians who provide physician services at Presence Health are not employees or agents of Presence Health, but instead are independent medical practitioners and independent contractors who have privileges to care for patients at Presence Health facilities.* I understand that each of these medical practitioners exercises his or her own independent medical judgment and is solely responsible for the care, treatment, and services that they order, request, direct, or provide. *I acknowledge that these practitioners are not subject to the supervision or control of Presence Health. I acknowledge that the employment or agency status of physicians 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 physician providing me with physician services be an employee of Presence Health.* I also understand that I will receive, and am solely responsible for payment of a separate bill from each of these independent practitioners, or groups of practitioners, for care, treatment, or services provided. *By marking my initials on the line immediately below, I acknowledge that I fully read and understood this paragraph and have had all of my questions or concerns regarding the employment status of my physicians satisfactorily answered by Presence Health. . . .*
>
> **ACCEPTANCE AND SIGNATURE**
>
> I represent that I, as either the person identified above or such person's legal representative, have read and understand, and am duly authorized to accept and execute, these terms and conditions, *and have initialed the above paragraph regarding physician employment status.* Any questions that I've had have been satisfactorily answered. I hereby accept and agree to be bound by all of the above terms and conditions and I agree that a copy of this document may be used in the place of the original in enforcing any rights hereunder.

(Emphasis added). The defendants also assert that the Surgical Consent form precludes a finding of the "holding out" elements. Flores executed that form on April 15, 2016, at 5:30 p.m. It provides, in part, that:

> 2. I understand that this surgery/procedure or other medical treatment is to be performed by: Dr. Nacke, and such assistants and associates as may be selected by him/her and by Presence Saint Joseph Medical Center.
>
> 3. ***I understand that all practitioners who perform a surgery/procedure on me or provide treatment to me are INDEPENDENT PRACTITIONERS and not employees or agents of Presence Saint Joseph Medical Center, except for those practitioners who clearly and explicitly identify themselves as facility employees by wearing an identification badge with the facility name. I understand that each practitioner is solely and exclusively responsible for the exercise of his/her own medical judgment.***

(Emphasis in original).

The existence of a signed consent form containing a clear, concise, and unambiguous "independent contractor" disclaimer is an important but not dispositive fact in evaluating the holding out element. *James v. Ingalls Mem. Hosp.*, 299 Ill. App. 3d 627, 633 (1st Dist. 1998). In determining the effect of an independent contractor disclosure in a consent form, courts consider the precise language and the disclosure's location. *See, e.g., York*, 222 Ill. 2d at 196-97; *Lamb-Rosenfeldt v. Burke Med. Grp., Ltd.*, 2012 IL App (1st) 101558 ¶ 30; *Spiegelman v. Victory Mem. Hosp.*, 392 Ill. App. 3d 826, 911 (1st Dist. 2009). Courts have recognized situations in which a patient signed a consent form containing a disclaimer regarding an employment or agency relationship, but additional facts existed that created a triable issue of fact as to whether the hospital held out a physician as its agent. *See Churkey v. Rustia*, 329 Ill. App. 3d 239, 245 (2d Dist. 2002). Each case must, therefore, be decided on its own facts.

The defendants correctly point out that Illinois courts have consistently found that if a plaintiff signs a consent form containing clear and unambiguous independent contractor disclaimer language, such a consent form may vitiate any apparent agency claim between the hospital and the physician. *See, e.g., Mizyed v. Palos Cmty. Hosp.*, 2016 IL App (1st) 142790, ¶ 8 (affirming summary judgment favoring hospital because plaintiff signed several forms stating "I understand that all physicians providing services to me, including emergency room physicians, radiologists, pathologists, anesthesiologists, my attending physician and all physician consultants, are independent medical staff physicians and not employees or agents of Palos

Community Hospital."); *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 28 (affirming summary judgment in favor of hospital where plaintiff's decedent signed several forms stating that "'PHYSICIANS ARE NOT EMPLOYEES OF THE MEDICAL CENTER' and 'NONE OF THE PHYSICIANS WHO ATTEND ME AT THE HOSPITAL ARE AGENTS OR EMPLOYEES OF THE HOSPITAL'"); *Wallace v. Alexian Brothers Med. Cntr.*, 389 Ill. App. 3d 1081, 1083 (1st Dist. 2009) (hospital entitled to summary judgment because plaintiff signed the same consent form four times stating, "'I understand that physicians who provide professional services to me such as my attending physician . . . are not the employees or agents of [the hospital], but they are independent contractors. . . ."); *Churkey*, 329 Ill. App. 3d at 241 (affirming summary judgment because consent form stated hospital "'uses independently contracted physicians. . . . The physicians are not employees of Sherman Hospital but have been granted privileges to practice at the institution. . . .'"); *James*, 299 Ill. App. 3d at 629 (affirming summary judgment because patient signed consent form stating "'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.'").

