FIRST DIVISION
September 18, 2017

Nos. 1-16-2546 & 1-17-0084

JOHNNY LLOYD, PH.D., as Administrator of the ESTATE OF CHELSEA LYNN LLOYD, deceased, Plaintiff-Appellant, v. WARREN WOLLIN, D.O., PHYSICIANS IMMEDIATE CARE-ELGIN, KRISTIN NIEDNER, M.D., MIDWEST EMERGENCY ASSOCIATES, LLC, and ST. ALEXIUS MEDICAL CENTER, INC., Defendants (St. Alexius Medical Center, Inc., Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County No. 12 L 7080 The Honorable John P. Callahan, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff's initial notice of appeal failed to confer this court with jurisdiction because the circuit court's summary judgment order was not properly certified under Rule 304(a). However, a subsequent Rule 304(a) finding and amended notice of appeal conferred jurisdiction over the summary judgment order and an order dismissing certain other claims from an amended complaint. The circuit court properly granted summary judgment in favor of the hospital where there was no genuine issue of material fact as to whether the treating physician was the apparent agent of the hospital, and thus the hospital could not be held vicariously liable for the treating physician's alleged negligence. The circuit court erred, however, by dismissing plaintiff's second amended complaint that sought to hold the hospital liable for the alleged negligent acts of its employee where the amended claims relate back to a timely-filed pleading.

¶ 2 Plaintiff's first amended complaint sought, in part, to hold St. Alexius Medical Center vicariously liable for the alleged negligence of the physician who treated his deceased daughter after she presented to St. Alexius on September 2, 2011. The circuit court granted summary judgment in favor of St. Alexius on plaintiff's vicarious liability claims against the hospital based on a finding that the consent form signed by the decedent precluded any possibility that St. Alexius held the physician out as its agent. The circuit court granted St. Alexius's motion for a finding pursuant to Supreme Court Rule 304(a) (eff. Mar. 8, 2016), but failed to include an express finding as required by the rule. Plaintiff appealed. Plaintiff was granted leave to file a second amended complaint in which he sought to hold St. Alexius directly liable for the alleged negligence of the hospital's nurses who treated his daughter upon her arrival at St. Alexius on September 2, 2011. The circuit court granted St. Alexius's motion to dismiss plaintiff's direct liability claims from the second amended complaint, finding the claims were untimely. The circuit court again made a finding pursuant to Rule 304(a), and plaintiff filed a second notice of appeal. We have consolidated the appeals. For the following reasons, we dismiss in part, affirm in part, reverse in part, and remand.

¶ 3 BACKGROUND

¶ 4 In the morning of August 19, 2011, Chelsea Lloyd was driving when another car rear-ended her. Chelsea then drove herself to St. Alexius Medical Center and walked into the emergency room around 9:00 a.m. She signed a form entitled "Consent for Medical Treatment," which contained the following language above the signature line:

> "**INDEPENDENT STATUS OF PHYSICIANS**: I recognize that any or all physicians, residents, or medical students (under the supervision of physicians and/or residents), who furnish services to me during this admission are

> INDEPENDENT CONTRACTORS and are NOT AGENTS OR EMPLOYEES OF THE HOSPITAL. I understand and agree that each of the above referenced practitioners, including emergency room physicians, radiologists, pathologists, anesthesiologists, etc., who render professional services to me, bill and collect independently for their services. I understand that their bills will be separate and apart from this hospital's billing and collections, or the hospital may bill on the physician's behalf, but subject to the authorizations granted by me in accordance with this agreement.
>
> This form has been fully explained to me and I certify that I understand and accept its contents, except as noted." (Emphases in original.)

Chelsea was then evaluated by a triage nurse, who noted that she was "awake" and oriented to person, time, and place. Chelsea reported that she felt like she had a concussion. She was then evaluated by a physician's assistant, Michelene J. Meersman, who recorded that Chelsea denied hitting her head. After conducting a neurological exam, PA Meersman concluded that Chelsea had suffered a cervical strain and ordered x-rays, which revealed no fractures, dislocations, or other acute bone or joint abnormalities. At around 10:22 a.m., Chelsea told PA Meersman that she was feeling better, and she was discharged around 10:40 a.m. Chelsea was instructed to follow up with Dr. Aleksandra Popovic, or to return to the emergency room if her condition worsened.

