2017 IL App (1st) 161858-U
No. 1-16-1858

SECOND DIVISION
September 19, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDDIE FRANKLIN, Individually and as ADMINISTRATOR OF THE ESTATE OF TEAUNIE FRANKLIN, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 13 L 8595
v.	)	
LITTLE COMPANY OF MARY HOSPITAL, DR. MELISSA URIBES, and EVERGREEN EMERGENCY SERVICES, LTD.,	)	The Honorable Kathy M. Flanagan, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* circuit court's dismissal of the plaintiff's institutional negligence and spoliation claims against the defendant hospital affirmed where those claims were not filed within the applicable statute of limitations and did not relate back to plaintiff's timely filed vicarious liability claim; circuit court's order granting defendant hospital's motion for summary judgment on the plaintiff's vicarious liability claim affirmed where the plaintiff failed to present a sufficient factual basis to satisfy the "holding out" requirement; circuit court's dismissal of the plaintiff's spoliation claim against the defendant doctor affirmed where the plaintiff waived review of the court's judgment.

¶ 2 Decedent Teaunie Franklin (decedent or Teaunie) died after receiving medical care at the emergency room of Little Company of Mary Hospital (Little Company or Hospital). Plaintiff Eddie Franklin (plaintiff or Franklin), individually, and as administrator of his wife's estate, subsequently filed a wrongful death and survival action predicated on medical malpractice against defendants Little Company, Doctor Melissa Uribes, and Evergreen Emergency Services, Ltd. (Evergreen) (collectively, defendants). Franklin amended his pleadings multiple times and defendants filed responsive motions. All of the claims against Little Company were ultimately dismissed or disposed of via summary judgment proceedings and one of plaintiff's claims against Doctor Uribes was likewise dismissed. Franklin appeals these rulings. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Decedent had a history of diabetes, high blood pressure, and stomach ailments. As a result of these various health problems, decedent sought and received emergency medical treatment at various local hospitals, including Little Company, over the years. On October 14, 2011, 32-year-old decedent presented at Little Company's emergency room, complaining of abdominal pain, vomiting, and diabetes-related issues. At the time she sought treatment, decedent was required to sign a form delineating the "CONDITIONS FOR ADMISSION" (Admission Form). Included in the one-page document was an independent contractor physician disclosure statement, which informed Teaunie that the "emergency department physicians" at Little Company were "independent contractor[s]" and "not employees or agents of th[e] hospital." Plaintiff, who accompanied decedent at the time she sought treatment from Little Company on October 14, 2011, signed the Admission Form on his wife's behalf, thereby indicating that he "read and underst[ood] the foregoing" and was "authorized to accept the above

terms on the patient's behalf." Although decedent did not personally sign the Admission Form containing the aforementioned disclaimer at the time of her October 14, 2011, hospital admission, she had received medical treatment at Little Company's emergency room on ten prior occasions since April 2010. Decedent had personally signed admission forms containing the same language on nine of those prior occasions. Plaintiff, in turn, had signed an admission form containing the same independent physician disclosure statement on his wife's behalf during one of her prior hospital visits.[1]

¶ 5 Following decedent's admission to Little Company's emergency room on October 14, 2011, Teaunie received treatment from Doctor Melissa Uribes and other emergency room medical personnel. Decedent underwent an electrocardiogram (EKG) and was subsequently placed on a cardiac monitor and a pulse oximeter for cardiac and pulse monitoring. Teaunie also received medication to alleviate her vomiting as well as morphine and dilaudid for pain management. She remained overnight in the emergency room for observation. Franklin departed the emergency room at approximately 12:30 a.m. on October 15, 2011, and left his wife in the care of Little Company. Sometime around 3 a.m., on October 15, 2011, however, Teaunie was found unresponsive and asystolic in her hospital room. Doctor Uribes and other medical personnel engaged in resuscitation efforts that ultimately proved unavailing and Teaunie was pronounced dead at 3:13 a.m. on October 15, 2011. Doctor Uribes believed that Teaunie's death was likely the result of a sudden cardiac arrhythmia caused by underlying comorbidities, including coronary artery disease, malignant hypertension, and poorly controlled diabetes.

[1] The prior dates on which Teaunie signed admission forms containing the aforementioned independent contractor disclaimer language include: April 24, 2010; October 2, 2010; October 18, 2010; December 6, 2010; January 4, 2011; May 21, 2011; June 6, 2011; June 13, 2011; and September 16, 2011. Prior to signing the October 14, 2011, Admission Form at issue, Franklin signed an admission form on his wife's behalf on April 11, 2011. Including the October 14, 2011, Admission Form, decedent and her husband had signed paperwork containing the relevant disclosure language on eleven occasions.

¶ 6 Complaint

¶ 7 On July 30, 2013, following his wife's death, Franklin filed a wrongful death and survival action against Little Company and Doctor Uribes. In the complaint, Franklin alleged that Doctor Uribes failed to "possess and apply the knowledge and use the skill and care ordinarily used by well qualified emergency room physicians in her care and treatment of Teaunie." In pertinent part, Franklin alleged that Doctor Uribes committed one or more negligent acts and omissions: failing to adequately monitor decedent; failing to accurately diagnose decedent's condition; administering excessive doses of narcotic pain medication to decedent; and failing to timely and adequately administer resuscitation efforts. Franklin alleged his wife died as a direct and proximate result of those negligent acts and omissions. He further alleged that Doctor Uribes was Little Company's agent and employee and, as a result, Little Company was vicariously liable for Doctor Uribes's negligent conduct.

¶ 8 Franklin's complaint was accompanied by a report completed by a medical professional attesting to the merits of his medical malpractice allegations in accordance with section 2-622 of the Illinois Code of Civil Procedure (Code or Civil Code) (735 ILCS 5/2-622 (West 2010)). The report was completed by Doctor James Matthews, a physician board certified in emergency medicine. Doctor Matthews opined that after reviewing Teaunie's medical records, he believed that: (1) "the staff of Little Company of Mary Hospital and Dr. Melissa M. Uribes gave Ms. Franklin excessive doses of narcotic pain medications, including Dilaudid and Morphine;" (2) the "excessive doses of narcotics resulted in the untimely death of Ms. Franklin;" and (3) a "meritorious case exists against Little Company of Mary Hospital and Dr. Uribes."

¶ 9 Amended Complaint

¶ 10 Thereafter, plaintiff learned that Doctor Uribes was actually employed by Evergreen at the time of Teaunie's October 2011 admission to Little Company. As a result, Franklin sought, and obtained, leave of the court to file an amended complaint in order to add Evergreen as a defendant. Accordingly, in his amended complaint, filed on October 15, 2013, Franklin alleged that Doctor Uribes was acting individually and as an agent, servant, and employee of both Little Company and Evergreen at the time that she provided treatment to Teaunie. As a result, Franklin alleged that Little Company and Evergreen were both vicariously liable for Doctor Uribes's negligent conduct. The specific negligent acts and omissions attributed to Doctor Uribes in the original complaint were re-alleged in the amended complaint. The amended filing was accompanied by the same 2-622 report completed by Doctor James Matthews.

