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APPELLATE COURT 5TH DISTRICT

No. 5-18-0046

In the

Appellate Court of Illinois

Fifth Judicial District

CRYSTAL M. WILLIAMS, Individually and as Parent and Next Friend of JERRIN K. WILLIAMS, a disabled minor,

Plaintiff-Appellant,

v.

ST. ELIZABETH'S HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS,

Defendant-Appellee.

Appeal from the Circuit Court of the Twentieth Judicial Circuit,
St. Clair County, Illinois, No. 09 L 526.
The Honorable **Vincent Lopinot**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT

JAMES R. WILLIAMS
(jim@wcfelaw.com)
WILLIAMS, CAPONI, FOLEY & ECKERT, P.C.
30 East Main Street
Belleville, Illinois 62220-1602
(618) 235-1550

TIMOTHY S. TOMASIK
(tim@tkklaw.com)
ROBERT F. GEIMER
(bob@tkklaw.com)
PATRICK J. GIESE
(pat@tkklaw.com)
TOMASIK KOTIN KASSERMAN, LLC
161 North Clark Street
Suite 3050
Chicago, Illinois 60601
(312) 605-8800

Counsel for Plaintiff-Appellant
Crystal M. Williams

ORAL ARGUMENT REQUESTED

COUNSEL PRESS · (866) 703-9373

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CRYSTAL M. WILLIAMS' REPLY BRIEF

Introduction

St. Elizabeth's lengthy brief boils down to this: it was entitled to summary judgment because Williams selected Dr. Tissier to be her physician, years before the negligence at issue, without any input from the hospital, and she signed 13 consent forms. This is an argument for a jury. But, based on the facts of record, which the Hospital minimizes in its brief, it is insufficient to support the trial court's grant of summary judgment in the Hospital's favor.

The evidence in this case showed that:

1. Williams relied on her knowledge that the hospital was a good place to have a baby;
2. the hospital's web site listed Dr. Tissier as one of its doctors;
3. there was no signage at Dr. Tissier's office informing patients that Dr. Tissier was an independent contractor;
4. the sign for Dr. Tissier's office listed it as a St. Elizabeth's office;
5. Dr. Tissier's own letterhead identified Dr. Tissier as a doctor providing care at "St. Elizabeth's Medical Park;" and
6. numerous documents provided to Williams related to her care and treatment with Dr. Tissier, including prescription forms and consent forms, identified Dr. Tissier, his practice, and the location of his group as being located at "St. Elizabeth's Medical Park." (See Pl. Br. at pp. 3-7.)

The evidence further showed that Dr. Tissier's name did not appear anywhere on any of the very lengthy consent forms that Williams signed, and that Williams did not know what the term "attending physician" meant. (Pl. Br. at 8.) In Williams' view, the consent forms led her to believe that Dr. Tissier was a St. Elizabeth's employee. (*Id*.) So did her conversations with Dr. Mathus. (*Id*.) There was no evidence in the record that anyone ever told Williams that Dr. Tissier was not St. Elizabeth's employee or agent. (*Id*. at 9.) Williams never testified that she understood the consent forms. (*Id*. at 9-10.) The language about the attending physician's" status, which did not name Dr. Tissier, was nestled in the second paragraph of a 16-paragraph, two-page consent form that touched on topics including medical consent to treatment, AIDS, release of health information, a personal valuables policy, a guarantee of account, and assignment of benefits provision, and Medicare information. (*Id*. at 7; C827.)

These facts differentiate the case at bar from the cases the Hospital relies on in support of its argument. There is no reported decision where a reviewing court has contemplated and confirmed that a 16-paragraph consent form was dispositive on the holding out issue. The evidence presented in this case, at summary judgment, creates genuine issues of material fact as to whether St. Elizabeth's held Dr. Tissier out as its agent and whether Williams reasonably relied on St. Elizabeth's holding out. None of the hospital's arguments to the contrary are convincing.