¶ 5 A few days after her visit to St. Alexius, Chelsea noticed a bump on her chest that was getting bigger. On August 28, 2011, plaintiff, Chelsea's father, took her to Dreyer Medical Clinic where Dr. Robert Ireland diagnosed an abscess on her chest that he suspected was a methicillin-

resistent Staph aureus (MRSA) infection. Dr. Ireland referred Chelsea to Provena Mercy Medical Center's emergency department, where the abscess was assessed and drained, and cultures were taken. Chelsea was placed on Keflex and Bactrim, which are prophylactic antibiotics intended to treat a MRSA infection. The cultures tested positive for MRSA.

¶ 6 On September 2, 2011, at around 10:22 p.m., Chelsea, accompanied by plaintiff, returned to St. Alexius's emergency department, where she was admitted. She was first seen by Leticia N. Tiangson, R.N., who noted that Chelsea "arrived ambulatory via private auto" accompanied by her father, that she was awake, alert, and "oriented x3," and that she was calm and speaking coherently. Chelsea had a temperature of 103.4°F and a pulse of 131, but her other vital signs were within normal ranges. Chelsea again signed a "Consent for Medical Treatment" that contained the same provision included in the consent form she executed on August 19, 2011.

¶ 7 At around 12:28 a.m. on September 3, 2011, Chelsea was seen at St. Alexius by Kristin Niedner, M.D., an employee of Midwest Emergency Associates. Chelsea explained to Dr. Niedner the history of the bump on her chest and her course of treatment. Chelsea reported that she had not felt well during the past two days, and was experiencing severe shaking chills, body aches, and fatigue. Dr. Niedner performed an examination, finding Chelsea "alert and in no apparent distress," and observed that she had a fever, a high heart rate, "but she looked great." Chelsea and plaintiff were talking and joking, and Chelsea did not "appear ill at all[.]" Dr. Niedner ordered blood tests and cultures, which were negative, and Chelsea had a normal CBC white blood cell count, leading Dr. Niedner to conclude that Chelsea did not have severe sepsis or septic/toxic shock. Dr. Niedner concluded that Chelsea was on an appropriate treatment plan, including antibiotics for MRSA and other potential infections. Chelsea was treated with a 1000ml bolus of saline and Tylenol, which improved her condition. Dr. Niedner discharged

Chelsea at around 2:17 a.m. on September 3 with instructions to follow up with her personal physician, Allison Rittman, M.D.

¶ 8 On September 3 at around 11:25 a.m., Chelsea followed up with Dr. Rittman, who changed the bandaging around Chelsea's wound, and referred her to an infectious disease doctor for further evaluation.

¶ 9 On September 5, Chelsea presented to Physicians Immediate Care clinic with a fever and chills. She was seen by Warren Wollin, D.O., who noted that the wound on Chelsea's chest was almost completely healed, but that she possibly had a rash. Dr. Wollin concluded that Chelsea might be experiencing an allergic reaction to the antibiotics and ordered her to stop taking them and "push fluids!" He further ordered her to start taking ibuprofen and Benadryl, and to follow up with her primary care physician the following day.

¶ 10 On September 6, Chelsea was found lying face down on her bed, unresponsive. Paramedics arrived, and Chelsea was pronounced dead. The medical examiner performed an autopsy and concluded that Chelsea died of bronchopneumonia.

¶ 11 Plaintiff initiated this action on June 25, 2012. He timely filed an amended complaint on August 13, 2013, adding Dr. Niedner and St. Alexius as defendants. In count VII of the amended complaint, plaintiff asserted a "negligence/wrongful death" claim against St. Alexius, and in count VIII he asserted a "survival" claim against St. Alexius. Both counts sought to hold St. Alexius vicariously liable "for the acts of its apparent agent, Kristen Niedner, M.D." Specifically, plaintiff alleged in counts VII and VIII of the amended complaint that Dr. Niedner failed to (1) appreciate the severity of Chelsea's condition upon presentation to St. Alexius, (2) appreciate the significance of the medical history relayed by Chelsea, (3) formulate a diagnosis and implement a plan of treatment, (4) appreciate Chelsea's "ongoing and evolving

condition," and (5) admit Chelsea for further testing, diagnosis and treatment. Plaintiff further alleged that Dr. Niedner was otherwise negligent in treating Chelsea. The parties engaged in written and oral discovery.

