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

Joanne Pettitt, as independent administrator of the estate of Nicole Pettitt, deceased,	)	
Plaintiff,	)	
v.	)	No. 19 L 5990
Palos Community Hospital; Wayne C. Lue, M.D.; Illinois Gastroenterology Group, L.L.C.; Fadi Aldaas, M.D.; Anas Nahhas, M.D.; and Midwest Pulmonary, Critical Care & Sleep Consultants, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Under the doctrine of apparent agency, a hospital may be liable for the conduct of an independent physician if the hospital held out the physician as an employee and the plaintiff justifiably relied on those representations. Here, the plaintiff has provided sufficient evidence to satisfy the holding out and reliance elements of apparent agency. For that reason, summary judgment on the issue of apparent agency must be denied.

Facts

On November, 4, 2018, Nicole Pettitt arrived at the emergency room of Palos Community Hospital ("PCH") in Palos Heights, complaining of abdominal pain and vomiting. Nicole's father later testified that prior to going to the hospital, Nicole "could hardly walk. She was in tears. She was lost. She didn't know what to do[.]" During her admission, Nicole signed a six-part consent form provided by PCH, including the disclaimer depicted below that Nicole initialed:

> 2. **INDEPENDENT PHYSICIAN SERVICES:** I understand and acknowledge that the Cardiologists, Radiologists, Anesthesiologists, Pathologists, Emergency Medicine physicians and other independent physicians and their advanced practice nurses and physician assistants who may provide professional services to me are NOT employees or agents of Palos Hospital. These medical professionals are independent contractors which I understand and acknowledge I am personally engaging to provide care and treatment independent of their association or affiliation with PMG or PH. I also understand and acknowledge the professional physician services provided by these physicians will be billed to me separately and apart from any services provided and billed by Palos Hospital and its affiliates, including Palos Medical Group.
>
> I further understand and acknowledge that I have had any questions regarding physician employment at PH or PMG and their affiliates answered to my satisfaction prior to initialing this section and signing this form.
>
> Initials: NP
>
> **I understand that the practice of medicine is not an exact science and acknowledge that no warranties or guarantees have been made or can be made regarding any care, treatment, testing or other related services that may be provided to me.**

A computed tomography scan of Nicole's abdomen and pelvis revealed stool throughout the colon with a dilated rectum, likely the result of fecal impaction. The CT scan also showed "[n]o evidence of free air or free fluid," meaning no evidence of a bowel perforation. PCH admitted Nicole to the intensive care unit where Dr. Fadi Aldaas was the on-call physician. Aldaas was the attending physician for Nicole until about 8:30 a.m. on November 5, 2018, but Aldaas never saw or examined Nicole.

At about 4:00 a.m. on November 5, Nicole woke up with abdominal pain, which she reported to a PCH nurse as ten out of ten in severity. Approximately four hours later, Dr. Anas Nahhas examined Nicole. Nahhas did not perform a rectal exam or order a surgical consultation. At about 10:26 a.m., Dr. Wayne Lue saw Nicole, but he also did not perform a rectal exam or order a surgical consultation.

Around 8:35 p.m., Lue received a page, after which he ordered a surgical consultation. At about 9:00 p.m., Nicole started vomiting and became unresponsive, prompting a code blue. At some point that evening, Nicole suffered a perforated colon. Around midnight, a general surgeon examined Nicole and determined he could not perform a fecal disimpaction or exploratory laparotomy because of Nicole's critical condition. Nicole's perforated colon ultimately led to sepsis and septic shock. Nicole died on November 6 at 2:00 a.m.

On May 31, 2019, Joanne Pettitt, Nicole's mother and independent administrator of Nicole's estate, filed a complaint. The action asserts claims of negligence against Aldaas, Nahhas, and Lue, as well as claims against PCH under a vicarious liability theory for the doctors' alleged negligence. The action also asserts additional claims, including one against PCH, that are not the subject of the present motion.