ARGUMENT

I.
The Hospital has not refuted Williams' argument that she has satisfied the "reliance" factor required by *Gilbert.*

The parties agree on the applicable law: under *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 524-525 (1993), Williams is required to establish the following:

> [A] plaintiff must show that: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

The Hospital's insistence that Williams cannot meet the "reliance" factor (Hospital Br. at 8-21), misinterprets *Gilbert* and its progeny.

A. The Hospital minimizes the evidence in the record.

Simply stated, the fact that Williams had a pre-existing relationship with Dr. Tissier, whom she selected to be her personal physician, without any input from St. Elizabeth's, is not the be-all-and-end-all of whether she can satisfy the reliance factor of *Gilbert*. (Def. Br. at 11, 13.)

The fact that Williams looked to Dr. Tissier, and not the Hospital, to deliver her twins (Def. Br. at 13), is not enough to support the Hospital's position. Of course Williams expected Dr. Tissier to deliver her twins. He was her OB/GYN. Doctors deliver babies, not hospitals.

But, the Hospital ignores the fact that the law only requires the plaintiff to show that she relied on the hospital, *in part,* to deliver medical care. *McCorry v. Evangelical Hosps. Corp.,* 331 Ill.App.3d 668, 675 (1st Dist. 2002) (The fact that a plaintiff contracted with a private physician as a primary surgeon was not inconsistent with a hospital's having clothed an independent contractor physician with apparent agency); *Spiegelman v. Victory Memorial Hospital,* 392 Ill.App.3d 826, 839-40 (1st Dist. 2009) (hospital advertisement stating that it has the best physicians is evidence the physicians are employees of the hospital).

In this case, Williams reviewed the Hospital's marketing materials, studied the Hospital's web presence on the internet, saw that Dr. Tissier was affiliated with the Hospital via the sign at his office, her written prescriptions and other documents from the doctor, believed he was employed by the Hospital, and relied on the Hospital to be a good hospital for delivering babies. This is sufficient for showing reliance, *in part*. As detailed in the opening brief, targeted marketing efforts are highly relevant to establishing the existence of apparent agency. *See Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App. (1st) 151107, ¶¶ 71-72, 77, and *McCorry v. Evangelical Hospitals Corp*., 331 Ill.App.3d 668, 675 (1st Dist. 2000).

B. The Hospital's cited authorities are unavailing.

Lamb-Rosenfeldt v. Burke Med. Grp., Ltd, 2012 IL App (1st) 101558, on which St. Elizabeth's heavily relies (Def. Br. at 11-12, 14-15), is distinguishable

from the case at bar. The primary similarity between the two cases is that both involve vicarious liability. That is not enough.

The record on appeal in *Lamb-Rosenfeldt* was grossly incomplete and provided no facts, like those cited above, which show that Williams justifiably relied on the Hospital as a fine place to deliver her twin babies.[1]

The Court, in *Lamb-Rosenfeldt*, expressly stated that "there was no showing or evidence that the decedent knew or relied on information alleging Doctor Burke's position or alleged standing with St. James Hospital at the time of decedents [sic], treatment, tests or the execution of her consent forms." *Id*. at ¶ 17. Further, in *Lamb-Rosenfeldt*, the disclaimer the plaintiff's decedent signed was conspicuous, in bold, large print, with capital letters; it said, "NONE OF THE PHYSICIANS WHO ATTEND TO ME AT THE HOSPITAL ARE AGENTS OR EMPLOYEES OF THE HOSPITAL." *Id*. at ¶ 30. That is significantly different from the consent forms signed in this case, which obscured the disclaimer in a lengthy, multi-paragraph document that referred to "attending physicians," a term Williams reasonably did not understand.