Here, PSJMC admitted Flores around 11:15 p.m. on April 13, 2016. Masood and Alexander did not see Flores, however, until the following day at 7:00 a.m. and 9:20 a.m., respectively. Flores did not execute the General Consent form until 12:46 p.m. on April 14, 2016, and the Surgical Consent form until 5:30 p.m. on April 15, 2016. These dates and times are significant because Flores contends the medical negligence occurred before she signed either consent form. In other words, Masood and Alexander had already failed to evaluate, diagnose, treat, and prescribe antibiotics for her condition accurately or in a timely manner. The consent forms could not, therefore, have put Flores on notice that either doctor was an independent contractor because she had already received the allegedly negligent care that formed the basis of her lawsuit before she signed the form.

Flores additionally asserts that the plain language of the consent forms suggested that Masood and Nacke were employees, not independent contractors. The Surgical form states: "***I understand that all practitioners who perform a surgery/procedure on me or provide treatment to me are INDEPENDENT PRACTITIONERS and not employees or agents of Presence Saint Joseph Medical Center, except for those practitioners who clearly and explicitly identify themselves as facility employees by wearing an identification badge with the facility name.***" (Emphasis in original). Importantly, both Masood and Nacke testified they wore identification badges with their photograph, name, and "Presence Saint Joseph" on it. The defendants contend that Nacke's

deposition did not establish that he was wearing his badge; however, Nacke testified that he had no reason to believe he was not wearing scrubs and his identification badge when treating Flores. Thus, Masood and Nacke clearly and explicitly identified themselves as facility employees in accordance with the Surgical form's plain language.

Flores also argues the General Consent form is ambiguous as to the employment status of the physicians working at PSJMC. The General Consent form states: "I acknowledge and understand that *most physicians* who provide physician services at Presence Health are not employees or agents of Presence Health, but instead are independent medical practitioners and independent contractors who have privileges to care for patients at Presence Health facilities." (Emphasis added). The General Consent form's plain language merely states that "most physicians" are independent contractors, but fails to identify the specific physicians or even the practice areas to which this provision could apply. Importantly, each doctor admitted he did not inform Flores he was not a PSJMC employee. Flores could, therefore, not have known the doctors were independent contractors.

Courts have also held that if disclaimers are ambiguous or open to multiple interpretations, the disclaimers do not preclude a finding of a hospital "holding out" the physician as an employee. *See, e.g., Spiegelman,* 392 Ill. App. 3d at 837. Further, courts have found that if a disclaimer is incorporated in a multi-part consent form, the disclaimer does not fulfill the requisite clear and unambiguous independent contractor disclaimer. *Schroeder v. Northwest Cmty. Hosp.*, 371 Ill. App. 3d 584, 587 (1st Dist. 2006); *Williams*, 2019 IL App (5th) 180046, ¶ 43; *Hammer v. Barth*, 2016 IL App (1st) 143066 ¶24. Here, the independent contractor disclosure in the General Consent form is clearly ambiguous because it is contained in the same agreement for consent to treatment, financial provisions, insurance notifications, allocation for personal possessions, patients' rights and responsibilities, use and disclosure of health information, and privacy practices. Such a multi-part form with ambiguous "independent contractor" disclosure language creates a question of material fact as to whether the disclosure provided Flores with meaningful notice that her doctors were independent contractors. Further, as in both *Churkey* and *James*, there are additional facts bearing on the "holding out" element to support a question of material fact. Specifically, Masood and Nacke each wore an identification badge containing their photograph, name, and "Presence Saint Joseph" on it. Masood testified that he wore scrubs. Flores emphasized that the defendants hold themselves out as providing complete medical care.