¶ 12 On July 11, 2016, St. Alexius filed a motion for summary judgment, arguing that Dr. Niedner was not its apparent agent but was instead an independent contractor. The motion was fully briefed. On August 16, the circuit court entered a handwritten order granting summary judgment in favor of St. Alexius. The circuit court entered and continued St. Alexius's motion for a finding pursuant to Supreme Court Rule 304(a).

¶ 13 On August 29, 2016, the circuit court granted plaintiff leave to file a second amended complaint. Plaintiff's second amended complaint re-alleged the claims from his first amended complaint for the purposes of preserving those claims for appeal. He added two claims against St. Alexius, seeking to hold it directly liable for the alleged negligence of Nurse Tiangson. Count VII of the second amended complaint asserted a claim of wrongful death against St. Alexius, claiming that when Chelsea presented to St. Alexius on September 2, St. Alexius's nurses, including Nurse Tiangson, failed to place Chelsea on "sepsis protocol" and failed "to order a lactic acid laboratory test as part of a complete sepsis panel work-up." Count VIII of the second amended complaint asserted a survival claim against St. Alexius.

¶ 14 Also on August 29, 2016, the circuit court granted St. Alexius's motion for a finding pursuant to Rule 304(a) with respect to the August 16 summary judgment order. The order, however, failed to contain an express finding as required by Supreme Court Rule 304(a). Plaintiff filed a notice of appeal on September 21, 2016, which was assigned docket No. 1-16-2546.

¶ 15 On October 5, 2016, St. Alexius moved to dismiss counts VII and VIII of the second

amended complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2014)), arguing that plaintiff's claims were time-barred and did not relate back to the allegations of his prior complaint. The motion was fully briefed. On January 4, 2017, the circuit court entered a written order granting St. Alexius's motion to dismiss counts VII and VIII "for the reasons stated on the record," and finding the allegations untimely. In the same order, the circuit court found "there is no just reason to delay appeal from the August 29, 2016[,] order granting summary judgment on [the] allegations of apparent agency, or from this order granting [St. Alexius's] motion to dismiss the allegations of institutional negligence as untimely." Plaintiff filed an amended and supplemental notice of appeal on January 11, 2017, which was assigned docket No. 1-17-0084. We have consolidated the appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiff argues that (1) there are genuine issues of material fact as to whether Dr. Niedner was an apparent agent of St. Alexius, and (2) the allegations in his second amended complaint relate back to his previous complaint and were therefore timely. We address these arguments in turn.

¶ 18 As an initial matter, plaintiff's September 21, 2016, notice of appeal from the circuit court's August 16, 2016, order granting summary judgment in favor of St. Alexius was premature. On August 29, 2016, the circuit court granted St. Alexius's motion to make the August 16, 2016, summary judgment order final and appealable, but that order failed to make an express finding as required by Rule 304(a). Therefore, when plaintiff filed his September 21, 2016, notice of appeal, the August 16, 2016, order was not yet final and appealable, and we must dismiss appeal No. 1-16-2546 for lack of jurisdiction.

¶ 19 However, the circuit court found on January 4, 2017, that "there is no just reason to delay appeal from the August 29, 2016[,] order granting summary judgment on [the] allegations of apparent agency, or from this order granting [St. Alexius's] motion to dismiss the allegations of institutional negligence as untimely." Plaintiff timely filed his amended and supplemental notice of appeal in appeal No. 1-17-0084 on January 11, 2017, which identified both the August 29, 2016, order granting summary judgment and the January 4, 2017, order dismissing his direct liability claims against St. Alexius. We therefore have jurisdiction over both orders by virtue of plaintiff's January 11, 2017, notice of appeal.

¶ 20 First, plaintiff argues that there are genuine issues of material fact regarding whether Dr. Niedner was an apparent agent of St. Alexius. Plaintiff contends that the "Consent for Medical Treatment" form drafted and used by St. Alexius placed paragraphs regarding independent contractors under the heading "AUTHORIZATION TO RELEASE INFORMATION," and was not part of a numbered paragraph. He argues that the consent provision is ambiguous because it uses the phrase "any or all," and that the use of "or" creates a "complex sentence," which "by its nature, is not proper for a consent for treatment that is purported to be so clear that it subject [*sic*] to but one interpretation and proper for summary judgment." He argues that the disclosure here is similar to disclosures in cases in which we have reversed summary judgment in favor of hospitals on the issue of apparent agency. Plaintiff relies primarily on *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584 (2006) and *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826 (2009), to support his claim that the consent form at issue here precludes summary judgment.