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[1] The Hospital deceptively states that the *Lamb-Rosenfeldt* Court was able to review deposition transcripts. (Def. Br. at 15.) In fact, the Court noted that it was only able to review excerpts; full depositions of the plaintiff's and the doctor's discovery depositions were not included in the record on appeal. *Lamb-Rosenfeldt*, at ¶ 22. The Court admonished plaintiff for not perfecting a sufficient record for meaningful appellate review and stated: "in the absence of a sufficiently complete record, a reviewing court will resolve all insufficiencies against the appellant and will presume that the trial court's ruling had a sufficient legal and factual basis." *Id*. In the penultimate paragraph in that decision, the Court re-emphasized that, "based on the sparse nature of the record . . . we reiterate that all deficiencies in the record must be resolved against plaintiff." *Id.* at ¶ 35.

The Hospital's attempted distinction of *McCorry v. Evangelical Hospitals Corps.*, 331 Ill.App.3d 668 (1st Dist. 2002) (Def. Br. at 16), fails. Williams relies on *McCorry* for the proposition that reliance can be shown by a hospital's claiming that its staff includes hundreds of highly qualified physicians. (See Pl. Br. at 18.) The Hospital is wrong in asserting that the facts of *McCorry* support its position. Certainly, the facts are not identical. No two cases are exactly the same. But they are similar enough to be instructive and persuasive.

In *McCorry*, the plaintiff's personal physician referred the plaintiff to a private and independent neurosurgery group that practiced at the hospital. The neurosurgeon who operated on him was negligent. The plaintiff, like Williams, sued the neurosurgeon and the hospital. The claim against the hospital was only for vicarious liability. The plaintiff asserted that he accepted the neurosurgeon's care because he had confidence in the hospital and the doctors on staff there. *Id*. at 674. He did not know the neurosurgeon's actual status *vis-a-vis* the hospital. The neurosurgeon never discussed it with him. That is very much like the case at bar.

Further, the Hospital is wrong in asserting that Williams ignores the holding in *McCorry*. (Def. Br. at 17) The "holding" the Hospital cites is simply an explanation of the Wisconsin Supreme Court's decision in *Kashishian v. Port*, 167 Wis. 2d 24, 481 N.W.2d 277 (1992), which the Illinois Supreme court relied on as authority in *Gilbert*. This case comports with *Gilbert.*

The Hospital's attempted distinction of *Spiegelman v. Victory Memorial Hosp.*, 392 Ill.App.3d 826 (1st Dist. 2009) (Def. Br. at 17), also fails. Although *Spiegelman* involves a hospital's liability for an emergency room physician, whom the plaintiff did not specifically choose, plaintiff cited the case for the proposition that where a hospital publishes newspaper advertisements exalting the health care it offered, that publication can suffice to show plaintiff's reasonable reliance on the hospital's emergency room, even if there is no evidence that the plaintiff actually saw the advertisements. *Id.* at 839. *Spiegelman* does not support the trial court's order in favor of the Hospital. (Def. Br. at 18.)

The Hospital's discussion of *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill.2d 17 (1999) and *Schroeder v. Northwest Community Hosp*., 371 Ill.App.3d 584 (1st Dist. 2006) (Def. Br. at 18), completely misses the mark. These cases stand for the proposition that hospitals and other medical entities may be vicariously liable for non-hospital-based employees. (Pl. Br. at 19-20.) Plaintiff does not miss any point regarding the Hospital's position. (Def. Br. at 18.) As stated above, Williams did look to her personal physician to deliver her babies (*Id*.), but that does not negate the fact that she also looked to the hospital for its reputation as an excellent birthing center. There is no "critical distinction" (*Id*.) between these cases and the case at bar that supports summary judgment in the Hospital's favor. To the contrary, *Petrovich* supports Williams in that it holds that the determination of apparent agency, in a case like Williams, should be a question of fact, not law.