PCH filed a motion for partial summary judgment, arguing that it cannot be held liable for the acts or omissions of Aldaas, Nahhas, and Lue because they were not actual or apparent agents of PCH. The record indicates that Aldaas and Nahhas are pulmonary medicine physicians employed by Midwest Pulmonary, Critical Care & Sleep Consultants, LLC, while Lue is a gastroenterologist employed by Illinois Gastroenterology Group, LLC.

Analysis

The defendants bring their summary judgment motion pursuant to the Code of Civil Procedure. Summary judgment is appropriate if the evidentiary record shows "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 Code of Civil Procedure permits partial summary judgment on discrete issues for which there is no genuine dispute of material fact even if other issues involving such disputes

remain unresolved. *Id.* The purpose of summary judgment is not to resolve issues of material fact but rather to determine whether such issues exist. *Monson v. City of Danville*, 2018 IL 122486, ¶ 12 (citing *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 42-43 (2004)).

Summary judgment should not be granted unless "the movant's right to judgment is clear and free from doubt." *Seymour v. Collins*, 2015 IL 118432, ¶ 42 (citing *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007)). Accordingly, courts determining whether a genuine dispute of material fact exists are required to view the record in the light most favorable to the non-movant, construing all facts and reasonable inferences liberally in their favor. *See Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if either the material facts remain in dispute or reasonable observers could draw different inferences based on the undisputed facts. *See Seymour*, 2015 IL 118432, ¶ 42 (citing *Pielet v. Pielet*, 2012 IL 112064, ¶ 53)).

An agency relationship arises if an agent acts on behalf of a principal and is subject to the principal's right of control. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 660 (2d Dist. 2006). Whether an agency relationship exists is a question of fact, unless the undisputed facts permit no other reasonable conclusion. *See Shoemaker v. Elmhurst-Chicago Stone Co.*, 273 Ill. App. 3d 916, 920 (1st Dist. 1994) (citing *Perkinson v. Manion*, 163 Ill. App. 3d 262, 266 (5th Dist. 1987)). If an agency relationship exists, a principal may be held vicariously liable for the torts of the agent acting within the scope of the agency. *See Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 522 (1993).

Agency may be predicated on actual or apparent authority. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 34 (citing *Zahl*, 365 Ill. App. 3d at 660). Before 1993, Illinois hospitals could be found vicariously liable through an agency relationship only if the physician's purported agency was predicated on actual authority. *Schroeder v. Northwest Cmty. Hosp.*, 371 Ill. App. 3d 584, 590 (1st Dist. 2006). In 1993, however, the Illinois Supreme Court recognized the "reality of modern hospital care" in which patients seeking emergency care usually rely on a hospital's reputation, rather than individual doctors. *Frezados v. Ingalls Mem'l Hosp.*, 2013 IL App (1st) 121835, ¶ 14 (quoting *Gilbert*, 156 Ill. 2d at 521). Given that reality, a hospital may also be vicariously liable through agency relationships with physicians predicated on apparent authority. *Id.* Actual authority is the authority given, whether express or implied, by a principal to its agent. *C.A.M. Affiliates, Inc. v. First Am. Title Ins. Co.*, 306 Ill. App. 3d 1015, 1021 (1st Dist. 1999). Apparent authority is the authority imposed by equity that a principal holds out an agent as possessing and that "a reasonably prudent person, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." *Gilbert*, 156 Ill. 2d at 523-24 (citing *State Sec. Ins. Co. v. Burgos*, 145 Ill. 2d 423, 431-32 (1991)).

To prove agency predicated on actual authority, mere allegations of agency are insufficient. *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶ 28 (citing *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (1996)). Rather, a claimant must show that, "(1) a principal/agent relationship existed, (2) the principal controlled or had the right to control the conduct of the agent, and (3) the alleged conduct of the agent fell within the scope of the agency." *Id.* (citing *Wilson v. Edward Hosp.*, 2012 IL 112898, ¶ 18). In this case, PCH did not employ any of the defendant doctors. Aldaas and Nahhas each testified that Midwest Pulmonary Critical Care Consultants employed them. For his part, Lue testified he was a member of Illinois Gastroenterology Group. Nothing in the record suggests that PCH simultaneously employed any of the three doctors. Further, the record does not indicate that PCH had the right to control the doctors' conduct. In short, the doctors had no actual authority to act on behalf of PCH; consequently, PCH cannot be held vicariously liable for the doctors' conduct under an actual agency theory.

