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### Apparent Authority and Healthcare in Illinois - Revisited, 27 N. Ill. U. L. Rev. 11 (2006)

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# Apparent Authority and Healthcare in Illinois – Revisited

MARC D. GINSBERG\* AND PATRICIA C. NOWAK\*\*

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## I. INTRODUCTION

The notion that hospitals may be vicariously liable for negligent acts committed by non-agent physicians on hospital premises, indisputably, has become a fundamental component of Illinois tort law.<sup>1</sup> Vicarious liability under these circumstances results from “apparent authority,” a doctrine adopted from the commercial side of agency law,<sup>2</sup> as well as the doctrine of *respondeat superior*.<sup>3</sup>

This topic was discussed in a recent article in this law review.<sup>4</sup> The fundamental components of apparent authority were discussed in detail in the aforementioned article, and therefore, will not be discussed here. In the

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The views and opinions of the authors are not necessarily those of their law firm or the law firm’s clients.

1. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 794 (Ill. 1993).
2. 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 724 (2d ed. 1914).
3. See Marc D. Ginsberg, *Apparent Authority and Healthcare in Illinois*, 22 N. ILL. U. L. REV. 475, 476-78 (2002).
4. *Id.*

“Special Problems” section of that article,<sup>5</sup> the “reliance” element of apparent authority was addressed.<sup>6</sup> Specifically, the author questioned: “Is reliance necessary to ‘lure’ the patient to the hospital in the first instance?”<sup>7</sup> Other “reliance” issues were also raised.

The reliance prong of apparent authority in healthcare is particularly troublesome because it simply does not work as well as it does in the context of commercial litigation. In the commercial setting, the application of apparent authority involves a third party’s reliance on the agent’s appearance of authority to represent a principal in a commercial transaction, despite the agent’s lack of authority to do so. Therefore, apparent authority in contract only applies when an agent executes an unauthorized transaction on behalf of a principal. The third party is able to enforce the unauthorized transaction against the principal if the third party can prove that the principal held out the agent to the third party as having the authority to enter into the transaction and the third party could reasonably rely on the appearance of authority.<sup>8</sup>

In the commercial setting, the application of apparent authority is sensible, as it protects an innocent third party from bearing the risk of loss perpetrated by an unauthorized agent. As previously noted in this law review, apparent authority in healthcare is a difficult, ill-fitting concept, which seeks to create a fictitious agency relationship and engrafts *respondeat superior* to create vicarious tort liability.<sup>9</sup> Fashioning agency principles of apparent authority to fit the healthcare setting is a misapplication of the basic principles of agency law.

The reliance element of apparent authority has become a culprit worthy of further examination due to recent case law in Illinois. Since *Gilbert v. Sycamore Municipal Hospital* held that “reliance” is a component of the apparent authority equation,<sup>10</sup> it is valuable to re-examine “reliance,” particularly in light of the Illinois Supreme Court’s most recent pronouncement of the topic in *York v. Rush-Presbyterian-St. Luke’s Medical Center*.<sup>11</sup> *York* has effectively abolished the reliance element.

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5. *Id.* at 488-91.

6. *Id.* at 488-90.

7. *Id.* at 488.

8. See *Kasselder v. Kapperman*, 316 N.W.2d 628, 630 (S.D. 1982).

9. Ginsberg, *supra* note 3.

10. *Gilbert*, 622 N.E.2d at 795-96.

11. 854 N.E.2d 635 (Ill. 2006).

## II. APPARENT AUTHORITY AND RELIANCE

### A. THE RULE BEFORE *YORK*

In the healthcare setting, the third party in the apparent authority equation is typically the patient as the consumer of care. The patient is the target of the “holding out” process – the hospital holds out, advertises, or informs the patient that non-agent physicians, with staff privileges only,<sup>12</sup> are representatives of the hospital. The patient believes that the hospital provides the care, essentially through its employees.

Under *Gilbert*, reliance occurs if “the plaintiff acted in reliance upon the conduct of the hospital or its agent.”<sup>13</sup> This particularly unhelpful statement has created more problems than it has solved. What is “reliance” in a healthcare setting? If there are circumstances which prove reliance, certainly there must exist circumstances to demonstrate non-reliance such that apparent authority will not apply and hospital vicarious liability will not result.