¶ 11 Second Amended Complaint

¶ 12 After Franklin filed his amended complaint, discovery subsequently ensued and various witnesses were deposed, including medical personnel involved in Teaunie's care during her October 2011 Little Company emergency room admission. The deponents included nurses Erin Regan, Michelle St. John, and Shannon Guerra, and ER technician Dalton Dobesh. The depositions of the aforementioned individuals were conducted between June 2014 and November 2014.[2] None of the deponents recalled hearing the alarms on the machines monitoring Teaunie's pulse and heart rate sound before she was found unconscious in her hospital room.[3] Moreover, Guerra categorized the emergency room as "extremely busy" on the night that Teaunie sought treatment and recalled "needing to be in multiple places as once." Doctor Uribes was also

[2] St. John and Dobesh were deposed on June 13, 2014. Guerra was deposed on August 28, 2014. Regan was deposed on November 18, 2014.

[3] We note that full transcripts of the depositions taken of Regan, St. John, Guerrera, and Dobesh are not included in the record on appeal; rather, the record merely contains excerpts of their deposition testimony. Given that it is the burden of the appellant to provide a sufficiently complete record to allow for meaningful appellate review, any doubts arising from the incomplete record will be resolved against Franklin. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

deposed. In her deposition, Doctor Uribes provided details about her employment with Evergreen and her treatment of decedent at Little Company. [4] She also testified that she was the only physician scheduled to provide emergency medical care at Little Company's emergency room from 2 a.m. to 6 a.m. on November 15, 2014. This was the typical manner in which Evergreen staffed physicians at Little Company during the overnight shift. Doctor Uribes testified that Little Company was responsible for the staffing of nurses and technicians assigned to the emergency room and that the emergency room was generally understaffed between 2 a.m. to 6 a.m. on a nightly basis. She categorized the emergency room as "extremely chaotic" and "very busy" at the time of Teaunie's October 2011 admission.

¶ 13 Following those depositions, plaintiff sought and obtained leave to file a second amended complaint. The pleading was filed on September 16, 2014. In his second amended complaint, Franklin re-alleged that Doctor Uribes's aforementioned negligent acts and omissions proximately caused Teaunie's death and that Little Company and Evergreen were both vicariously liable for her conduct. For the first time, however, Franklin also included claims of direct institutional negligence against Little Company. Specifically, he alleged that Little Company was institutionally negligent for "fail[ing] to have an adequate number of nurses, physicians, and other emergency room personnel on duty;" "fail[ing] to adequately monitor [decedent];" and "fail[ing] to have properly functioning equipment in the emergency room." The same 2-622 report authored by Doctor James Matthews was affixed to plaintiff's second amended complaint.

¶ 14 Little Company responded with a motion to dismiss plaintiff's allegations of institutional negligence, arguing in pertinent part, that these new and "independent" allegations, which were

[4] Doctor Uribes's deposition took place on May 27, 2014. Additional details of her deposition testimony will be set forth later in this disposition.

included for the first time in plaintiff's second amended complaint, filed on September 16, 2014, which was more than two years after decedent's October 15, 2011, death, fell "squarely outside" of the two-year statute of limitations applicable to wrongful death and survival actions predicated on medical malpractice set forth in section 13-212(a) of the Civil Code (735 ILCS 5/13-212(a) (West 2010)). Little Company further argued that the newly added institutional negligence allegations did not "relate back" to the vicarious liability claim included in plaintiff's timely-filed original and first amended complaints, because they were not similar in character or general subject matter to his original claim. Alternatively, Little Company argued that dismissal was proper because the allegations contained in plaintiff's second amended complaint were not supported by an affidavit and report completed by a licensed medical professional attesting that plaintiff's institutional negligence claims against Little Company had merit in accordance with the pleading requirements set forth in section 2-622 of the Civil Code (735 ILCS 5/2-622 (West 2010). That is, the report authored by Doctor Matthews offered no opinions concerning the allegations of institutional negligence included in Franklin's second amended complaint.

¶ 15 In a written response, Franklin asserted that the arguments advanced in Little Company's motion to dismiss lacked merit. With respect to the statute of limitations issue, plaintiff argued that the specific facts that formed the basis for his institutional negligence claims only became known to him after the depositions of various Hospital staff were completed in 2014. Because that "information was unavailable prior to the case being filed and formal discovery initiated," Franklin argued that he had no reason to know that there was evidence to support any institutional negligence claims against Little Company until those depositions were concluded. Because his second amended complaint containing the institutional negligence claims against Little Company was filed "less than 2 years after he knew or should have known of the evidence

supporting the allegations," based on the responses provided by the deponents, plaintiff argued that his institutional negligence claims were timely. Plaintiff further argued that the direct institutional negligence claims "clearly grew out of and relate[d] back to the same occurrence set up in the original pleadings."

¶ 16 In a detailed written order, the circuit court granted Little Company's motion to dismiss. The court explained its rationale as follows:

> "The Plaintiff neither pleads the discovery rule, nor applies [it] properly here. The Plaintiff already knew that there was a wrongfully caused injury and the limitations period began to run with the Decedent's death. That the Plaintiff did not know the extent or full nature of the injury or the specific acts of each Defendant, does not give rise to the applicability of the discovery rule or re-set the running of the limitations period. The allegations of direct negligence against the hospital added for the first time in the Second Amended Complaint were added beyond the expiration of the limitations period. The question is whether these newly added allegations relate back.
>
> The original and amended complaints only alleged vicarious liability against the hospital. In the Second Amended Complaint, direct institutional negligence is alleged against the hospital. There is nothing in the original and amended pleadings which put the hospital on notice that its direct negligence was at issue. The hospital's direct acts in failing to have an adequate number of nurses, physicians, and other emergency room personnel on duty, in failing to monitor the Decedent, and in failing to have properly functioning equipment in the emergency room are separate from the acts of [negligence] alleged [against] Dr. Uribes in the care and treatment of the Decedent for which the hospital is vicariously liable and they were not raised prior to the instant pleading.

> In *Porter*, the [supreme] court adopted the sufficiently close relationship test to determine whether a new claim arose out of the same transaction or occurrence as was set up in the original pleading. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 360 (2008). The *Porter* court determined that an amendment is considered distinct from the original pleading and will not relate back where the original and amended set of facts are separated by a significant lapse of time, or the two sets of facts are different in character, or the two sets of facts lead to arguably different injuries. *Id*. at 359. Here, the two sets of facts involving the vicarious liability and the institutional negligence are different in character. Further, the failure to have adequate staff and properly functioning equipment occurred at some time prior to the medical care rendered to the Decedent. While the failure to monitor was alleged in the original complaint with respect to Dr. Uribes and thus, the hospital's vicarious liability for it, there were no allegations implicating the hospital's separate and direct allegations in the failure to monitor. Thus, the newly added allegations of direct negligence do not arise from the same transaction or occurrence, and thus, do not relate back pursuant to section 2-616(b). *** Accordingly, the allegations of direct negligence must be dismissed with prejudice."