In contrast, to prove agency predicated on apparent authority, a claimant must show that: (1) either the principal or the agent acted in a way that would lead a reasonable person to believe the alleged tortfeasor was the principal's agent; (2) the principal knew of and acquiesced in the agent's acts, thereby creating the appearance of authority; and (3) the plaintiff relied on the principal's or the agent's conduct. *See Gilbert*, 156 Ill. 2d at 525. The first two elements comprise the so-called "holding out" element of apparent agency. *Gilbert*, 156 Ill. 2d at 525. In a medical negligence case, a hospital will not be liable if the patient knew or should have known the treating physician was an independent contractor, rather than the hospital's agent. *Id.* at 522. The existence of a consent form disclaiming agency between a hospital and a physician is one important factor in determining whether a patient knew or should have known the physician was an independent contractor. *James by James v. Ingalls Mem'l Hosp.*, 299 Ill. App. 627, 633 (1st Dist. 1998).

PCH correctly notes that a patient's signature on an unambiguous consent form may show the patient knew or should have known the physician was an independent contractor. *See, e.g., Mizyed v. Palos Cmty. Hosp.*, 2016 IL App (1st) 142790, ¶ 8 (affirming summary judgment for 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 v. Burke Med. Grp., Ltd.*, 2012 IL App (1st) 101558 ¶ 28 (affirming summary judgment for hospital because plaintiffs decedent signed several forms stating: "'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 Bros. Med. Ctr.*, 389 Ill. App. 3d 1081, 1083 (1st Dist. 2009) (hospital entitled to summary

judgment because plaintiff signed 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'"). Yet, the existence of such a disclaimer is not dispositive. *James*, 299 Ill. App. at 633. Disclaimers that are confusing, ambiguous, or open to multiple interpretations do not preclude a finding that a hospital held out a physician as an agent. *See Spiegelman v. Victory Mem'l Hosp.*, 392 Ill. App. 3d 826, 837 (1st Dist. 2009). Further, courts have found that disclaimers incorporated in a multi-part consent form were not sufficiently clear and unambiguous to support summary judgment on the issue of apparent agency. *See, e.g.*, *id.* (finding a jury could reasonably conclude multi-part consent form was "confusing and ambiguous"); *Schroeder*, 371 Ill. App. 3d at 587, 594 (finding summary judgment inappropriate because six-part consent form contained (1) general consent for treatment, (2) independent physician disclosure, (3) release of responsibility for valuables, (4) assignment of insurance benefits, (5) guarantee of payment, and (6) an acknowledgement); *Williams*, 2019 IL App (5th) 180046 ¶¶ 6, 9, 46 (reversing lower court's grant of summary judgment in which independent physician disclaimer was one of several consent forms plaintiff signed).

Joanne contends the PCH consent forms were ambiguous. The most relevant portion of that form is, again, depicted below:

2. **INDEPENDENT PHYSICIAN SERVICES:** I understand and acknowledge that the Cardiologists, Radiologists, Anesthesiologists, Pathologists, Emergency Medicine physicians and other independent physicians and their advanced practice nurses and physician assistants who may provide professional services to me are NOT employees or agents of Palos Hospital. These medical professionals are independent contractors which I understand and acknowledge I am personally engaging to provide care and treatment independent of their association or affiliation with PMG or PH. I also understand and acknowledge the professional physician services provided by these physicians will be billed to me separately and apart from any services provided and billed by Palos Hospital and its affiliates, including Palos Medical Group.

I further understand and acknowledge that I have had any questions regarding physician employment at PH or PMG and their affiliates answered to my satisfaction prior to initialing this section and signing this form.