The Hospital's factual distinctions of *Malanowski v. Jabamoni*, 293 Ill.App.3d 720 (1st Dist. 1997) (Def. Br. at 19), are unavailing. Defendant's claim that *Malanowski* is not on point because the billing for the physician at issue was handled by the outpatient center and because the plaintiff saw the physician at the outpatient center (*Id.*), is disingenuous. In this case, Dr. Tissier's letterhead, billing statements, prescriptions and other documents that Williams received all stated that Dr. Tissier was part of the "St. Elizabeth's Medical Park." (See Pl. Br. at 6.) The sign for his office stated the same. (See Pl. Br. at 5.) *Malanowski* is not "inapposite." (Def. Br. at 19.)

C. The Hospital's other arguments are not convincing.

The Hospital is correct in asserting that Williams ignored the fact that she previously delivered a baby at Memorial Hospital while treating with Dr. Tissier. (Def. Br. at 20.) This fact does support the Hospital's position. It is a fact that the Hospital may be able to tell the jury, if the court deems it relevant and material to whether Williams reasonably relied on the Hospital as a place to go for the birth of her children. But, it is not a fact that supports summary judgment in the Hospital's favor as a matter of law. There is no evidence in the record as to what Williams was led to believe about Dr. Tissier's employment relationship with Memorial Hospital or how Memorial Hospital held itself out to patients like Williams.

Moreover, as has been stated repeatedly above, the fact that Williams relied on Dr. Tissier for her medical care (Def. Br. at 20-21), does not defeat Williams'

position that she also relied on St. Elizabeth's. This is so no matter how many times the Hospital claims otherwise.

II.

The Hospital has not refuted Williams' argument that she has satisfied the "holding out" factor required by *Gilbert*.

The parties again agree as to the applicable law for "holding out." As the Hospital states, "Illinois courts hold that '[t]he hospital prevails on this element if the patient is in some manner put on notice of the independent status of the professionals with whom he might be expected to come into contact.'" *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶138; *Mizyed v. Palos Comm. Hosp*., 2016 IL App (1st) 142790, ¶ 39." (Def. Br. at 21.) The Hospital, however, has not refuted Williams' claim that she has demonstrated a genuine question of material fact as to whether the Hospital held Dr. Tissier out as its agent or employee.

Plainly stated, the consent forms that Williams signed do not defeat her position as a matter of law. There is a genuine issue of material fact as to whether Williams was on notice of Dr. Tissier's independent status.

It is undisputed that Williams did not know what the term "attending physician" in the consent forms meant. (See C805 at 48-49.) She believed that Dr. Tissier was a Hospital employee. (C808 at 58.) As detailed in the opening brief, a genuine issue of material fact exists as to whether the 16-paragraph, 2-page consent forms were confusing, and another one exists as to whether all the

factors lead a reasonable person to believe that the Hospital was holding Dr. Tissier out as its agent or employee.

A. The case law on which the Hospital relies does not defeat Williams' arguments.

The consent forms in this case were nowhere near as clear and unambiguous as the consent forms in *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, on which the Hospital relies. (Def. Br. at 22.) As noted above, the consent forms in *Lamb-Rosenfeldt* stated, "NONE OF THE PHYSICIANS WHO ATTEND TO ME AT THE HOSPITAL ARE AGENTS OR EMPLOYEES OF THE HOSPITAL." *Id*. at ¶ 30. That is dissimilar from the forms in this case, which were long and complicated.

Moreover, the Hospital ignores the case law which states that an independent contractor "disclaimer" is merely a factor to consider on the issue of whether the apparent principal held the apparent agent out as its agent – it is not dispositive on the issue. *Churkey v. Rustia*, 329 Ill.App.3d 239, 245 (2d Dist. 2002). Even *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, ¶ 42, which supports the Hospital's position that Williams' lack of understanding what the term "attending physician" is meaningful (Def. Br. at 25.), held that "the signing of a consent form will not preclude recovery under an apparent agency theory if it is ambiguous or potentially confusing as to whether one or more of the plaintiff's treating physicians are agents of the hospital or independent contractors."