Reliance seems to suggest a mental element – if not intent, then, at least, awareness. Nevertheless, the unconscious patient has received the benefit of apparent authority in Illinois.<sup>14</sup>

As noted in the aforementioned law review article:

In *Monti v. Silver Cross Hospital*, the appellate court considered the case of an unconscious patient receiving hospital care. The court held that apparent agency could apply despite the patient’s inability to decide which hospital to attend. Essentially, the court reasoned that persons responsible to help the patient obtain emergency care relied on the hospital to provide this care. The *Monti* court did not desire to exclude unconscious patients from using apparent authority to hold a hospital vicariously liable for medical negligence.

Of course, the “reasoning” in *Monti* further contorts the concept of apparent authority. There simply cannot be any

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12. See BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 455 (3d ed. 1997) (“A physician or other health care professional may treat patients in a particular hospital only if the practitioner has “privileges” at that hospital. The hospital does not pay a fee or salary to a health care professional who only holds privileges and who has no other relationship (such as employment, a contract for services or a joint business venture) with the hospital.”).

13. *Gilbert*, 622 N.E.2d at 795 (quoting *Pamperin v. Trinity Mem’l Hosp.*, 423 N.W.2d 848, 856 (Wis. 1988).

14. *Monti v. Silver Cross Hosp.*, 637 N.E.2d 427 (Ill. App. Ct. 1994).

patient reliance when the patient is unconscious; there is no state of mind. That others may “rely” on the hospital by taking a patient to an emergency room is of no moment. There is either a reliance element or there is not. *Monti* is a perfect example of how a contorted theory is easy to further contort by merely excusing proof of an element of the cause of action.<sup>15</sup>

Apparent authority and healthcare in Illinois, therefore, challenges us to uncover a factual pattern in which the doctrine should not apply. Are there facts which would conclusively prove that a patient was neither lured to a hospital nor treated there by relying on the appearance of a fictitious agency relationship? *York v. Rush-Presbyterian-St. Luke's Medical Center*,<sup>16</sup> recently decided by the Illinois Supreme Court, is a classic example of a factual pattern that seemed to implicate non-reliance, but which, surprisingly, was construed to establish reliance.

#### B. THE RULE AFTER *YORK*

In *York*, the plaintiff allegedly suffered an intra-operative spinal injury during knee replacement surgery at Rush-Presbyterian-St. Luke's Medical Center (Rush).<sup>17</sup> He filed a negligence action against the hospital and the attending anesthesiologist, Dr. El-Ganzouri, and the doctor's employer, University Anesthesiologists, S.C.<sup>18</sup> Plaintiff, in an amended complaint, alleged that the defendant anesthesiologist was the hospital's apparent agent.<sup>19</sup> Following trial, all defendants were found liable.<sup>20</sup> The appellate court affirmed the verdict, and the Illinois Supreme Court granted the hospital's petition for leave to appeal.<sup>21</sup> As the Supreme Court noted, the “appeal solely address[ed] plaintiff's apparent agency claim against Rush.”<sup>22</sup>

There were numerous facts in *York* that address the reliance component of apparent authority, most of which militate against its application:

- Plaintiff, Dr. York, was a retired orthopedic surgeon,<sup>23</sup>

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15. Ginsberg, *supra* note 3, at 489.

16. *York*, 854 N.E.2d 635.

17. *Id.* at 637.

18. *Id.* at 639.

19. *Id.*

20. *Id.* at 638.

21. *Id.*

22. *York*, 854 N.E.2d at 638.

