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

Morgan Keller, individually, and Rose Maria Keller, individually and as mother and next friend of Morgan Keller, Plaintiff, v. Edward-Elmhurst Healthcare, a corporation, Elmhurst Memorial Hospital, a corporation, Elmhurst Emergency Medical Services, Ltd., a corporation, Angela McCormick, M.D., James Jaffe, R.N., Bryan Hernandez, R.N., and Lizzeth Uriostegui, R.N., Defendants.	)	No. 19 L 3457

MEMORANDUM OPINION AND ORDER

To hold a hospital liable under the doctrine of apparent agency for the acts of independent contractors, a plaintiff must prove the hospital held the independent contractor out as an employee, the hospital was aware of such representations and acquiesced, and the plaintiff relied on those representations. Here, the plaintiff provided sufficient evidence to establish the "holding out" and "reliance" elements; consequently, the defendants' motion for partial summary judgment must be denied.

Facts

On February 28, 2017, Elmhurst Memorial Hospital ("EMH") entered into an "Emergency Services Agreement" with Elmhurst Emergency Medical Services, Ltd. ("EEMS"). EEMS employed Dr. Angela McCormick as an emergency room physician. As an employee of EEMS, McCormick had staff privileges at EMH. Edward-Elmhurst Healthcare ("EEH") is the parent corporation of EMH.

On August 5, 2017, Morgan Keller sustained an injury to her right knee and was taken to EMH's emergency department. At the time, Morgan was 15 years old and her parents, Patrick and Rose Keller, assisted her at the hospital. Patrick executed the "Authorizations and Agreements" form

("Agreement") in which he consented to Morgan's treatment. The Agreement provides in relevant part:

> **3. ELMHURST MEMORIAL HOSPITAL DOES NOT EMPLOY, CONTROL, OR DIRECT THE MEDICAL CARE OF THE INDEPENDENT PHYSICIANS ON ITS MEDICAL STAFF.**
> **I understand that all of the physicians treating me at Elmhurst Memorial Hospital except the Elmhurst Memorial Medical Group (EMMG), Linden Oaks Medical Group (LOMG) and the Edward Health Ventures/Edward Medical Group physicians are independent physicians and are not agents or employees of Elmhurst Memorial Hospital or Healthcare. I also understand that the Elmhurst Clinic, LLC, Elmhurst Medical Associates, *Elmhurst Emergency Medical Services, Ltd*, Elmhurst Anesthesiologists, P.C., Elmhurst Radiologists, S.C. and Associated Pathology Consultants of Elmhurst SC, physicians are not agents or employees of Elmhurst Memorial Hospital or Healthcare. By signing this form I acknowledge that these independent physicians are not employed, supervised, or controlled by Elmhurst Memorial Hospital. I understand that each of these physicians has staff privileges but treats patients based upon his/her own independent medical judgment and that he/she, and not Elmhurst Memorial Hospital, is solely responsible for the care, treatment, and services that he/she orders, requests, directs, or provides. . . .**

(Emphasis added in italics only.) Further, directly above the signature line, the form provides:

> I have read this entire form and any questions I had about this form have been answered to my satisfaction. I understand and agree to its contents.

McCormick evaluated Morgan and diagnosed her with a right knee and leg sprain. On August 8, 2017, Morgan returned to the emergency department at EMH and underwent a US Venous Doppler of her right leg. The study revealed significant dampened flow in the right popliteal artery. Morgan was transferred to Loyola University Medical Center and underwent emergency surgery. After the operation, Morgan developed necrosis and ischemia of the muscles and consequently underwent a knee-through amputation of her right leg.

On August 2, 2021, Morgan, individually, and Rose Maria, individually and as mother and next friend of Morgan, filed a 14-count second amended complaint against the defendants. Count one through four are directed against EEH for negligence under a *respondeat superior* theory, the Family Expense Act, and ordinary negligence. The case proceeded to discovery. Patrick and Rose testified it was their understanding that McCormick was an employee of EEH and EMH. Patrick and Rose noted that neither McCormick nor anyone from EEH or EMH informed them that McCormick was not an EEH or EMH employee. Both parents explained they did not choose McCormick to be Morgan's doctor, but relied on EEH and EMH to provide her medical care. Both parents remembered McCormick wearing an identification badge and lab coat with the words "Elmhurst Hospital." Both Patrick and Rose admitted that they did not read the Agreement before signing it or ask any questions concerning the form.