¶ 17 Third Amended Complaint

¶ 18 Following the court's ruling on Franklin's second amended complaint, Little Company sought summary judgment on his vicarious liability claim, the sole remaining claim against the Hospital. In lieu of filing a response, Franklin sought to file a third amended complaint, and the circuit court granted Franklin's request over the objection of Little Company. Accordingly, on May 12, 2015, Franklin filed his third amended complaint. Franklin again re-alleged that Doctor Uribes's aforementioned negligent acts and omissions proximately caused Teaunie's death and

that Little Company and Evergreen were vicariously liable for her conduct. He also re-alleged the aforementioned claims of institutional negligence against Little Company. That is, he alleged that Little Company "failed to have an adequate number of nurses, physicians, and other emergency room personnel on duty;" "failed to adequately monitor Teaunie Franklin;" and "failed to have properly functioning equipment in the emergency room." In addition to those aforementioned claims, Franklin also included two new claims of institutional negligence against Little Company. Specifically, he alleged that Little Company was also institutionally negligent because it "failed to insure that the monitors placed on Teaunie Franklin were properly functioning" and "administered inappropriate amounts of narcotic medications in light of her condition." Franklin also included a spoliation of evidence claim against Little Company and Doctor Uribes. This claim was based on the defendants' purported deletion or failure to maintain cardiac monitoring strips that were collected during decedent's hospital stay. Plaintiff alleged that the failure to maintain those monitoring strips constituted a violation of the Illinois Hospital Licensing Act, which requires "every hospital to preserve its medical records *** for not less than 10 years" (210 ILCS 85/6.17(c) (West 2010)). The same 2-622 report authored by Doctor James Matthews was affixed to plaintiff's third amended complaint.

¶ 19 Little Company responded with a motion seeking dismissal of Franklin's institutional negligence and spoliation of evidence claims. Little Company again argued that all of Franklin's institutional negligence claims were time-barred because they were filed after the expiration of the applicable statute of limitations and did not relate back to his timely filed vicarious liability claim. Moreover, Franklin's institutional negligence claims were not supported by a proper 2-622 report because the report authored by Doctor Matthews did not offer any opinions regarding the Hospital's direct institutional negligence. Little Company likewise argued that Franklin's

spoliation claim, which was derivative of his negligence claims and subject to the same 2-year statute of limitations, was also time-barred. Alternatively, Little Company argued that Franklin's spoliation claim was not properly pled and that dismissal of the claim was also warranted under section 2-615 of the Civil Code (735 ILCS 5/2-615 (West 2010)).

¶ 20 Doctor Uribes and Evergreen filed a separate motion to dismiss plaintiff's spoliation of evidence claim against Doctor Uribes. In their motion, Doctor Uribes and Evergreen argued that the duty to preserve records set forth in the Illinois Hospital Licensing Act only applied to hospitals, not individual physicians. Absent a duty, Doctor Uribes could not be guilty of negligent spoliation of evidence. Therefore, Doctor Uribes and Evergreen argued that the circuit court should dismiss with prejudice Franklin's spoliation of evidence claim against Doctor Uribes.

¶ 21 In another detailed written order, the circuit court granted Little Company's motion to dismiss. In its order, the court again concluded that plaintiff's institutional negligence claims against Little Company were time-barred, explaining: "As the court has previously pointed out, Plaintiff already knew that there was a wrongfully caused injury and the limitations period began to run with Decedent's death. Further, the fact that the Plaintiff did not know the extent or full nature of the injury or the specific acts against each Defendant, does not give rise to the applicability of the discovery rule or re-set the running of the limitations period. Therefore, all of the allegations of direct negligence against the hospital were added beyond the expiration of the limitations period." In addition, the court reasserted its previous conclusion that Franklin's allegations of direct institutional negligence did "not relate back" to his original and amended complaints, which only contained allegations of vicarious liability. With respect to Franklin's spoliation of evidence claim against Little Company, the court concluded that "for the same

reasons that the institutional negligence claims are time barred so too is the spoliation claim which is based on those claims." The court similarly dismissed with prejudice the spoliation claim against Doctor Uribes, noting that the provision of the Hospital Licensing Act on which Franklin relied to support his spoliation claim only imposed a duty on hospitals to preserve its patient medical records. Given that the plain language of the statute imposed no such requirement on individual physicians, the court concluded that Franklin's spoliation claim against Doctor Uribes failed on that basis alone.

¶ 22 Summary Judgment

¶ 23 Following the circuit court's ruling on its motion to dismiss plaintiff's third amended complaint, Little Company filed a new motion for summary judgment on plaintiff's vicarious liability claim, which was the last remaining claim against the hospital set forth in Franklin's third amended complaint. In its motion, Little Company argued that there were no genuine issues of material fact that Doctor Uribes was neither an actual nor an apparent agent of the Hospital at the time she provided emergency medical treatment to Teaunie. Regarding actual agency, Little Company argued that Doctor Uribes's deposition testimony conclusively established that she was employed by Evergreen and was not an employee or actual agent of Little Company. Doctor Uribes testified that Evergreen was responsible for scheduling and paying her for her medical services. With respect to the issue of apparent agency, Little Company argued that there was no evidence that the Hospital "held Doctor Uribes out as its agent." Little Company emphasized that decedent's husband signed an Admission Form at the time of his wife's October 14, 2011, hospital admission that specifically stated that the emergency room physicians were "independent contractors" and "not employees or agents of [the] hospital." Moreover, Teaunie had personally signed identical forms containing the same

disclaimer language on nine prior occasions that she had sought out emergency treatment at Little Company. Plaintiff, in turn, had signed a form on his wife's behalf on one other prior occasion before her October 2011 admission that contained the same aforementioned disclaimer. In addition to the disclaimer language, Little Company further argued that there was "no evidence that Doctor Uribes acted as though she were an agent" of the Hospital or that it acquiesced to any such actions. Little Company emphasized that Doctor Uribes's discovery deposition established that the scrubs she wore while providing emergency treatment were her own personal scrubs and that they did not bear any label pertaining to Little Company. Moreover, Doctor Uribes did not inform decedent or her husband that she was a Little Company employee. Given the lack of evidence of actual or apparent agency, Little Company argued that summary judgment was proper.

¶ 24 In response, plaintiff argued that whether or not Doctor Uribes was an actual or apparent agent were questions of fact and that Little Company's motion for summary judgment should be denied. In support, plaintiff attached excerpts of various unauthenticated documents, including a purported contact and printouts from Little Company's website.