¶ 21 Summary judgment is appropriate where 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 a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). The purpose of summary judgment is to determine whether there are triable issues of fact. *Hartz Construction Co. v. Village of Western Springs*, 2012 IL App (1st) 103108, ¶ 23. A plaintiff need not prove his entire cause during summary judgment, but he must present some evidentiary facts to support the elements of his cause of action. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009). The failure to establish even a single element of the cause of action will warrant the entry of summary judgment in favor of the defendant. *Id.* A circuit court's ruling on summary judgment is reviewed *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 22 Under the doctrine of apparent authority, "a hospital can be held vicariously liable for the negligent acts of a physician providing care at the hospital, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician is an independent contractor." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 524 (1993). To hold a hospital liable under the doctrine of apparent authority, the plaintiff must establish the following elements: (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 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. *Id.* at 525. A plaintiff may satisfy the "holding out" element by showing that the hospital "[held] itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors." *Id.*

¶ 23 We find that the circuit court properly granted summary judgment in favor of St. Alexius on the issue of apparent agency. The language used in the consent form Chelsea signed, that "any or all physicians, residents, or medical students *** who furnish services to me during this admission are INDEPENDENT CONTRACTORS and are NOT AGENTS OR EMPLOYEES OF THE HOSPITAL," was clear and subject to only one interpretation: that the physicians present in St. Alexius were independent contractors and not employees of the hospital. Plaintiff fails to develop or advance any persuasive argument in support of his claim that the use of "any or all" creates an ambiguity as to the consent form's meaning, and he offers no alternative interpretation of the phrase "any or all" that might cast doubt on which physicians are covered by the consent form. Indeed, it is hard to imagine a situation where the phrase "any or all" could be construed to mean something less than all. Furthermore, the consent provision here is similar to the consent provisions we considered in *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081 (2009), *Frezados v. Ingalls Memorial Hospital*, 2013 IL App (1st) 121835, and *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558.

¶ 24 In *Wallace*, the plaintiff claimed that the defendant hospital was vicariously liable for the alleged malpractice of the doctors that treated her daughter. 389 Ill. App. 3d at 1084. The defendant hospital moved for summary judgment, arguing that the plaintiff could not establish that the treating doctors were the actual or apparent agents of the hospital. *Id.* Attached to the motion was a consent form signed by the plaintiff. The consent form stated:

> "I understand that physicians who provide professional services to me such as my attending physician and consulting physicians, are not the employees or agents of Alexian Brothers Medical Center, but they are independent contractors who will be providing their specialized services on my behalf and as such will be my

> employees or agents. Alexian Brothers Medical Center is not responsible for the services these physicians provide. These physician's and their employee's services will be billed separately.
>
> * * *
>
> I acknowledge that I have read this consent form (or a large print version) and have had the opportunity to ask questions." (Emphasis omitted.) *Id.* at 1083.

The circuit court granted summary judgment in favor of the hospital, and we affirmed. We observed that a signed consent form can be dispositive of the issue of "holding out" because it may show that the plaintiff knew or should have known that the physician was an independent contractor. *Id.* at 1087. We found the language of the defendant's consent form was "clear and concise," and demonstrated that the plaintiff knew or should have known of the independent contractor's status. *Id.* at 1088-89.

¶ 25 In *Frezados*, the plaintiff sued the defendant hospital for the alleged professional negligence of its alleged agents. 2013 IL App (1st) 121835, ¶ 3. The plaintiff admitted signing a two-page "Consent to Treatment" form consisting of 11 numbered paragraphs. The consent form stated:

> "I have been informed and understand that physicians providing services to me at Ingalls, such as my personal physician, Emergency Department and Urgent Aid physicians, radiologists, pathologists, anesthesiologists, on-call physicians, consulting physicians, surgeons, and allied health care providers working with those physicians are not employees, agents or apparent agents of Ingalls but are independent medical practitioners who have been permitted to use Ingalls'

> facilities for the care and treatment of their patients. I further understand that each physician will bill me separately for their services." *Id.* ¶ 5.

¶ 26 The circuit court granted summary judgment in favor of the defendant hospital, and we affirmed. We found that the Ingalls consent form stated "clearly and concisely that none of the physicians at defendant hospital are its employees, agents, or apparent agents and are instead independent contractors. There are no exceptions to this language, and the disclaimer is not implicitly contradicted elsewhere in the form ***." *Id.* ¶ 22.