McCormick was also deposed. McCormick testified she was an EEMS employee. McCormick noted she did not inform the Kellers she was not an EEH or EMH employee. McCormick explained she was required to wear an identification badge that had her name, "Emergency Medicine," and the title "Medical Staff" on it. The badge was attached to a lanyard clip that had the words "Edward-Elmhurst" on it. McCormick explained she would wear hospital issued scrubs and a lab coat that had her name and "Emergency Medicine" on it. McCormick further testified that she worked exclusively at Edward-Elmhurst Immediate Care centers.

On October 1, 2021, EEH and EMH (collectively "defendants") filed a motion for partial summary judgment. 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).

In this instance, the defendants' motion follows from the second method of summary judgment. The defendants argue Morgan does not have sufficient evidence to prove that McCormick was an actual or apparent agent of the defendants. It is axiomatic that a hospital may be held vicariously liable based on an agency relationship between the hospital and a physician. *Gilbert v. Sycamore Municipal Hospital,* 156 Ill. 2d 511, 518 (1993). An agency relationship exists if a principal is bound by the actions of its agents if the agent has the authority to act on the principal's behalf. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 660 (2006). An agent's authority can be either 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 International, Inc.*, 372 Ill. App. 3d 127, 134 (1st Dist. 2007).

Here, McCormick testified she was not the defendants' employee, but of EEMS. Likewise, in response to Morgan's second amended complaint, the defendants answered that McCormick was "an independent medical provider with staff privileges." Thus, defendants assert there was no employment relationship with McCormick. Additionally, defendants argue there is nothing in the record to establish that they had the right to control McCormick's conduct.

Morgan counters that the "Emergency Services Agreement" establishes the defendants had the right to control McCormick's actions and the defendants agreed to provide performance compensation to McCormick and set the fee schedule for her medical services billed to patients. Importantly, this agreement is between EMH and EEMS. That fact is critical because only parties to a contract and any third-party beneficiaries of a contract have standing to enforce the rights and benefits under the contract. *Perkinson v. Courson*, 2018 IL App (4th) 170364, ¶ 78. Illinois law holds a strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party. *Bates & Rogers Construction Corp. v. Greely & Hansen*, 109 Ill. 2d 225 (1985).

Illinois recognizes two types of third-party beneficiaries, intended and incidental. An intended beneficiary is intended by the parties to the contract to receive a benefit for the performance of the agreement and has rights and may sue under the contract; an incidental beneficiary has no rights and may not sue to enforce them. *MBD Enterprises, Inc. v. American Nat'l Bank of Chicago*, 275 Ill. App. 3d 164 (1st Dist. 1995). To be deemed a third-party beneficiary, the terms of the contract must clearly express intent to benefit the third party or an identifiable class of which the third party is a member. *Perkinson*, 2018 IL App (4th) 170364, ¶ 78. When an express declaration of intent is lacking, a strong presumption exists "'that the third party is not a beneficiary and that the parties contracted to benefit only themselves.'" *Id.*

There is no express declaration in the "Emergency Services Agreement" that the parties specifically intended to benefit McCormick. McCormick was, therefore, not an intended third-party beneficiary and was, at most, an incidental beneficiary. As a result, McCormick was not bound by

the EMH-EEMS Agreement, and, likewise, the defendants could not control McCormick through the agreement. In sum, there is nothing in the record to establish that the defendants had the right to control McCormick's conduct; consequently, McCormick did not have actual authority to act for the defendants and the defendants cannot be held vicariously liable under that theory.