¶ 25 After considering the parties' filings, the circuit court issued a written order granting Little Company's motion for summary judgment.[5] Regarding the issue of actual agency, the circuit court noted that "there is no evidence in the record that Doctor Uribes was an employee of the hospital" or any "evidence in the record which indicates or even suggests that Doctor Uribes did not retain the right to control her own work as a physician or her medical judgment in the treatment and care of her patients." As a result, the court concluded: "there is no evidence to support the existence of an [actual] agency relationship between the hospital and Doctor Uribes."

[5] We note that the circuit court's order is entitled "Memorandum Opinion and Order on Defendants' Motions to Dismiss Third Amended Complaint;" however, the substance of the order correctly refers to the motion at issue as Little Company's motion for summary judgment.

With respect to the issue of apparent agency, the court similarly found that there was "nothing in the record here which shows that the hospital or Doctor Uribes acted in a manner which would lead a reasonable person to conclude, or give the appearance of authority, that she was an employee or agent of the hospital." In doing so, the court found it significant that the Admission Form that plaintiff signed on his wife's behalf at the time of her October 14, 2011, hospital admission specifically provided that the physicians working in the emergency room were independent contractors and not employees or agents of Little Company. Moreover, "[d]ecedent herself also signed the same identical consent form on all of her nine prior admissions[6] to the hospital." Accordingly, the court concluded that because "Doctor Uribes was neither the actual nor apparent agent of Little Company *** summary judgment in favor of the hospital is appropriate." The court also entered a finding in accordance with Supreme Court Rule 304(a) that there was no just reason to delay the enforcement or appeal of the order.

¶ 26 This appeal followed.

¶ 27 ANALYSIS

¶ 28 Institutional/Direct Negligence Claims

¶ 29 On appeal, Franklin first challenges the circuit court's finding that his direct institutional negligence claims against Little Company, which were included in his second and third amended complaints, were time-barred. He invokes the discovery rule and argues that his institutional negligence claims were pled within two years after Little Company hospital staff members involved in the care of decedent were deposed. Because he did not discover that a valid basis for an institutional negligence claim against Little Company existed until after those depositions

[6] We note that decedent did sign admission forms on nine prior occasions; however, she was actually admitted to Little Company on ten prior occasions. Decedent's husband had signed the consent form on her behalf on one of those prior occasions.

concluded, Franklin argues that his institutional negligence claims were timely. Alternatively, he argues that his institutional negligence claims relate back to the vicarious liability claim included in his prior timely filed pleadings because "the allegations at issue were part of the same events leading up to the same injury and were closely connected in time and location."

¶ 30 Little Company responds that the circuit court properly dismissed Franklin's institutional negligence claims as untimely because they were not filed within the applicable statute of limitations and because they did not relate back to his timely filed vicarious liability claim.

¶ 31 The purpose of a motion to dismiss pursuant to section 2-619 of the Civil Code (735 ILCS 5/2-619 (West 2010)) is to provide litigants with the means to dispose of issues of law and easily proven issues of fact. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995); *Caywood v. Gossett*, 382 Ill. App. 3d 124, 128-29 (2008). The proponent of a 2-619 motion to dismiss admits the legal sufficiency of the factual allegations contained in the complaint, but asserts that the complaint is barred by an affirmative matter that defeats the claim. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993); *Caywood*, 382 Ill. App. 3d at 129. Section 2-619(a)(5) of the Code, in pertinent part, provides for the dismissal of a claim that "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). When ruling on a 2-619 motion to dismiss, a court will construe all pleadings and supporting documents in the light most favorable to the nonmoving party. *Richter v. Prarie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 18; *In re Parentage of M.J.*, 203 Ill. 2d 526, 533 (2003); *Caywood*, 382 Ill. App. 3d at 128. The circuit court's dismissal of a complaint pursuant to section 2-619 of the Civil Code is subject to *de novo* review. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 115 (2008); *Owens v. VHS Acquisition Subsidiary Number 3, Inc.*, 2017 IL App (1st) 161709, ¶ 19; *Amalgated Transit Union, Local 308 v. Chicago Transit Authority*, 2012 IL App (1st) 112517, ¶ 12.

¶ 32 Wrongful death and survival actions predicated on claims of medical malpractice are subject to the statute of limitations period set forth in section 13-212(a) of the Civil Code (735 ILCS 5/13-212(a) (West 2010)). See *Moon v. Rhode*, 2016 IL 119572, ¶¶ 29-30. That provision, in pertinent part, provides as follows:

> "§ 13-212. Physician or hospital.
>
> (a) [N]o action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than *2 years* after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which the act or omission or occurrence alleged in such action to have been the cause of such injury or death." (Emphasis added.) 735 ILCS 5/13-212(a) (West 2010).

¶ 33 The plain language of the statute "incorporates" the discovery rule (*Holladay v. Boyd, M.D.*, 285 Ill. App. 3d 1006, 1013 (1996)), and mandates that "any claim of malpractice against a physician or hospital must be filed within two years of the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the injury or death for which damages have been sought." *Moon*, 2016 IL 119572, ¶ 24; see also *Gapinski v. Gujrati*, 2017 IL App (3d) 150502, ¶ 50. More specifically, "the statute of limitations in a wrongful death action alleging medical malpractice begins to run when a plaintiff knows or reasonably should know of the death and also knows or reasonably should know that it was wrongfully caused." *Moon*, 2016 IL 119572, ¶ 27. Courts interpreting the knowledge

requirement of the statute have held that a plaintiff's knowledge that an injury or death was wrongfully caused "does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action;" rather, the term "refers to that point in time when 'the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.' " *Moon*, 2016 IL 119672, ¶ 43 (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)); see also *Heredia v. O'Brien*, 2015 IL App (1st) 141952, ¶ 22. At that point, it becomes the burden of the injured party to inquire further and determine the existence of an applicable cause of action. *Moon*, 2016 IL 119672, ¶ 43 "The purpose of this rule is to encourage diligent investigation on the part of potential plaintiffs without foreclosing any claims of which the plaintiffs could not have been aware." *Heredia*, 2015 IL App (1st) 141952, ¶ 23. Generally, the time pursuant to which a plaintiff knew or should have known of an injury and that it was wrongfully caused are questions of fact; however, they may be considered matters of law where the facts are undisputed and where only one conclusion can be drawn from those facts. *Gapinski*, 2017 IL App (3d) 150502, ¶ 50.

¶ 34 In concluding that Franklin's institutional negligence claims against Little Company were untimely, the circuit court expressly found that the statute of limitations began running on October 15, 2011, the date of decedent's unexpected and sudden death, because Franklin knew or should have known that there was a wrongfully caused injury at that time. Given that Franklin's institutional negligence allegations were included for the first time in his second amended complaint, filed on September 16, 2014, the court found that the claims were not commenced within the applicable 2-year statute of limitations.