¶ 27 In *Lamb-Rosenfeldt*, the plaintiff sued the defendant hospital for the alleged professional negligence of its alleged agents in treating the plaintiff's deceased father. 2012 IL App (1st) 101558, ¶ 1. Prior to receiving treatment, the decedent signed nine consent forms, each of which contained the following provision:

> ***"STATEMENT OF UNDERSTANDING: PHYSICIANS ARE NOT EMPLOYEES OF THE MEDICAL CENTER:*** I understand that St. James Hospital utilizes independent physicians and consultants to perform services for patients at its hospitals. These physicians may include my private physician, a physician from a physician group who has agreed to treat me because I do not have a physician on staff or a consultant. With the exception of some anesthesiologists who might provide anesthesia to some patient in the hospital, NONE OF THE PHYSICIANS WHO ATTEND TO ME AT THE HOSPITAL ARE AGENTS OR EMPLOYEES OF THE HOSPITAL and therefore they, and not the hospitals, are legally liable for the physicians' acts. I further understand that one (1) or more of these physicians might be involved in my care, for example, through reading of x-rays, interpreting

> laboratory tests, providing emergency medical care or performing surgery. In most cases, I can expect to receive a separate bill from my private physician, a member(s) of the physician group or consultant who has treated me. However, in some cases, third party payers, such as an insurance company, may require certain independent physician charges to be included as part of the total hospital billings. In these cases the hospital may be required to bill me for physician services although the physician IS NOT AN EMPLOYEE OR AGENT OF THE HOSPITAL." (Emphases in original.) *Id.* ¶ 4.

At the bottom of the page, after the disclosure statement and before the signature line was the following statement: "I CERTIFY THAT I HAVE READ AND UNDERSTAND THIS CONSENT AND THAT NO GUARANTEE OR ASSURANCE HAS BEEN MADE AS TO THE RESULTS OR OTHER ASPECT OF ANY TREATMENT, PROCEDURE, OR TEST AUTHORIZED HEREUNDER." (Emphasis in original.) *Id.* ¶ 5. We affirmed the circuit court's summary judgment order in favor of the defendant hospital. We found that defendant could not establish that the defendant hospital "held out" the treating physicians as its agents because the consent form "contained clear disclaimer language." *Id.* ¶ 28.

¶ 28 Each of these cases involved consent forms with language that clearly and concisely informed the patient that the physicians providing treatment were not employees or agents of the defendant hospitals, and that the physicians were independent practitioners or contractors. The provisions clearly conveyed to the patient that the treating physicians were not employees or agents of the hospital, and left no room for confusion as to whether the treating physicians had been held out as agents or employees of the hospital. The same is true of the consent form at issue here.

¶ 29 Plaintiff relies on *Schroeder*, but the consent provision there is markedly different from the consent provision here, and from the consent provisions in *Wallace*, *Frezados*, and *Lamb-Rosenfeldt*. In *Schroeder*, the plaintiff sued the defendant hospital seeking to hold it vicariously liable for the treatment provided by physicians to plaintiff's deceased husband. The evidence showed that on three occasions, decedent, or the plaintiff on decedent's behalf, signed consent forms containing the following provision:

> "*Item 2 disclosure Statement:* Your care will be managed by your personal physician or other physicians *who are not employed by Northwest Community Hospital* or Northwest Community Day Surgery Center but have privileges to care for patients at this facility. Your physician's care is supported by a variety of individuals employed by Northwest Community Hospital or Northwest Community Day Surgery Center, including nurses, technicians and ancillary staff. Your physician may also decide to call in consultants who practice in other specialities and may be involved in your care. Like your physician, those consultants have privileges to care for patients at this facility, *but are not employed by Northwest Community Hospital* or Northwest Community Day Surgery Center." (Emphases in original.) *Schroeder*, 371 Ill. App. 3d at 587.

Plaintiff argued that the consent form "was 'extremely confusing' and ambiguous because it did not state in a clear fashion that the doctors who would be caring for decedent were not hospital employees or agents, and it could reasonably be interpreted to mean that his personal physicians were employed by Northwest but the other unidentified physicians who might be involved in his care were not." *Id.* at 589. The circuit court granted summary judgment in favor of the defendant hospital based on the fact that the plaintiff and decedent had signed the consent forms. *Id*. at 589.