Illinois has long recognized the doctrine of apparent authority, which refers to a type of an agency relationship. *Gilbert*, 156 Ill. 2d at 523. Under apparent authority, a principal will be bound not only by that authority actually given to another, but also by the authority that appears to have been given. *Id.* Apparent authority in an agent is the authority the principal knowingly permits the agent to assume, or the authority the principal holds the agent out as possessing. *Id.* Apparent authority is that which 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 been led to rely on the appearance of authority in the agent. *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 a question of fact. *Schoenberger v. Chicago Transit Auth.*, 84 Ill. App. 3d 1132, 1138 (1st Dist. 1980) (citing *Paine v. Sheridan Trust & Savings Bank*, 342 Ill. 342 (1930)).

Under the doctrine of apparent authority, a hospital may be held vicariously liable for the negligent acts of a physician providing care at the hospital, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, the physician is 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 was alleged to be negligent was a hospital employee or agent; (2) if the agent's acts 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, consistent with ordinary care and prudence. *Id.* at 525.

The first two elements encompass the "holding out" aspect of apparent agency. *Williams v. Tissier*, 2019 IL App (5th) 180046, ¶ 28. The holding out

element does not require a showing the hospital made an express representation that the allegedly negligent person was an employee. *Gilbert*, 156 Ill. 2d at 525. Rather, the element is satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors. *Id.*

With respect to the third element, courts have determined a plaintiff's apparent agency claim is satisfied if the plaintiff reasonably relies on a hospital to provide medical care, rather than on a specific physician. *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 merely as a place for his or her personal physician to provide medical care. *York*, 222 Ill. 2d at 151.

Based on these principles of apparent agency applied to the record, there exists a genuine issue of material fact as to whether McCormick was the hospital's apparent agent. The defendants argue explicitly that they did not hold out McCormick as an employee as evidenced by the agreement that Patrick signed. That agreement provides in relevant part:

> **3. ELMHURST MEMORIAL HOSPITAL DOES NOT EMPLOY, CONTROL, OR DIRECT THE MEDICAL CARE OF THE INDEPENDENT PHYSICIANS ON ITS MEDICAL STAFF.**
> **I understand that all of the physicians treating me at Elmhurst Memorial Hospital except the Elmhurst Memorial Medical Group (EMMG), Linden Oaks Medical Group (LOMG) and the Edward Health Ventures/Edward Medical Group physicians are independent physicians and are not agents or employees of Elmhurst Memorial Hospital or Healthcare. I also understand that the Elmhurst Clinic, LLC, Elmhurst Medical Associates, *Elmhurst Emergency Medical Services, Ltd*, Elmhurst Anesthesiologists, P.C., Elmhurst Radiologists, S.C. and Associated Pathology Consultants of Elmhurst SC, physicians are not agents or employees of Elmhurst Memorial Hospital or Healthcare. By signing this form I acknowledge that these independent physicians are not employed, supervised, or controlled by Elmhurst Memorial Hospital. I understand that each of these physicians has staff privileges but treats patients based upon his/her own independent medical judgment and that he/she, and not Elmhurst Memorial Hospital, is solely responsible for the**

care, treatment, and services that he/she orders, requests, directs, or provides. . . .

(Emphasis added in italics only.)

The existence of a signed consent form containing a clear, concise, and unambiguous "independent contractor" disclaimer is an important fact to consider in evaluating the holding out element, but such a disclaimer is not dispositive. *James v. Ingalls Mem'l Hosp.*, 299 Ill. App. 3d 627, 633 (1st Dist. 1998). To determine the effect of an independent contractor disclosure in a consent form, courts consider the precise language and the location of the disclosure. *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'l Hosp.*, 392 Ill. App. 3d 826, 911 (1st Dist. 2009). Courts have also recognized situations in which a patient signed a consent form containing a disclaimer regarding an employment or agency relationship, but additional facts exist that create a triable issue of fact as to whether a hospital held a physician out as its agent. *See, e.g., Churkey v. Rustia*, 329 Ill. App. 3d 239, 245 (2d Dist. 2002). Thus, each case must be decided on its own specific facts.