23. *Id.*

- Plaintiff's 1998 surgery was his third knee surgery at Rush since 1997;<sup>24</sup>
- The three procedures were performed by the same orthopedic surgeon;<sup>25</sup>
- The defendant anesthesiologist was an employee of a professional anesthesiology group, not Rush;<sup>26</sup>
- Dr. York's son was an anesthesiology resident at Rush at the time of the subject surgery;<sup>27</sup>
- Pre-operatively, Dr. York asked his son if it was possible to have a specific anesthesiologist for the procedure;<sup>28</sup>
- Dr. York's son testified that the anesthesiology group, University Anesthesiologists, had its offices located in a Rush building and that all of the attending anesthesiologists at Rush were members of the anesthesiology group.<sup>29</sup> He also testified that he had no conversations with Dr. York about the anesthesiology group prior to surgery;<sup>30</sup>
- Dr. El-Ganzouri testified that, pre-operatively on the day of surgery, he introduced himself to Dr. York.<sup>31</sup> Dr. York responded and acknowledged Dr. El-Ganzouri as his son's teacher.<sup>32</sup>

Of course, other typical apparent authority and healthcare facts did exist. Dr. El-Ganzouri wore Rush scrubs in the operating room.<sup>33</sup> He also did not inform patients that he was employed by the anesthesiology group and not by Rush.<sup>34</sup>

The Illinois Supreme Court referred to a group of five post-*Gilbert* apparent authority cases discussed in the appellate court: *O'Banner v.*

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24. *Id.*  
25. *Id.*  
26. *Id.* at 640.  
27. *Id.* at 642-43.  
28. *York*, 854 N.E.2d at 643-44.  
29. *Id.* at 644.  
30. *Id.*  
31. *Id.* at 648.  
32. *Id.*  
33. *Id.* at 647.  
34. *York*, 854 N.E.2d at 648.

*McDonald's Corp.*,<sup>35</sup> *Butkiewicz v. Loyola University Medical Center*,<sup>36</sup> *James v. Ingalls Memorial Hospital*,<sup>37</sup> *McCorry v. Evangelical Hospitals Corp.*,<sup>38</sup> and *Scardina v. Alexian Bros. Medical Center*.<sup>39</sup> Rush wisely argued that pursuant to *O'Banner*, a non-medical/hospital negligence case, the plaintiff must prove that Rush induced him to use Rush for surgery and that the attending anesthesiologist was an agent of Rush.<sup>40</sup> Essentially, this is the "luring as reliance" position.

In *O'Banner*, the plaintiff slipped and fell in the bathroom of a McDonald's Restaurant.<sup>41</sup> McDonald's contended that it was not liable because the restaurant was owned by a franchisee and McDonald's did not own, operate, maintain or control the restaurant.<sup>42</sup> The Illinois Supreme Court, in *O'Banner*, held that in order to recover on "apparent agency" the plaintiff would need to prove that he actually relied on the "apparent agency" in going to the restaurant.<sup>43</sup> After examining the facts of the case, the Court found that the plaintiff may have entered the restaurant "simply because it provided the closest bathroom. . . ."<sup>44</sup> The Court thus affirmed the trial court's grant of summary judgment for McDonald's.<sup>45</sup>

In *Butkiewicz*, a patient was directed to a hospital by his primary physician.<sup>46</sup> The patient followed his physician's advice and went to the hospital his physician recommended.<sup>47</sup> The patient's decision to enter the hospital was not due to a desire to receive treatment from the hospital.<sup>48</sup> The patient was conscious and relied upon his primary care physician's advice to enter the hospital.<sup>49</sup> Therefore, the appellate court held that a radiologist who allegedly misinterpreted an x-ray was not the apparent agent of the hospital.<sup>50</sup> No reliance was established so as to invoke apparent agency.<sup>51</sup>

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35. 670 N.E.2d 632 (Ill. 1996).

36. 724 N.E.2d 1037 (Ill. App. Ct. 2000).

37. 701 N.E.2d 207 (Ill. App. Ct. 1998).

38. 771 N.E.2d 1067 (Ill. App. Ct. 2002).

39. 719 N.E.2d 1150 (Ill. App. Ct. 1999).

40. *York*, 854 N.E.2d at 658-59.

41. *O'Banner*, 670 N.E.2d at 633.

42. *Id.*

43. *Id.* at 635.

44. *Id.*

45. *Id.*

46. *Butkiewicz*, 724 N.E.2d at 1038.

47. *Id.*

48. *Id.* at 1041.