The *Mizyed* Court recognized that in that situation, the consent forms signed were clear, like the forms in *Lamb-Rosenfeldt*. It recognized that other consent forms, such as those in *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 30-31 (1st Dist. 2004) (consent form did not state that hospital could select independent contractors), *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584 (1st Dist. 2006) (ambiguous consent form in 6 sections), and *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826 (1st Dist. 2009) (ambiguous consent form in 9 paragraphs), were "arguably confusing" and thus not clear enough to support summary judgment in the defendant hospitals' favor. *Mizyed v. Palos Community Hospital, supra*. at ¶¶ 43-45. The consent forms in this case are likewise "arguably confusing."

Further, *Mizyed* is distinguishable from the case at bar due to the fact that there was absolutely no evidence that the Hospital there held itself out in any way as the doctor's principal. Unlike here, there was no evidence of the hospital's advertising or internet presence.

The Hospital's reliance on *Frezados v. Ingalls Memorial Hosp.*, 2013 IL App (1st) 121835 (Def. Br. at 27), is grossly misplaced. The applicable consent form in that case did not only mention the patient's "personal physician," a term that is perfectly clear, but it also specified that the patient would receive a separate bill from each of his treating physicians. In addition to the acknowledgment, the uncontradicted affidavit of the hospital's counsel stated that signs were posted in

both the waiting room and treatment area to the same effect. *Id*. at ¶¶ 5, 10. *Frezados* is a far cry from Williams.

The Hospital's argument that the inclusion of Dr. Mathus' name on the consent form is meaningless (Def. Br. at 28), is another argument for the jury, just as Williams' argument that his name added to the confusion of the lengthy form is for the jury.

The Hospital's next argument – that Dr. Tissier's name appears in the other consent forms that Williams signed, thus showing that the forms were not confusing (Def. Br. at 29.), is illogical. The names cannot be both irrelevant and meaningful at the same time. The Hospital can consider this argument if it wants to, at trial.

The Hospital reaches to argue that Williams' reliance on the First District's *Yarbrough* decision, which was reversed after the Hospital's Motion was argued in the trial court, illustrates the "specious" nature of Williams' positions now. (Def. Br. at 33.) Of course, Williams relied on a case when it was in favor, in part, of her position. Zealous advocacy demands no less. Reliance on favorable case law, however, does not support the Hospital's rather sharp and uncalled for charge of "intellectual dishonesty." (*Id*.)

B. The Hospital's remaining arguments are unconvincing.

As its final argument, the Hospital asserts that the other facts detailed in Williams' brief do not support her position. (Def. Br. at 29 *et seq*.) The Hospital

is wrong. The additional facts provide strong support for Williams' position that the Hospital held itself out as Dr. Tissier's principal.

As detailed in the opening brief, Dr. Tissier explained to Williams that St. Elizabeth's was where he did his work and where he delivered babies. (C807 at 56.) Dr. Tissier told Williams that St. Elizabeth's was a good hospital, with a good birthing center, and that it was a good place to deliver her baby. (*Id*.) Dr. Tissier never explained to Williams that he was not an employee of the hospital; nor did anyone else at St. Elizabeth's explain to her that Dr. Tissier was not a hospital employee. (C807 at 57.)

When Williams learned that she would be delivering at St. Elizabeth's, she looked St. Elizabeth's up on the internet. (C807 at 56; C808 at 57.) It appeared to her to be a good hospital. (C808 at 57.) Dr. Tissier was listed on the web site as one of St. Elizabeth's doctors. (*Id*. at 57.) Williams knew that St. Elizabeth's was a community hospital. (C807 at 56.) From time to time, Williams would see ads around town that led her to believe it was a good hospital. (*Id*.)

There is no evidence that there were placards or signage at Dr. Tissier's office providing notice to patients that he was an independent contractor. Dr. Tissier explained to Williams that he wanted her to deliver at St. Elizabeth's. (C807 at 55.) She believed Dr. Tissier worked at the hospital. (C807 at 55; C808 at 57.) No one at the hospital explained to Williams that Dr. Tissier was not a hospital employee. (*Id*.)