¶ 35 On appeal, Franklin does not dispute the court's finding that he knew or had reason to know that his wife's death was wrongfully caused at the time of her death.[7] Instead, he argues that he did not specifically know or have reason to know that Little Company had engaged in institutional negligence at that time of her death; rather, he did not discover that there was a basis for an independent institutional negligence cause of action against Little Company until the depositions of medical personnel involved in decedent's care were taken in 2014. During those depositions, the deponents provided information about Little Company's staffing methods and the type of equipment employed in its emergency room. It was thus not until 2014, that Franklin became aware of any hospital staffing issues or Little Company's failure to have properly functioning equipment in its emergency room. Because Franklin's institutional negligence claims were filed within two years upon the conclusion of those depositions, he insists that the claims was timely filed. His argument, however, is premised on an improper understanding and application of the discovery rule. Although the information that formed the basis for plaintiff's institutional negligence claim was gleaned from the deposition testimony of medical personnel who provided medical care to Teaunie, the running of the statute of limitations is not dependent upon a plaintiff's knowledge of a specific defendant's conduct or knowledge of the existence of a specific cause of action. *Moon*, 2016 IL 119672, ¶ 43. Rather, as set forth above, the statute of limitations is triggered by "that point in time when 'the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.' " *Moon*, 2016 IL 119672, ¶ 43 (quoting *Knox*, 88 Ill. 2d at 416). Contrary to Franklin's argument, the relevant inquiry for the discovery

[7] In one of the headings in his reply brief, Franklin suggests that he "does dispute" that he had reason to know that his wife's death may have been wrongfully caused on the day of her death. However, the substance of his argument simply pertains to the date on which the discovery depositions of Little Company staff members were concluded. As explained above, this argument is premised on an improper application of the discovery rule.

rule and the commencement of the relevant statute of limitations is thus not when he knew or should have known there was a potential cause of action against Little Company for direct institutional negligence; rather, the relevant inquiry is when he knew or should have known that Teaunie's death was potentially wrongfully caused. Here, Franklin does not dispute the circuit court's finding that he had reason to know that Teaunie's death was wrongfully caused on the date that she died. The court's conclusion is supported by the fact that plaintiff filed a complaint and an amendment thereto against defendants within two years of Teaunie's death. Because Franklin's institutional negligence claims against Little Company were not included in those initial timely filings, the circuit court properly found that his institutional negligence claims were added beyond the expiration of the applicable 2-year statute of limitations.

¶ 36 In an effort to avoid procedural default, however, Franklin invokes the relation back doctrine and argues that his untimely institutional negligence claims against Little Company should nonetheless be considered because they "relate back" to the vicarious liability claim that was timely plead in his original and amended complaints. Section 2-616 (b) of the Civil Code sets forth the relation back doctrine and provides as follows:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading *grew out of the same transaction or occurrence set up in the original pleading*, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other

> matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2010).

¶ 37 The purpose of the relation back doctrine is to provide fairness to the litigants and to "preserve causes of action against loss by reason of technical default unrelated to the merits." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 355 (2008); see also *Cammon v. West Suburban Hospital Medical Center*, 301 Ill. App. 3d 939, 945-46 (1998). In enacting this provision, " 'the legislature struck a balance between a preference for resolving disputes on their merits and preventing surprise or prejudice to a party resulting from a lack of notice of the conduct or condition upon which liability is asserted against him.' " *Cammon*, 301 Ill. App. 3d at 946 (quoting *Yette v. Casey's General Stores, Inc.*, 263 Ill. App. 3d 422, 425 (1994)). In the context of claims predicated on medical malpractice, the "relation back doctrine has been frequently applied to permit an amended complaint against the defendant medical providers when they had received adequate notice of the same operative facts leading to the alleged medical negligence stated in an earlier, timely filed complaint." *Lawler v. University of Chicago Medical Center*, 2016 IL App (1st) 143189, ¶ 54. To determine whether a cause of action relates back to an earlier filed claim, courts employ the sufficiently-close relationship test. *Porter*, 227 Ill. 2d at 360. Under this test, "new factual allegations will be considered to relate back where there is a 'sufficiently close relationship' between the original and new claims, both in temporal proximity and in the general character of the sets of factual allegations and where the facts are all

part of the events leading up to the originally alleged injury." *Porter*, 227 Ill. 2d at 359 (citing *In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370, 1372-72 (N.D. Ill. 1985)). The rationale behind this rule is that "a defendant is not prejudiced if ' "his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him." ' " *Id*. at 355 (quoting *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995) (quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965)). In order to determine whether a defendant was afforded the requisite notice and whether later added claims relate back to earlier timely filed claims, courts should consider the entire record, including the pleadings, depositions and exhibits. *Porter*, 227 Ill. 2d at 359; see also *Cammon*, 301 Ill. App. 3d at 946-948 (finding that some later added claims against the hospital in a malpractice case related back to earlier timely filed claims while others did not based on a thorough examination of the pleadings and the record).

¶ 38 Here, Franklin argues that his institutional negligence claims against Little Company necessarily relates back to his timely filed vicarious liability claim because "the allegations at issue were part of the same events leading up to the same injury and were closely connected in time and location" to Teaunie's treatment at Little Company. In his timely filed original and first amended complaints, Franklin solely alleged that Little Company was vicariously liable for the negligent conduct of Doctor Uribes. The specific negligent conduct alleged included Doctor Uribes's "fail[ure] to adequately monitor [decedent];" "fail[ure] to accurately diagnose [decedent's] condition;" "administ[ration of] excessive does of narcotic pain medications, including Dilaudid and Morphine;" and her "fail[ure] to timely and adequately administer resuscitation efforts." Franklin's later filed institutional negligence claims against Little Company, in turn, alleged that the Hospital negligently "failed to have an adequate number of

nurses, physicians, and other emergency room personnel on duty;" "failed to have properly functioning equipment in the emergency room;" "failed to insure that the monitors placed on [decedent] were properly functioning;" "failed to adequately monitor" decedent; and "administered inappropriate amounts of narcotic medications" to decedent.[8]

¶ 39 We observe that Franklin's allegations concerning Little Company's staffing and its acquisition, monitoring, and maintenance of its emergency room equipment implicate the Hospital's management and administration decisions. Nothing in Franklin's timely filed original or first amended complaints, however, suggested that he was asserting that decedent's death was the result of Little Company's management and administration decisions. These allegations significantly differ both factually and in character from the initial allegations that formed the basis for Franklin's vicarious liability claim against the hospital, which solely pertained to the medical care and treatment that Teaunie received. Moreover, the Hospital's staffing and equipment acquisition, monitoring, and maintenance decisions necessarily occurred prior to Teaunie's October 2011 admission and treatment at Little Company, and thus these allegations also differ temporally from the original negligence allegations contained in Franklin's timely filed pleadings. Franklin's timely filed pleadings did not place the Hospital on notice that its administrative and managerial decisions were at issue. Accordingly, we find that the circuit court's dismissal of Franklin's claims of institutional negligence against Little Company premised on the Hospital's failure to have adequate staff on duty; failure to have properly functioning equipment in its emergency room; and its failure to ensure that the equipment placed on decedent were properly functioning was proper as those claims do not relate back to claims advanced in his earlier timely filed pleadings, which solely concerned the medical care that

[8] For the purpose of our analysis, we are listing the specific allegations of institutional negligence in different order than they are included in Franklin's pleadings.