The defendants are correct that Illinois courts have consistently found that if a plaintiff signs a consent form containing clear and unambiguous independent contractor disclaimer language, a defendant can vitiate any claim of apparent agency 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 because 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 Medical Center*, 389 Ill. App. 3d 1081, 1083 (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 the 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 a 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.'").

The defendants rely on *York* for the proposition that a patient who signs a disclaimer is foreclosed from arguing there was apparent agency between the independent contractor and the hospital. The *York* court, however, ultimately found the defendant hospital vicariously liable for the independent contractor physician because the hospital failed to place the plaintiff on notice that the physician was an independent contractor, and the physician wore either scrubs covered with the hospital logo or a lab coat displaying the hospital emblem; and nothing in the treatment consent form alerted plaintiff that the physician was an independent contractor. 222 Ill. 2d at 196.

Here, Morgan argues the agreement is unclear because it does not specifically identify McCormick as an independent contractor. Rather, the agreement states, "***Elmhurst Emergency Medical Services, Ltd . . .*** **physicians are not agents or employees of Elmhurst Memorial Hospital or Healthcare. . . .**" (Emphasis added in italics only.) The agreement fails, however, to specify or identify those physicians. Further, there is nothing in the record indicating the Kellers knew or believed based on the agreement that McCormick worked for EEMS.

Further, McCormick's badge contained her name, the field "Emergency Medicine," and the title "Medical Staff." The badge did not, however, identify her as an EEMS physician. Moreover, neither McCormick nor any of the defendants informed Morgan that McCormick was not an employee. Despite the defendants' contentions otherwise, it is immaterial whether the Kellers read the agreement, as it merely notified them that various independent contractors worked at the hospital. Thus, there was no way the Kellers could have known that McCormick was an EEMS employee and, thus, an independent contractor.

The law also provides that if disclaimers are ambiguous or open to multiple interpretations, such disclaimers do not preclude a finding of a hospital holding out the physician as an employee. *See Spiegelman*, 392 Ill. App. 3d at 837. Further, courts have found that disclaimers incorporated in a multi-part consent form do not meet 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, unlike *Lamb-Rosenfeldt* and *Wallace*, the location of the disclaimer language and the patient acknowledgment is printed on page two of the agreement, just above the signature line, but is not highlighted in bold print or capital letters. The acknowledgment states: "I have read this entire form and any questions I had about this form have been answered to my satisfaction. I understand and agree to its contents." Yet, the independent contractor disclosure and the acknowledgment and signature line are separated by multiple paragraphs covering the authorization for consent to treatment, responsibility for payment, assignment of benefits, financial provisions, and the liability waiver for personal valuables. Thus, this multi-part form with ambiguous independent contractor disclosure language creates a question of material fact as to whether the disclosure provided the Kellers meaningful notice that McCormick was an independent contractor.

Further, as in both *Churkey* and *James*, there are additional facts bearing on the holding out element sufficient to support a question of material fact. Here, McCormick wore a hospital issued lab coat, scrubs, and badge. Her badge was attached to her lab coat by a lanyard clip that stated "Edward-Elmhurst." Morgan also emphasizes that the defendants hold themselves out as providing comprehensive emergent care and advertise the awards received by their emergency medicine physicians. Further, McCormick's badge classified her field as "Emergency Medicine" but did not indicate she was an EEMS employee.

The justifiable reliance element of apparent agency may be satisfied if the plaintiff or person responsible for plaintiff's care relied on the hospital itself to provide care, rather than upon a specific physician. *Gilbert*, 156 Ill. 2d at 525. Courts have recognized a significant distinction between cases in which the plaintiff sought care from the hospital and cases in which the plaintiff was merely looking to the hospital as a place where the plaintiff's personal physician provided care and treatment. *Id.* at 525-26. Here, the Kellers testified they did not specifically select McCormick to treat Morgan. Instead, they chose the hospital because it was the closest to their home and the hospital assigned McCormick to Morgan's case. Thus, Morgan has met the requirements establishing justifiable reliance on behalf of the hospital.

Conclusion

For the reasons presented above, it is ordered that:

The defendants' motion for partial summary judgment is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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