The defendants argue that to establish "holding out," a hospital must advertise and market itself to the public. For this proposition, the defendants

rely on *Yarbrough v. Northwestern Mem'l Hosp.*, 2017 IL 121367, ¶ 39. Such reliance is not well founded. *Yarbrough* merely explained the court's rationale for the "holding out" element, following *Gilbert*. *Id.* ¶ 38. *Yarbrough* does not mandate marketing or advertising on behalf of a hospital to establish "holding out." Rather, the court explicitly stated:

> Hospitals increasingly hold themselves out to the public as the providers of health care, particularly in their marketing. . . . Patients have come to rely on the reputation of the hospital in seeking out emergency care. These patients would naturally assume that the physicians attending the emergency room are employees of the hospital, unless put on notice otherwise. Consequently, we held that, unless the patient knows or should have known that the physician providing treatment is an independent contractor, vicarious liability can attach to a hospital for the medical malpractice of its physicians under the apparent authority doctrine.

Id. ¶ 39 (citing *Gilbert*, 156 Ill. 2d at 524). The circumstances in *Yarbrough* are also markedly distinct because the plaintiff sought treatment at one hospital, but looked to impose liability on another, *Id.* ¶ 44, which is plainly not the case here.

The defendants also encourage the application of *Steele v. Provena Hospitals*. 2013 IL App (3d) 110374. They assert that *Steele* holds that a patient's signature on a consent form it is nearly always conclusive that a hospital should not be held liable for the medical negligence of an independent contractor. That proposition goes too far. The *Steele* court addressed consent language stating: "I acknowledge and understand 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." The court found such language did not put the plaintiff on notice that the doctor was an independent contractor. *Id.* ¶¶ 138-39. Importantly, the defendants acknowledge this is the identical language to the General Consent form Flores signed. Thus, contrary to the defendants' arguments, the General Consent form did not put Flores on notice that her doctors were independent contractors.

The defendants further argue that a form's reference that physicians may issue separate bills defeats the "holding out" element. Once again, the defendant's reliance on *Gore v. Provena Hospital* and *Frezados v. Ingalls Memorial Hospital* is misplaced. In both cases the courts found:

> The form at issue states clearly and concisely that none of the physicians at defendant hospital are its employees, agents, or apparent agents and are instead independent contractors. There are no exceptions to this language, and the disclaimer is not implicitly contradicted elsewhere in the form, as in *Schroeder* and *Spiegelman*. Moreover, the form specifies that the patient will receive a separate bill from each of his treating physicians.

Gore, 2015 IL App (3d) 130446, ¶ 29 (citing *Frezados*, 2013 IL App (1st) 121835, ¶ 22). Plainly, reference to the patient receiving separate bills, standing alone, did not defeat the patient's attempt to establish the "holding out" elements. Rather, both *Gore* and *Frezados* determined the clear and unambiguous independent contractor disclaimer language prevented a finding of the "holding out" element. *Gore*, ¶ 29; *Frezados*, ¶ 22.

The "justifiable reliance" element of apparent agency may be satisfied if the plaintiff or person responsible for plaintiff's care relied on the hospital, rather than a specific physician, to provide care. *Gilbert*, 156 Ill. 2d at 525. Courts have recognized a significant distinction between cases in which the plaintiff is seeking care from the hospital and cases in which the plaintiff is merely looking to the hospital as a place where the plaintiff's personal physician provides care and treatment. *Id.* at 525-26. Here, Flores and the doctors each testified that Flores did not specifically select any of the doctors that treated her. Instead, PCH transferred Flores to PSJMC because it accepted her insurance. Once there, the hospital assigned the doctors to provide care and treatment. In short, Flores has met the requirements to establish justifiable reliance on the hospital.

Lastly, the defendants argue that the General Consent form precludes a finding of the "reliance" element because the form includes the statement:

> I acknowledge that the employment or agency status of physicians 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 physician providing me with physician services be an employee of Presence Health.

As established above, this language is not persuasive because Flores executed the form after the alleged medical negligence had already occurred; consequently, the language could not operate to put Flores on notice. Ultimately, it is plain there exist genuine issues of material fact as to whether Nacke, Masood, and Alexander were the hospital's apparent agents.

Conclusion

For the reasons presented above, it is ordered that:

The motion for partial summary judgment brought by the defendants PSJMC, Presence Legacy Association, and Presence Healthcare Services as to counts nine, eleven, and thirteen, and the defendants Masood, Alexander, and Nacke is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 28 2022

Circuit Court 2075