These are relevant facts for the court, and fact finder, to consider.

The Hospital is wrong in asserting that the representations it made in 2007 on its website are irrelevant because Williams began seeing Dr. Tissier in 2000. (Def. Br. at 30.) The question presented is whether the Hospital held itself out as Dr. Tissier's employer or principal in 2007. It listed Dr. Tissier as one of its doctors. That is meaningful and relevant evidence of "holding out."

The Hospital's argument that the sign for Dr. Tissier's office – under the general heading of "St. Elizabeth's Hospital O'Fallon Medical Building"– is irrelevant (Def. Br. at 30-31), is merely an argument for the jury. The fact that Dr. Tissier is identified under "its independent name," goes to the weight of the evidence. It is undisputed that this identification is under the heading of the Hospital. The same logic applies to the Hospital's argument that the photograph is not dated. (Def. Br. at 31.) And its argument regarding the content of the materials found on the internet from 2007. (*Id*.) Any alleged deficiencies in foundation can easily be cured from the witness stand at trial.

Williams is not required to "demonstrate that St. Elizabeth's Hospital exercised any control over Dr. Tissier and OB BYN (*sic*) Care, LLC's office as providers of medical care in O'Fallon, Illinois." (Def. Br. at 32.) She conceded actual agency below. Control is not a factor for apparent agency.

CONCLUSION

For all of the reasons stated above, and all of the reasons advanced in the opening brief, plaintiff-appellant, Crystal Williams, Individually, and as Parent and Next Friend of Jerrin Williams, a disabled minor, by her attorneys, Tomasik Kotin Kasserman, LLC, respectfully requests that this Court reverse the circuit court's order of January 31, 2018, which granted summary judgment to St. Elizabeth's Hospital, and remand this case to the circuit court for further proceedings.

Respectfully submitted,

By: */s/ Timothy S. Tomasik*

Timothy S. Tomasik
Robert F. Geimer
Patrick J. Giese
Tomasik Kotin Kasserman, LLC
161 North Clark Street, Suite 3050
Chicago, Illinois 60601
(312) 605-8800
(312) 605-8808 (f)
tim@tkklaw.com

James R. Williams
Williams, Caponi, Foley & Eckert, P.C.
30 East Main Street
Belleville, Illinois
(618) 235-1550
(618) 235-8059 (f)
jim@wcfelaw.com

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 15 pages.

/s/ Timothy S. Tomasik
Timothy S. Tomasik

NOTICE OF FILING and PROOF OF SERVICE

In the Appellate Court of Illinois
Fifth Judicial District

CRYSTAL M. WILLIAMS, Individually and as Parent and Next Friend of JERRIN K. WILLIAMS, a disabled minor,	)	
Plaintiff-Appellant,	)	
v.	)	No. 5-18-0046
ST. ELIZABETH'S HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS,	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on October 11, 2018, the Reply Brief of Plaintiff-Appellant was electronically filed and served upon the Clerk of the above court and that on the same day, a pdf of same was e-mailed to the following counsel of record:

Mr. Michael J. Nester
Donovan Rose Nester, P.C.
201 South Illinois Street
Belleville, Illinois 62220
mnester@drnpc.com

Mr. James. E. Neville
Neville, Richards & Wuller, LLC
P.O. Box 23977
Belleville, Illinois 62223-0977
jneville@nrw-law.com

Mr. James R. Williams
Williams, Caponi & Associates, P .C.
30 East Main Street
Belleville, Illinois 62220
jim.williams@williamscaponifoley.com

Within five days of acceptance by the Court, the undersigned states that 5 paper copies of the Reply Brief of Plaintiff-Appellant bearing the court's file-stamp will be sent to the above court.

/s/ Timothy S. Tomasik
Timothy S. Tomasik

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Timothy S. Tomasik
Timothy S. Tomasik