Initial: [illegible]

I understand that the practice of medicine is not an exact science and acknowledge that no warranties or guarantees have been made or can be made regarding any care, treatment, testing or other related services that may be provided to me.

Joanne argues that the defendant physicians do not fall within any of the disclaimer's listed categories of specialists, and notes that Aldaas and Nahhas are pulmonologists and Lue is a gastroenterologist. Further, Joanne argues that the phrase, "other independent physicians who may provide professional services," is ambiguous because the failure to specify that *all* "other independent physicians" were not agents or employees of the hospital means that *some* "other independent physicians" could have been PCH agents or employees.

In response, PCH relies on *Frezados* and *Wallace* to argue that the disclaimer is clear and unambiguous. In *Frezados*, the First District upheld summary judgment for the defendant-hospital on apparent agency grounds because the hospital's disclaimer form specifically identified the emergency department and urgent aid physicians treating the plaintiff-patient as independent physicians, and signs posted in the waiting room and treatment area said the same. 2013 IL App

(1st) 121835 ¶¶ 17, 26. In *Wallace*, the First District similarly upheld summary judgment for the defendant-hospital because the relevant disclaimer specifically identified the attending and consulting defendants as independent contractors, and the plaintiff-mother contradicted her own testimony as to whether she actually signed the associated consent form. *See* 389 Ill. App. 3d at 1088-90, 1093.

Here, the relevant portion of the PCH disclaimer provides:

> [T]he Cardiologists, Radiologists, Anesthesiologists and Pathologists, Emergency Medicine physicians and other independent physicians . . . who may provide professional services . . . are **NOT** employees or agents of Palos Hospital. These physicians are independent contractors which I understand and acknowledge I am personally engaging to provide care and treatment independent of their association or affiliation with PMG or PH.

On a previous 2016 visit, Nicole had initialed "NAP" twice next to the paragraph containing this language. On the 2018 version of the form, however, Nicole initialed next to the paragraph immediately below, acknowledging that any questions she had regarding physician employment at the hospital had been answered to her satisfaction. PCH also asserts that the phrase, "other independent physicians who may provide professional services," includes Aldaas, Nahhas, and Lue. Further, each physician had a badge identifying him as an "independent physician."

Joanne argues that the language in the PCH disclaimer is sufficiently ambiguous to raise a genuine issue of material fact. Unlike in *Frezados* and *Wallace*, the PCH disclaimer did not specifically identify Nicole's treating physicians as independent contractors. *Cf.* 2013 IL App (1st) 121835, ¶ 17 (consent form specifically identified defendant emergency department and urgent aid physicians as independent physicians); 389 Ill. App. 3d at 1088 (consent form specifically identified defendant attending and consulting physicians as independent contractors). Joanne is also correct that the phrase, "other independent physicians," does not necessarily mean *all* "other independent physicians." A reasonable jury could, therefore, find that Nicole had reasonably understood the disclaimer to mean that *some* "other independent physicians" were not employees, while others were.

Given that understanding, the badges identifying Aldaas, Nahhas, and Lue as independent physicians would be irrelevant because they would not have given Nicole any way of discerning between employee and non-employee physicians. Even if the badges' content were relevant, nothing in the record suggests that Nicole ever had the opportunity to see the doctors' badges. Aldaas never met Nicole in person while Nahhas testified he typically entered PCH from the lobby where he did not

have to display his badge. Thus, there is evidence in the record to show that Nicole would have had no way of identifying Aldaas and Nahhas as independent physicians. And while it is undisputed that Lue was wearing his independent physician badge when he saw Nicole on November 5, 2018, the ambiguity in the PCH consent form could have reasonably led Nicole to conclude that PCH employed Lue as an independent physician. On its own, the term, "independent physician," does not necessarily give the reasonably prudent person exercising diligence and discretion notice that the physician is not a hospital employee. *See Spiegelman*, 392 Ill. App. 3d at 837 (disclaimer identifying physician as "independent contractor" could still be confusing).