Teaunie received. See, *e.g.*, *Weidener v. Carle Foundation Hospital*, 159 Ill. App. 3d 710, 712-13 (1987) (finding that the plaintiff's institutional negligence claim against the defendant hospital based on the hospital's staff management did not relate back to the plaintiff's timely filed vicarious liability claim seeking to hold the hospital liable for the actions of a single physician because the allegations of institutional negligence were "separate from the alleged malpractice which led to plaintiff's injuries" and the plaintiff's earlier pleadings did not place the hospital on notice that its negligent management was at issue).

¶ 40 Franklin's remaining two institutional negligence claims against the Hospital, however, do pertain to the medical care and treatment that his wife received. He alleged that Little Company "failed to adequately monitor" decedent and "administered inappropriate amounts of narcotic medications" to decedent. These allegations track the allegations included in Franklin's original pleadings, where he alleged that Doctor Uribes also failed to adequately monitor decedent and administered excess narcotics medications. These allegations of negligence were closely related both temporally and subject matter to Franklin's original allegations concerning Doctor Uribes's treatment of decedent. Little Company was thus on notice that the failure to monitor decedent and the administration of medication to her were at issue in this case. As the circuit court found, however, the claims differ significantly in character because Little Company was not on notice that its own direct negligence was at issue. That is, Franklin's original filings solely concerned the conduct of Doctor Uribes, whereas his latter filings implicated the conduct of Little Company as an entity. Little Company, however, was never placed on notice of any institutional liability prior to the expiration of the statute of limitations; rather, his initial filings and the 2-622 report affixed thereto simply alerted Little Company to Franklin's vicarious liability claim. See, *e.g.*, *Cammon*, 301 Ill. App. 3d at 947 (reviewing the health care report

attached to the plaintiff's complaint to determine whether the defendant hospital was provided with the requisite notice of a specific claim of negligence to trigger the relation back doctrine). Although we are sympathetic to plaintiff, our review is constrained by the pleadings and the record. Plaintiff's timely filings only contained allegations of vicarious liability against Little Company based solely on Doctor Uribes's negligent conduct. Nothing in plaintiff's timely filed pleadings or the record put Little Company on notice that its own institutional negligence was at issue. As a result, we find that the relation-back doctrine does not apply to plaintiff's remaining allegations of direct negligence against Little Company. We therefore also affirm the portion of the circuit court's order dismissing Franklin's claims pertaining to the Hospital's independent failure to adequately monitor decedent and its administration of inappropriate doses of medication to decedent.

¶ 41 Spoliation Claim

¶ 42 Franklin also contests the circuit court's dismissal of his spoliation of evidence claim against Little Company. He raises no specific argument as to the propriety of the court's ruling, but simply suggests that if this court reverses the dismissal of his institutional negligence claims against Little Company, we should also "reinstate [his] spoliation count."

¶ 43 Illinois courts do not recognize spoliation of evidence as an independent cause of action; rather, it is a considered a derivative action that arises out of other causes of action and may be pled under existing negligence principles. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188-192-93 (1995); *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 431 (2007). Accordingly, to establish a claim for spoliation of evidence, a plaintiff must allege: (1) the defendant owed the plaintiff a duty to preserve evidence; (2) the defendant breached that duty; (3) the loss or destruction of the evidence proximately caused the plaintiff to be unable to prove his or her

underlying claim; and (4) the plaintiff suffered actual damages as a result. *Martin v. Keeley & Sons*, 2012 IL 113270, ¶ 26; *Jackson v. Michael Reese Hospital & Medical Center*, 294 Ill. App. 3d 1, 10 (1997). As a general rule, there is no duty to preserve evidence; however, a duty may arise via agreement, contract, a statutorily imposed obligation, or in other special circumstances. *Boyd*, 166 Ill. 2d at 195. In this case, Franklin alleged that the duty to preserve medical records was imposed on Little Company and Doctor Uribes by section 6.17(c) of the Illinois Hospital Licensing Act. That provision provides:

> "Every *hospital* shall preserve its medical records in a format and for a duration established by hospital policy and for not less than 10 years, provided that if the hospital has been notified in writing by an attorney before the expiration of the 10 year retention period that there is litigation pending in court involving the record of a particular patient as possible evidence and that the patient is his client or is the person who has instituted such litigation against his client, then the hospital shall retain the record of that patient until notified in writing by the plaintiff's attorney, with the approval of the defendant's attorney of record, that the case in court involving such record has been concluded or for a period of 12 years from the date that the record was produced, whichever occurs first in time." (Emphasis added.) 210 ILCA 85/6.17(c) (West 2010).

¶ 44 As a threshold matter, we note that Franklin does not raise any substantive argument concerning the circuit court's dismissal of his spoliation of evidence claim against Doctor Uribes in his appellate brief. That is, he neither challenges the court's conclusion that the duty to retain medical records set forth in the Illinois Hospital Licensing Act applies solely to hospitals and does not extend to individual physicians nor its dismissal of his spoliation claim against Doctor Uribes. In his reply brief, Franklin erroneously stated that the circuit court made no ruling

concerning the propriety of his spoliation of evidence claim against Doctor Uribes; however, he subsequently filed a motion to correct his reply brief to remove that inaccurate statement, which this court granted. Given Franklin's failure to raise any substantive challenge to the circuit court's dismissal of his spoliation claim against Doctor Uribes in his appellate brief, he has thus waived appellate review of this issue. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). We therefore affirm the circuit court's dismissal of Franklin's spoliation claim against Doctor Uribes.

¶ 45 Turning to Franklin's spoliation claim against Little Company, we note that there appears to be no dispute that the Hospital was subject to the Hospital Licensing Act's medical records retention requirement. We nonetheless conclude that the circuit court properly dismissed his spoliation claim against the Hospital. Because spoliation claims are derivative actions, courts have routinely held that they are subject to the procedural and substantive rules applicable to the underlying actions from which they are derived, including statutes of limitation. *Wofford v. Tracy*, 2015 IL 141229, ¶ 35; *Babich*, 377 Ill. App. 3d at 432; but see *Schusse v. Pace Suburban Bus Division of the Regional Transport Authority*, 334 Ill. App. 3d 960 (2002) (concluding that the general catch-all 5-year statute of limitation period set forth in section 13-205 of the Civil Code applies to spoliation claims). Accordingly, if a plaintiff's underlying cause of action is not filed within the applicable statute of limitations, his spoliation claim is also time-barred. See, *e.g.*, *Babich*, 377 Ill. App. 3d at 431-32 (finding that once the limitations period on the plaintiff's product liability action expired, the plaintiff could not proceed on his derivative spoliation claim as it was subject to the same limitations period as the underlying products liability claim); *Wofford*, 2015 IL App (2d) 141220, ¶¶ 35-36 (concluding that the circuit court properly

dismissed the plaintiffs' spoliation claim where it was not commenced within the limitations period applicable to their underlying negligence action from which their spoliation claim derived).