We reversed, explaining that we believed that "the issue is not whether plaintiff was confused or led to believe by any actions on the part of Northwest that the physicians were its agents or employees but whether decedent was confused or misled by the disclosure forms and whether he perceived or believed the physicians were the agents or employees of Northwest." *Id.* at 593. We found that "if *** there is evidence that decedent reasonably believed his personal care physician and the consulting physicians were agents or employees of the hospital, a triable issue of fact exists and should be presented to a jury." *Id.* at 593-94. Unlike here, the consent provision in *Schroeder* did not use terms such as "independent contractor" or expressly disclaim against an agency relationship. Furthermore, the consent provision in *Schroeder* left open the possibility that the plaintiff could reasonably have been confused by the scope of the consent form. Here, the consent provision is not susceptible to any other reasonable interpretation as to the employment status of the treating physicians.

¶ 30 In *Spiegelman*, a jury ruled in favor of the plaintiff on her claims that the defendant hospital was vicariously liable for the negligence of its apparent agent, an emergency room physician. 392 Ill. App. 3d at 828. On appeal, the hospital argued that it was entitled to a judgment notwithstanding the verdict, in part because the plaintiff failed to prove that the hospital held out the ER physician as its agent. *Id.* at 833. We considered whether the consent form signed by the plaintiff was confusing or misleading. The consent form contained the following provisions:

> "I am aware that during my visit to the Emergency Department of Victory Memorial, hospital employees will attend to my medical needs as may be necessary. I understand that these individuals may carry out a part or all of my

> treatment as consistent with their respective professional education, experience, and license. ***
>
> I understand that the Emergency Department physician and my attending physician are independent contractors and not agents or employees of Victory Memorial Hospital. I further understand that my attending physician may request treatment or diagnostic services (including radiology, anesthesiology, pathology) by other physicians. I am also aware that any other physicians who may be called to attend my care are independent contractors and not employees or agents of Victory Memorial Hospital." (Emphasis omitted.) *Id.* at 829.

The signature line for the consent form was below a separate sections titled: "RELEASE FOR RESPONSIBILITY FOR VALUABLES." (Emphasis in original.) *Id.* We found that there were sufficient facts presented to the jury to support its verdict, namely because the two relevant provisions, when read together, could be confusing as to the status of the treating physician. We relied on *Schroeder* to find that "a jury could reasonably conclude that the consent was confusing and ambiguous and therefore did not adequately inform plaintiff of her doctor's independent contractor status." *Id.* at 837.

¶ 31 Both *Schroeder* and *Spiegelman* involved multi-part consent forms that contained potentially confusing and conflicting information regarding the status of the treating physicians. The consent form here, however, is more similar to the consent provisions in *Wallace*, *Frezados*, and *Lamb-Rosenfeldt*. Plaintiff has not demonstrated that the consent form here was either ambiguous, or that reasonable minds could differ as to whether the consent Chelsea signed was confusing with respect to the independent contractor status of the physicians present in the

hospital. The argument that Chelsea, an educated woman, presented with a fever and would be confused by the language of the form is not persuasive given the nurse's notes showing her to be awake, alert, and "oriented x3," and that she was calm and speaking coherently. We therefore affirm the judgment of the circuit court granting summary judgment in favor of St. Alexius on the issues of vicarious liability and apparent agency for the alleged negligence attributed to Dr. Niedner.

¶ 32 Next, plaintiff argues that the circuit court erred in dismissing his direct liability claims against St. Alexius from the second amended complaint pursuant to section 2-619(a)(5) of the Code. He contends that the allegations of the second amended complaint relate back to his first amended complaint and were therefore timely. We agree.

¶ 33 When deciding a section 2-619 motion, a court accepts all well-pleaded facts in the complaint as true and will grant the motion when it appears that no set of facts can be proved that would allow the plaintiff to recover. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 267 (2003). Under section 2-619(a)(5) of the Code, dismissal is warranted if the "action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014). Our review of an order granting a section 2-619 motion is *de novo*. *Moon v. Rhode*, 2016 IL 119572, ¶ 15.

¶ 34 Section 2-616(b) of the Code provides:

> "The cause of action *** 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 *** 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." 735 ILCS 5/2-616(b) (West 2014).

