Chicago Daily Law Bulletin®

Volume 164, No. 2 Serving Chicago's legal community for 163 years

High court: Hospital not liable for separate clinic

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SPRINGFIELD — A divided state high court declined to expand liability on health-care providers.

The Illinois Supreme Court ruled a long-standing precedent that says hospitals can be sued for the actions of certain nonemployees shouldn't apply to workers at separate, unrelated clinics.

In a 4-3 decision, the majority acknowledged rules set forth in a 1993 opinion that say if hospitals give the impression their own workers are providing care and patients justifiably relied on that premise, they can be held responsible for negligence even if the employees technically work as independent contractors.

But the 14-page decision authored by Justice Mary Jane Theis argued the defendant in this case, Northwestern Memorial Hospital, had only tenuous ties to Erie Family Health Center where the plaintiff was treated and, thus, shouldn't be held responsible under the doctrine of "apparent agency" set forth in *Gilbert v. Sycamore*.

"*Gilbert* was informed by our concern with the reasonable expectations of the public that the care providers that they encounter in a hospital are also hospital employees. *Gilbert* does not suggest that merely granting a physician employed by another entity hospital staff privileges alone could create an apparent agency relationship," Theis wrote.

"We refuse to read *Gilbert* and its progeny so broadly as to impose vicarious liability under the doctrine of apparent authority on a hospital for the care given by employees of an unrelated, independently owned and operated clinic like Erie," she wrote.

The case stemmed from a Cook County lawsuit filed by Christina Yarbrough, who in 2005 got a positive pregnancy result and received prenatal treatment at Erie, a community-based health-care center. She claimed she was led to believe members of the staff at Erie were employees of Northwestern, particularly because she was given information about Northwestern and told she would likely deliver her child at Northwestern.

Yarbrough was treated for vaginal bleeding in December of that year and told by a doctor at Erie she had a shortened cervix, but not a bicornuate uterus — a condition that affects the shape of the uterus and how a fetus lies in the womb.

After delivering her daughter prematurely in April 2006 and being told by the doctor at Erie that she had a bicornuate uterus, she filed a complaint against Northwestern.

She alleged the staff at Erie was negligent in identifying and addressing her shortened cervix and bicornuate uterus and caused her to deliver her child at only 26 weeks gestation.

She also claimed she was never told the staff at Erie were not employees at Northwestern and alleged the staff were apparent agents of the hospital.

Northwestern moved for partial summary judgment on all the agency complaints. That was denied by Cook County Associate Judge William Edward Gomolinski. However, he certified a question under Rule 308 for appellate review — "Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore [Municipal Hospital]*, 156 Ill. 2d 511 ([1993]), and its progeny for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation?"

A 1st District Appellate Court initially declined to look into the matter. But the Supreme Court ordered the panel to review the question, and it answered in the affirmative in an August 2016 decision authored by Justice Eileen O'Neill Burke. The decision held, among other things, that nothing in *Gilbert* limited recovery merely because the alleged conduct did not occur "within the four walls of the hospital."

The Supreme Court majority on Friday wrote the trends in health care that informed *Gilbert* "are even more true today."

Health care is a business. Patients increasingly rely on the reputation of hospitals in seeking care and hospitals do what they can to attract more patients. That includes merging with other, bigger and more reputable health-care providers and increasing a brand's public awareness.

Anne M. Burke

Mary Jane Theis

The *Gilbert* court sought to deter hospitals from soliciting more and more patients, but escaping liability through the use of outside doctors and other workers. The logic had been used to hold HMOs vicariously liable for conduct of independent physicians, for instance, in the 1999 decision *Petrovich v. Share Health Plan of Illinois*.

But Theis wrote the circumstances here stood "in marked contrast" to those cases. Erie is not owned or operated by Northwestern. Its employees are considered federal employees because it is a federally qualified health center that relies on Medicaid and grants.

Suits against its employees can only be sustained under the Federal Torts Claims Act, she wrote, and Erie does not use Northwestern's name in any branding nor its signature purple color.

For those reasons, the question should be answered in the negative, the majority wrote.

But in an eight-page dissent, Justice Anne M. Burke wrote the majority conflated the legal and factual issues in the case. She wrote the legal question had really already been answered — whether a medical-malpractice plaintiff could claim apparent agency against a defendant when the alleged conduct occurred in an outside facility. The majority stated it had already applied the doctrine in such a case — the *Petrovich* case that dealt with HMOs.

But once it established there was no bar for such a claim, the majority never conducted the appropriate analysis — whether the allegedly negligent employees "held out" as employees of Northwestern and whether the plaintiff relied on that representation in seeking care, Burke wrote.

Instead of focusing on that, "the majority emphasizes that Erie 'relies heavily on federal grants' and that 'Erie employees are considered federal employees' — facts that have nothing whatsoever to do with NMH's actions or whether plaintiffs can establish an apparent agency," Burke wrote.

"Further, the majority makes no mention of the burden NMH faces under summary judgment. Indeed, by expressly resting its decision on an analysis of the specific facts of this case but then calling that analysis the answer to the certified question, the majority has effectively awarded NMH summary judgment on a question of fact without ever requiring NMH to meet the summary judgment standard. This is both confusing and unfair to plaintiffs."

Burke was joined in the dissent by Justices Charles E. Freeman and Thomas L. Kilbride.

The plaintiffs were represented by Howard A. Janet, of Janet, Jenner & Suggs LLC. Patrick Thronson, an associate at the firm who also represented the plaintiffs, could not immediately comment on the decision.

The hospital was represented by Catherine A. Basque Weiler of Swanson, Martin & Bell LLP.

She could not be reached for comment.

The case is *Yarbrough v. Northwestern Memorial Hospital, No. 121367.*

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