¶ 46 Here, it is clear that Franklin's spoliation claim is derivative of his institutional negligence claim against Little Company premised on the Hospital's failure to secure and maintain properly functioning equipment in its emergency room. In his third amended complaint, Franklin alleged that: Little Company had a duty, pursuant to section 6.17 of the Hospital Licensing Act to preserve Teaunie's cardiac monitoring recordings and rhythm strips; Little Company breached that duty by either deleting the recordings or failing to keep the rhythm strips; the examination of such evidence "would be necessary" to prove his claim that Little Company "fail[ed] to have properly functioning equipment in the emergency room" and "fail[ed] to insure that the cardiac monitor that was placed on [decedent] was properly working;" and that as a direct and proximate result of the spoliation of evidence, he would be unable to prevail on his claim that Little Company failed to have properly functioning equipment in its emergency room. Given the derivative nature of Franklin's spoliation claim, it was subject to the same 2-year statute of limitations period set forth in section 13-212(a) of the Civil Code (735 ILCS 5/13-212(a) (West 2010)) applicable to all of his claims. See, *e.g.*, *Wofford*, 2015 IL 141229, ¶ 35; *Babich*, 377 Ill. App. 3d at 432. Franklin's spoliation claim, however, was pled for the first time in Franklin's third amended complaint filed on May 12, 2015. It is derivative of his institutional negligence claims predicated on the Hospital's failure to obtain and maintain properly functioning equipment in its emergency room, claims that this court found were not pled within the applicable statute of limitations and did not relate back to plaintiff's timely filed allegations of negligence against the Hospital. The circuit court thus properly held that "for the same

reasons that the institutional negligence claims are time-barred, so too is the spoliation claim which is based on those claims." Therefore, we affirm the circuit court's dismissal of plaintiff's spoliation claim against Little Company.

¶ 47 Apparent Agency

¶ 48 Finally, Franklin argues that the circuit court erred in granting Little Company's motion for summary judgment on his vicarious liability claim. He argues that there is a genuine issue of material fact as to whether Little Company can be subject to vicarious liability for Doctor Uribes's negligent treatment of decedent.[9]

¶ 49 Little Company responds that the circuit court's ruling on its motion for summary judgment was correct as there is no genuine issue of material fact that Doctor Uribes was not an apparent agent of the hospital.

¶ 50 Summary judgment is appropriate when "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 judgment as a matter of law." 735 ILCS 5/2-1005(c)(West 2010). In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of fact exists where the material relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). To survive a motion for summary judgment, the nonmoving party need not prove his case at this preliminary stage of litigation; however, the plaintiff must present some evidentiary facts to support each element of

[9] Franklin does not argue that Doctor Uribes was an actual agent of Little Company; rather, his argument on appeal solely pertains to apparent agency.

his cause of action, which would arguably entitle him to a judgment. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881 (2009); *Garcia v. Nelson*, 326 Ill. 2d 33, 38 (2001). Although summary judgment has been deemed a "drastic means of disposing of litigation" (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)), it is nonetheless an appropriate mechanism to employ to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt (*Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). A trial court's ruling on a motion for summary judgment is subject to *de novo* review (*Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009)).

¶ 51 Prior to 1993, hospitals in Illinois could be subject to vicarious liability for a physician's negligent acts only if the physician was an actual agent of the hospital. *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 590 (2007) (citing *Johnson v. Sumner*, 160 Ill. App. 3d 173, 175 (1987); *Greene v. Rogers*, 147 Ill. App. 3d 1009, 1015-16 (1986)). However, in *Gilbert v. Sycamore Hospital*, 156 Ill. 2d 511, 525 (1993), our supreme court held that under certain circumstances, a hospital may be subject to liability for the negligent medical treatment provided by its actual agents *or* its apparent agents, that is, physicians who are actually independent contractors, not employees of the hospital. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179 (2006). Specifically, in *Gilbert*, our supreme court explained that pursuant to the doctrine of apparent authority, "[a] principal will be bound by not only that authority which he actually gives to another, but also by the authority which he appears to give. Apparent authority in an agent is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing. It is the authority which 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.

¶ 52 For a hospital to be liable under the doctrine of apparent authority, a plaintiff must establish the following elements and 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 negligent was an employee or agent 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.' " *Gilbert*, 156 Ill. 2d at 525 (quoting *Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 207-08 (1988)).[10] To survive a defendant hospital's motion for summary judgment on a claim of apparent agency, the plaintiff must present at least some evidence to satisfy each of the *Gilbert* factors. *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, ¶ 38; *Wallace*, 389 Ill. App. 3d at 1086.

¶ 53 The first two *Gilbert* elements are frequently grouped together and have been referred to as the "holding out" factor. *Wallace*, 389 Ill. App. 3d at 1087. The focus of this factor is whether or not "the patient knows, or should have known, that the physician is an independent contractor." *Gilbert*, 156 Ill. 2d at 524; see also *Wallace*, 389 Ill. App. 3d at 1087 (recognizing that there is no holding out where the patient "was placed on notice of the independent contractor status of" the doctor). Accordingly, a 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 [or she] might be expected to come into contact.' " *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 138 (quoting *York*, 222 Ill. 2d at 182).

[10] We note that plaintiff fails clearly set forth or adequately analyze the factors relevant to the doctrine of apparent agency.

¶ 54 Although not dispositive of the "holding out" factor, whether a patient signs a hospital consent to treatment form that contains clear and unambiguous independent contractor disclaimer language is an important consideration when evaluating this factor because it is unlikely that a patient who signs such a form can reasonably believe that her treating physician is an employee or agent of a hospital when the form contains specific language to the contrary. See *e.g., Lamb-Rosenfeldt v. Burke Medical Group, Ltd.,* 2012 IL App (1st) 101558, ¶ 28 (affirming summary judgment in favor of the defendant hospital where the decedent patient signed forms containing language in bold print and capital letters 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* 389 Ill. App. 3d at 1083, 1088 (finding that the plaintiff could not satisfy the holding out element necessary to subject the hospital to vicarious liability for the alleged negligent acts of two independent contractor physicians where she signed a consent form that stated that the physicians providing treatment "are not the employees or agents of Alexian Brothers Medical Center, but they are independent contractors" and that the hospital was "not responsible for the services these physicians provide"); *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 632 (1998) (finding that there was no genuine issue of material fact that the hospital could not be held vicariously liable for the negligent acts of an independent contractor obstetrician where the patient signed a consent to treatment 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").