49. *Id.*

50. *See id.* at 1040-41. The radiologist was not employed by the hospital, but rather by a private group, Oak Lawn Radiologists. The patient was unaware of this fact, and nothing occurred during the patient's visit to alert him to this fact. The patient could have believed the radiologist to be an employee of the hospital, and the hospital did nothing to

Similarly, in *James*,<sup>52</sup> a patient entered a hospital because she was a public aid recipient and believed she was required to go to that hospital for care.<sup>53</sup> The patient testified that she would have gone to the hospital even if she knew that her physician was not an employee of the hospital.<sup>54</sup> Much like *Butkiewicz*,<sup>55</sup> the *James* court held that this fact pattern was insufficient to establish reliance and, thus, insufficient to establish apparent agency.<sup>56</sup>

Dr. York urged the Supreme Court to follow *Scardina* and *McCorry*.<sup>57</sup> In *Scardina*, the appellate court was not receptive to the concept of “luring as reliance.”<sup>58</sup> The *Scardina* court held that “nothing in the *Gilbert* decision indicates that the mere directives by a doctor to her patient to go to a particular hospital is dispositive of that patient’s ability to demonstrate justifiable reliance.”<sup>59</sup> The *Scardina* court, therefore, endorsed the idea that a patient could justifiably rely on a hospital (rather than a particular physician) to provide care.<sup>60</sup>

In *McCorry*, a more recent appellate apparent authority case, the plaintiff sued a neurosurgeon and hospital, urging that the neurosurgeon was an actual or apparent agent.<sup>61</sup> Plaintiff’s wife worked for the hospital.<sup>62</sup> Plaintiff’s physician referred plaintiff to CNS Neurological Surgery or to another surgeon employed by that group.<sup>63</sup> The defendant neurosurgeon was a CNS employee.<sup>64</sup>

The defendant hospital had published literature referring to physicians working at the hospital as “its physicians.”<sup>65</sup> The hospital “claim[ed] that the expertise of th[e]se physicians made [it a] desirable place for [medical] care.”<sup>66</sup> The hospital further advertised itself as a “full-care facility supplying quality health care.”<sup>67</sup>

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inform the patient otherwise. The apparent authority claim failed, however, because there was no evidence that the patient relied on any hospital representation or representation of the radiologist in going to the hospital. *Id.* at 1039-41.

51. *Butkiewicz*, 724 N.E.2d at 1041.

52. 701 N.E.2d 207 (Ill. App. Ct. 1998).

53. *Id.* at 211-12.

54. *Id.*

55. *Butkiewicz*, 724 N.E.2d at 1037.

56. *James*, 701 N.E.2d at 1041.

57. *See York*, 854 N.E.2d at 650.

58. *See Scardina*, 719 N.E.2d at 1155.

59. *Id.*

60. *See id.*

61. *See McCorry*, 771 N.E.2d at 1067-69.

62. *Id.* at 1067.

63. *Id.* at 1068.

64. *Id.*

65. *Id.* at 1069.

66. *McCorry*, 771 N.E.2d at 1069.

67. *Id.*



The appellate court further noted that plaintiff accepted the neurosurgeon's treatment because of his confidence in the hospital.<sup>68</sup> Plaintiff was not informed that the defendant neurosurgeon was not the hospital's agent.<sup>69</sup> The physician's employment status was not discussed between plaintiff and the neurosurgeon.<sup>70</sup> The court held that:

If a plaintiff shows that he relied in part on the hospital when he accepted treatment from an allegedly negligent doctor, he has met the reliance element of the proof needed to hold the hospital liable under the theory of apparent agency. . . . Plaintiffs also presented evidence that the hospital, in its literature, advertised itself in a manner that might lead a reasonable person to conclude that the hospital accepted responsibility for its choices of doctors to give the advertised health care, and thus that the doctors acted as the hospital agents.<sup>71</sup>

In *York*, the Supreme Court then considered which version of *Gilbert* and its progeny would guide its decision—the approach which requires a patient's reliance on the hospital to lure the patient to its facility in the first instances,<sup>72</sup> or a broader approach which allows a patient to rely on the hospital to provide health care once the patient arrives at the hospital.