¶ 35 Our supreme court has explained that "[t]he purpose of the relation-back doctrine of section 2-616(b) is 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). Furthermore, "the rationale behind the same transaction or occurrence 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." (Internal quotes omitted.) *Id.* Under Illinois law, "there is no question that relation back is appropriate where a party seeks to add a new legal theory to a set of previously alleged facts." *Id.* at 359 (citing *In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370, 1371-72 (N.D. Ill. 1985) and *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 108 (1996)). Our supreme court in *Porter* adopted the sufficiently-close-relationship test to determine whether new factual allegations grew out of the transaction or occurrence set up in a prior pleading. *Porter*, 227 Ill. 2d at 360. Under that test, "a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations show that the events alleged were close in time and subject matter and led to the same injury." *Id.* at 361.

¶ 36 Applying the sufficiently-close-relationship test to the facts of this case, it is clear that the allegations set forth in counts VII and VIII of plaintiff's second amended complaint relate back to the occurrence set up in the first amended complaint, and are therefore timely. Counts VII and VIII of plaintiff's first amended complaint sought to hold St. Alexius liable for the injury proximately caused by the alleged negligence of an apparent agent, Dr. Niedner, in connection with the treatment provided to Chelsea starting on September 2, 2011. Specifically, the first amended complaint alleged that Chelsea came under Dr. Niedner's care on September 2, 2011, and that Dr. Niedner failed to (1) appreciate the severity of Chelsea's condition upon presentation to St. Alexius, (2) appreciate the significance of the medical history relayed by Chelsea, (3) formulate a diagnosis and implement a plan of treatment, (4) appreciate Chelsea's "ongoing and evolving condition," and (5) admit Chelsea for further testing, diagnosis and treatment. Counts VII and VIII of plaintiff's second amended complaint sought to hold St. Alexius liable for the injury proximately caused by the alleged negligence of its employee, Nurse Tiangson, in connection with treatment provided to Chelsea beginning on September 2, 2011. In the second amended complaint, count VII asserted a claim of wrongful death against St. Alexius, claiming that when Chelsea presented to St. Alexius on September 2, St. Alexius's nurses failed to place Chelsea on "sepsis protocol" and failed "to order a lactic acid laboratory test as part of a complete sepsis panel work-up." Count VIII of the second amended complaint asserted a survival claim against St. Alexius. Both the first and second amended complaints sought to hold St. Alexius liable for injuries proximately caused by allegedly negligent acts of its alleged agents who treated Chelsea after she presented to St. Alexius on September 2, 2011. The claims set forth in the second amended complaint arise out of the same occurrence set up in plaintiff's first amended complaint, and depend on virtually the same set of operative facts. St. Alexius was on

notice that plaintiff sought to hold St. Alexius liable under the alternative theories of apparent agency or *respondeat superior* for Chelsea's injuries proximately caused by the alleged negligent acts of its medical professionals at its facility on September 2, 2011.

¶ 37 St. Alexius advances two arguments in support of the circuit court's judgment. First, it argues that we should construe the circuit court's finding that plaintiff's complaint was "untimely" to mean that the circuit court denied plaintiff leave to file the second amended complaint, and therefore we should review the circuit court's judgment for an abuse of discretion. Second, St. Alexius argues that the second amended complaint's claims seeking to hold it directly for Nurse Tiangson's alleged negligence "do not relate back to the allegations against St. Alexius contained in the last timely filed complaint seeking to hold it vicariously liable for the conduct of a non-employee, alleged apparent agency emergency room physician[.]" We find neither argument to be persuasive.

¶ 38 First, St. Alexius's argument that the circuit court effectively denied plaintiff leave to file the second amended complaint as "untimely" is contradicted by the record. On August 23, 2016, the circuit court entered an order granting plaintiff leave to file the second amended complaint. On October 5, 2016, St. Alexius filed a motion pursuant to section 2-619(a)(5) of the Code, seeking to have counts VII and VIII of the second amended complaint dismissed because the claims contained therein did not relate back to the timely-filed first amended complaint. After the motion to dismiss was fully briefed, the circuit court dismissed counts VII and VIII from the second amended complaint. It is clear that the issue before the circuit court was not whether plaintiff should be permitted to file a second amended complaint (which the circuit court had already granted), but rather whether plaintiff's second amended complaint contained allegations that relate back to the timely-filed first amended complaint. We therefore reject St. Alexius's

contention that the circuit court's dismissal of the claims in the second amended complaint was the equivalent of the circuit court denying plaintiff leave to file an amended pleading.

¶ 39 Second, St. Alexius contends that the claims of direct liability against St. Alexius in the second amended complaint did not relate back to the claims of the first amended complaint because plaintiff sought to add an entirely new claim based on a completely different set of facts. St. Alexius argues that plaintiff's claims "failed to put St. Alexius on notice of any intent to hold it liable for conduct of anyone other than Dr. Niedner." It argues that the situation here is analogous to *Wilson v. Schaefer*, 403 Ill. App. 3d 688 (2009). We disagree. As discussed, we apply the sufficiently-close-relationship test to determine whether newly-alleged claims relate back to a timely-filed pleading. The liability claims against St. Alexius in plaintiff's second amended complaint satisfy that test for the reasons already discussed.

¶ 40 Furthermore, *Wilson* is distinguishable. There, the plaintiffs filed a timely two-count complaint in August 2006 seeking to hold an orthopedic surgeon liable for allegedly failing to provide plaintiffs with adequate information to make an informed decision as to whether one of the plaintiffs should undergo a surgical procedure. *Id.* at 689. The alleged negligent acts took place in August 2004. *Id.* In May 2008, plaintiffs filed a six-count amended complaint, which re-alleged the claims from the original complaint, and added additional claims alleging that the orthopedic surgeon negligently failed "to determine the etiology of the sciatic nerve palsy that [plaintiff] developed after the surgery and *** to attempt to resolve the condition," as well as claims under a *res ipsa loquitor* theory of relief. *Id.* The circuit court dismissed the additional claims from the amended complaint as untimely, finding that those claims did not relate back to the original complaint. *Id* at 690. We affirmed, finding that "defendants did not have sufficient notice of the new allegations *** [in] plaintiffs' May 2008 complaint," since the original

complaint concerned what the orthopedic surgeon said or did not say prior to the procedure, while the new claims concerned how the orthopedic surgeon actually performed the procedure and cared for plaintiff afterward. *Id.* at 695. The orthopedic surgeon, therefore, "did not have 'a fair opportunity to investigate the circumstances upon which liability [was] based." *Id.* (quoting *Porter*, 277 Ill. 2d at 359).

¶ 41 The facts present here are markedly different from those in *Wilson*. Here, plaintiff's claims against St. Alexius in the first amended complaint sought to hold it liable for the conduct of its apparent agent, Dr. Niedner, in treating Chelsea shortly after she arrived at St. Alexius on September 2, 2011. Plaintiff's second amended complaint sought to hold St. Alexius liable for the conduct of its employee, Nurse Tiangson, in treating Chelsea shortly after she arrived at St. Alexius on September 2, 2011. In both iterations, plaintiff sought to hold St. Alexius liable for injuries proximately caused by the alleged failure to assess, evaluate, diagnose, and treat Chelsea after she presented to St. Alexius, which are not entirely new claims against St. Alexius that would require proof of entirely different facts. Furthermore, there is no prejudice to St. Alexius where its attention has been timely directed to the September 2, 2011, occurrence and the facts surrounding Chelsea's treatment by medical personnel at St. Alexius, including Nurse Tiangson, who were directly involved in the treatment Chelsea received after presenting to St. Alexius on September 2, 2011. At the time the circuit court allowed plaintiff to file the second amended complaint, there was an initial trial date set for nine months later. Contrary to St. Alexius's argument, there was then, and there will be after remand, sufficient time for the circuit court to allow the parties to engage in additional discovery and expert disclosures, if any, especially as this case has been stayed pending resolution of this appeal.

¶ 42 We conclude that the circuit court erred by dismissing the claims set forth in counts VII and VIII of plaintiff's second amended complaint because those claims relate back to the claims set forth in plaintiff's timely-filed first amended complaint.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, the circuit court's order granting summary judgment in favor of St. Alexius on counts VII and VIII of plaintiff's first amended complaint under the theory of apparent agency of Dr. Niedner is affirmed. The circuit court's dismissal of the claims set forth in counts VII and VIII of the second amended complaint alleging liability against St. Alexius due to the alleged negligent acts of its employee, Nurse Tiangson, is reversed, and we remand for further proceedings.

¶ 45 Appeal No. 1-16-2546 dismissed.

¶ 46 Appeal No. 1-17-0084 affirmed in part, reversed in part, remanded.