¶ 55 In contrast, "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." *Mizyed*, 2016 IL App (1st) 142790, ¶ 42; See, *e.g.*, *Hammer v. Barth*, 2016 IL App (1st) 143066, ¶ 24 (finding that there was a genuine issue of material fact as to whether the defendant hospital could be subject to vicarious liability for the negligent acts of a doctor, based in part, on the fact that the patient's husband signed an "ambiguous" consent form that stated that " '*some or all* of the physicians who provide medical services' at the hospital 'are not employees or agents of the hospital, but rather independent practitioners' ").

¶ 56 Here, it is undisputed that at the time of decedent's October 14, 2011, admission, Franklin signed an Admission Form on his wife's behalf that contained the following language:

> "I have been informed and understand that the physician(s) providing services to me at Little Company of Mary Hospital and Health Care Centers, such as my personal physician(s), *emergency department physicians*, radiologists, pathologists, anesthesiologists, consulting physicians, surgeons, other allied health care providers, residents, medical students and interns, *are independent contractors and are not employees or agents of this hospital*. I further understand that each of these physicians will bill be separately for his/her services." (Emphasis added).

¶ 57 The above disclaimer specifically informs patients that the emergency department physicians, such as Doctor Uribes, who provide emergency medical treatment in Little Company's emergency room, are not employees or agents of the hospital, but are instead independent contractors. Franklin does not dispute that the aforementioned language is clear and unequivocal; rather, without providing any citation to authority, Franklin suggests there is no evidence to impute his knowledge as the signee of the October 14, 2011 Admission Form to decedent, and thus a genuine issue of material fact exists as to whether the form was sufficient to

apprise decedent of the independent contractor status of the emergency room doctors providing medical treatment at the Hospital. The mere fact that a patient's spouse signs a consent form, however, does not create a genuine issue of material fact as to whether the consent form sufficiently put the patient on notice of the independent contractor status of a hospital's physicians; rather, it is the language contained in the consent form, itself, that is relevant to this inquiry. See, *e.g.*, *Hammer,* 2016 IL App (1st) 143066, ¶ 24 (evaluating the language contained in the consent form signed by the plaintiff's husband to determine whether the physician disclosure language was clear or ambiguous); *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 593-94 (reviewing the language of forms signed by the decedent's wife on his behalf to determine whether the decedent "was confused or misled by the disclosure forms.") Moreover, we note that prior to her October 14, 2011, hospital admission, decedent had been admitted to Little Company's emergency room on ten other occasions and was required to sign forms containing the same aforementioned disclosure language prior to each of those hospital admissions. Decedent had personally signed identical admission forms on nine of those prior occasions that she had sought emergency treatment at Little Company and Franklin had signed a form on one prior occasion preceding Teaunie's October, 11, 2014, admission.[11] See, *e.g.*, *Lamb-Rosenfeldt,* 2012 IL App (1st) 101558, ¶¶ 28, 30 (recognizing that the fact that a patient signed identical consent forms containing independent contractor disclosure language on prior occasions is a relevant consideration when determining whether the patient knew or should have known that the doctor who provided medical treatment was an independent contractor). Here, we find that based on the clear and unambiguous language contained in Little Company's

[11] The prior dates in which Teaunie signed consent forms containing the aforementioned independent contractor disclaimer language include: April 24, 2010; October 2, 2010; October 18, 2010; December 6, 2010; January 4, 2011; May 21, 2011; June 6, 2011; June 13, 2011; and September 16, 2011. Prior to signing the October 14, 2011, consent form at issue, Franklin signed a consent form on his wife's behalf on April 11, 2011.

consent forms, which were signed by both decedent and plaintiff on multiple occasions, decedent knew, or should have known,[12] that Doctor Uribes was an independent contractor at the time that she provided treatment to her.

¶ 58 While consent forms themselves are " 'almost conclusive' in determining whether a hospital should be liable for the medical negligence of an independent contractor" (*Steele*, 2013 IL App (3d) 110374, ¶ 131 (quoting *Thede v. Kapsas*, 386 Ill. App. 3d 396, 401 (2008)), we note that Doctor Uribes's deposition testimony provides further evidence that Little Company did not hold her out as its agent. She testified that she wore her own personal scrubs when providing medical services in Little Company's emergency room and that the scrubs did not bear a Little Company logo or contain any other indicia of an association with the hospital. *Cf. York*, 222 Ill. 2d at 196 (finding that the defendant hospital failed to place the plaintiff on notice that the doctor who treated him was an independent contractor and not an employee, where the doctor "wore either scrubs covered with the [hospital's] logo or a lab coat that displayed the [hospital's] emblem" during his interactions with the plaintiff); *Hammer*, 2016 IL App (1st) 143066, ¶ 25 (recognizing that the fact that a physician wears a lab coat or other clothing that contains a hospital's logo is a relevant consideration when determining whether the hospital held out the physician as agent). Indeed, there is no evidence in the record that Doctor Uribes, through her words or actions, created an appearance of agency between herself and Little Company. Given the lack of facts showing that Little Company held out Doctor Uribes as its agent, coupled with the clear and unambiguous consent forms, we necessarily conclude that decedent knew, or should have known, that Doctor Uribes was not an agent of the hospital. See, *e.g.*, *Mizyed*, 2016

[12] Whether or not Franklin and his wife actually read the language contained in the consent forms is immaterial given that it is well-established that "a competent adult is charged with knowledge of and assent to a document the adult signs and that ignorance of its contents does not avoid its effect." *Steele*, 2013 IL App (3d) 110374, ¶ 121 (citing *Black v. Wabash St. Louis & Pacific Ry. Co.*, 111 Ill. 351, 358 (1884)).

IL App (1st) 142790, ¶ 64. Because plaintiff failed to present a sufficient factual basis to satisfy the "holding out" requirement necessary to establish apparent agency, we conclude that the circuit court properly granted Little Company's motion for summary judgment on his vicarious liability claim.[13]

¶ 59 CONCLUSION

¶ 60 We affirm the circuit court's judgment dismissing Franklin's institutional negligence and spoliation claims against Little Company. We also affirm the circuit court's order granting Little Company's motion for summary judgment on plaintiff's vicarious liability claim. Finally, we affirm the circuit court's judgment dismissing Franklin's spoliation of evidence claim against Doctor Uribes.

¶ 61 Affirmed.

[13] In light of plaintiff's inability to satisfy the "holding out" factor, we need not address the "reliance" factor. See, *e.g.*, *Mizyed*, 2016 IL App (1st) 142790, ¶¶ 64-65.