The Supreme Court reasoned that *Gilbert* did not hold that a prior physician/patient relationship precluded the application of apparent authority.<sup>73</sup> The Supreme Court, without citation, stated that:

Rather, *Gilbert* recognized that when a patient relies on a hospital for the provision of support services, even when a physician specifically selected for the performance of a procedure directs the patient to that particular hospital, there may be sufficient reliance under the theory of apparent agency for liability to attach to the hospital in the event one of the supporting physicians commits malpractice.<sup>74</sup>

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68. *Id.* at 1068, 1071.

69. *Id.* at 1071.

70. *Id.*

71. *McCorry*, 771 N.E.2d at 1071-72.

72. *See O'Banner*, 670 N.E.2d 632.

73. *See York*, 854 N.E.2d at 660.

74. *Id.* at 660-61.

The Supreme Court rejected an application of *O'Banner* to the apparent authority equation.<sup>75</sup>

The Illinois Supreme Court also weighed in on how a patient seeks or obtains care in a hospital setting:

Upon admission to a hospital, a patient seeks care from the hospital itself, except for that portion of medical treatment provided by physicians specifically selected by the patient. If a patient has not selected a specific physician to provide certain treatment, it follows that the patient relies upon the hospital to provide complete care—including support services such as radiology, pathology, and anesthesiology—through the hospital's staff. If, however, a patient does select a particular physician to perform certain procedures within the hospital setting, this does not alter the fact that a patient may nevertheless still reasonably rely upon the hospital to provide the remainder of the support services necessary to complete the patient's treatment. Generally, it is the hospital, and not the patient, which exercises control not only over the provision of necessary support services, but also over the personnel assigned to provide those services to the patient during the patient's hospital stay. To the extent the patient reasonably relies upon the hospital to provide such services, a patient may seek to hold the hospital vicariously liable under the apparent agency doctrine for the negligence of personnel performing such services even if they are not employed by the hospital.<sup>76</sup>

The *York* analysis suggests that only Dr. Rosenberg, the orthopedic surgeon presumably chosen by Dr. York, would not qualify as an apparent agent. All other necessary "support services," *i.e.* other physicians not chosen by the patient, could qualify as apparent agents of the hospital.<sup>77</sup>

Whether intentionally or inadvertently, the *York* opinion injects "control" into the apparent authority formula. If the patient does not choose the physician, the patient may rely on the hospital to do so, because the hospital controls the "provision of necessary support services."<sup>78</sup> This "control" concept continues to beg the question of employment, *i.e.* whether professional services of radiology, pathology and others are actually performed by employed physicians or those like Dr. Frank in

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75. See *id.* at 661.

76. *Id.* at 661-62.

77. See *id.* at 662.

78. *Id.* at 661.

*Gilbert*,<sup>79</sup> a classic non-agent, “on staff” physician. This holding seems to contradict the holding in *Butkiewicz*.<sup>80</sup>

The *York* dissent is unquestionably correct in its assertion that the majority opinion has “diluted” the reliance element of apparent authority and will expand the scope of apparent authority liability.<sup>81</sup> Simply put, considering the case law which applies apparent authority to the unconscious patient – a patient who cannot have the requisite mental state to rely on anything in specific – and excluding only the few patients who could possibly know the employment status of every physician involved in the patient’s case at a hospital—*York* comes very close to a policy decision requiring Illinois hospitals to answer for the medical negligence committed on their premises by non-agent physicians. Again, however, the Supreme Court did not pronounce this policy. Instead, it presumed to apply agency concepts, particularly apparent authority and its reliance component, which are not well-suited for this purpose.

### III. CONCLUSION

Regrettably, *York* will likely leave us only with lip service to the defense of apparent authority claims in healthcare. It is difficult to imagine a set of facts stronger than those of *York* to militate against the reliance element of apparent authority.<sup>82</sup> Considering the competition for the healthcare dollars of the consumer-public, and the extent to which hospitals enter the competition by marketing and advertising, *York* may have sounded the death knell for the defense to most apparent authority claims in healthcare.

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79. *Gilbert*, 622 N.E.2d 788.

80. *Butkiewicz*, 724 N.E.2d 1037.

81. *York*, 854 N.E.2d at 667 (Garman, J., dissenting).

82. Perhaps, if plaintiff were a current on staff physician of defendant hospital, plaintiff would have the requisite knowledge to defeat an apparent authority claim.