Several other facts bolster the conclusion that a genuine issue of material fact exists as to whether Nicole had notice of her doctors' status as independent contractors. First, the relevant disclaimer language appeared within one part of the hospital's six-part consent form. By comparison, the *Schroeder* court found a markedly similar six-part consent form to be ambiguous. *See* 371 Ill. App. 3d at 587, 594.

Second, the consent form is printed entirely in small font, as depicted above, and the independent physician disclaimer is not prominently displayed. The line Nicole initialed on her 2018 visit appears in the same numbered item as the disclaimer, but next to a separate paragraph concerning whether Nicole's questions had been answered. Immediately following the initialed paragraph—again, in the same numbered item—appears bolded language disclaiming any guarantees or warranties as to the care, treatment, and services that PCH could provide. Arguably, the disclaimer is the least prominent portion of the numbered item in which it appears. The First District has reversed summary judgment in which the patient's signed consent form was similarly printed entirely in small font and the independent physician disclaimer was not prominently displayed. *See Williams*, 2019 IL App (5th) 180046, ¶¶ 39, 59.

Third, the consent form contained language indicating that "diagnostic procedures and medical care and treatment as necessary and appropriate . . . may be provided or performed *by the hospital, nurses, other health care providers, and physicians*." (Emphasis added). Such language suggests that PCH employs physicians, thereby creating the potential for patient confusion as to which personnel are hospital employees and which are independent contractors. *See Speigelman*, 392 Ill. App. 3d at 837 (finding disclosure that "hospital employees" would attend to medical needs was potentially confusing). In contrast, the *Frezados* court relied on the absence of such language in upholding summary judgment. 2013 IL App (1st) 121835, ¶ 22.

Finally, construing evidence liberally in favor of Nicole's estate, the record suggests that she was in no state to parse the language of the consent form when

she arrived at PCH. Nicole's father testified that prior to going to the hospital, Nicole "could hardly walk. She was in tears. She was lost. She didn't know what to do[.]" When she arrived at the emergency room, Nicole complained of abdominal pain and vomiting, and was also experiencing anal leakage. Several hours later, Nicole reported her pain as 10 out of 10 in severity. In a case later withdrawn on proximate causation grounds, the First District found the ambiguity of a defendant-hospital's consent form to be exacerbated by the pain its patient was experiencing when she signed the form. *Perez v. St. Alexius Med. Ctr.*, 2020 IL App (1st) 181887 ¶ 88. Similarly, a jury could reasonably find in this case that Nicole's condition when she signed the consent form exacerbated the form's ambiguity. *See id.*

In addition to the holding out element, a plaintiff seeking to avoid summary judgment on apparent agency must also show that the individual interacting with the purported agent justifiably relied on the principal's conduct. *See Robers v. Condell Med. Ctr.*, 344 Ill. App. 3d 1095, 1097 (2d Dist. 2003). In a medical negligence case, justifiable reliance may be established through evidence that the patient relied on the hospital, rather than a specific physician, to provide care. *Gilbert*, 156 Ill. 2d at 525. Courts distinguish between cases in which the plaintiff sought care from a hospital and cases in which the plaintiff merely looked to the hospital as a place where the plaintiff's personal physician provided care and treatment. *Id.* at 525-26. Here, Nicole's father testified that she went to PCH because it was the closest hospital to their home. Further, nothing in the record suggests that Nicole chose Aldaas, Nahhas, and Lue for her treatment. Although Lue had a prior physician-patient relationship with Nicole, there is no evidence that Nicole had any influence over selecting Lue for her consultation, other than going to PCH for emergency care. Joanne has, therefore, sufficiently established Nicole's justifiable reliance.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendant's summary judgment motion is granted in part, and denied in part;
2. Summary judgment is granted on the issue of whether Aldaas, Nahhas, and Lue were actual agents of PCH;
3. The claims of actual agency are dismissed with prejudice; and
4. Summary judgment is denied on the issue of whether Aldaas, Nahhas, and Lue were apparent agents of PCH.

Judge John H. Ehrlich

AUG 15 2022

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge