No. 121367

IN THE
SUPREME COURT OF ILLINOIS

CHRISTINA YARBROUGH and DAVID GOODPASTER, on behalf of HALEY JOE GOODPASTER, a minor, Plaintiffs-Appellees, v. NORTHWESTERN MEMORIAL HOSPITAL, Defendant-Appellant, and NORTHWESTERN MEDICAL FACULTY FOUNDATION, Defendant.	On Appeal from the Illinois Appellate Court, First Judicial District, No, 1-14-1585, There Heard on Application for Leave to Appeal from an Order of the Circuit Court of Cook County, County Department, Law Division, No. 2010 L 296, The Honorable William E. Gomolinski, Judge Presiding.

AMICUS CURIAE BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

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Points and Authorities

Argument

In *Gilbert v. Sycamore Municipal Hospital*, this Court laid out the test to determine whether a hospital can be liable under the doctrine of apparent agency for the negligence of an independent-contractor physician. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511 (1993). Underlying the change in Illinois' common-law was the recognition that the economics of hospital operations had evolved, and a rule disallowing in all cases a hospital's liability for an apparent agent's negligence could no longer be justified.

The Court observed, "In essence, hospitals have become big business, competing with each other for health care dollars." Thus, "If the [independent-contractor physicians] do their job well, the hospital succeeds in its chosen mission, profiting financially and otherwise from the quality of emergency care so delivered. On such facts, anomaly would attend the hospital's escape from liability where the quality of care so delivered was below minimally acceptable standards." 156 Ill.2d at 520-21.

And although *Gilbert's* three-prong test has given way to varying opinions on what constitutes a hospital's "holding out" of a treater and a patient's subjective reliance, this Court has not wavered from the fundamental economic principle of apparent-agency liability. Ten years ago, guided by the same policy adopted in *Gilbert*, this Court once again recognized that "hospitals today actively promote themselves as centers for complete medical care and reap profits when competent service is provided by the independent doctors in their facilities." *York v. Rush-*

Presbyterian-St. Luke's Med. Ctr., 222 Ill.2d 147, 202 (2006). The *York* opinion labelled this active promotion as "the fervent competition between hospitals to attract patients." *Id.* at 192.

York thus expanded apparent agency claims beyond the emergency room to a hospital's other revenue-supporting aspects of providing complete medical care. A plaintiff could now recover from the hospital if the patient reasonably relied "upon the hospital to provide complete care—including support services such as radiology, pathology, and anesthesiology—through the hospital's staff." *Id.* at 195. The Court reasoned such potential liability "may encourage hospitals to provide better supervision and quality control over the independent physicians working in their facilities." *Id.* at 202.

York stresses that a hospital may be liable for negligent treatment in one of the hospital's facilities:

"The independent doctors in their facilities."

"The independent physicians working in their facilities." *Id.* at 202.

While restating *Gilbert's* formulation that the hospital's apparent-agency liability derives from its economic interests in providing complete medical care, *York* twice emphasizes that those independent contractors work in a hospital facility - subject to the hospital's supervision and quality control. Absent such control, a hospital certainly does not stand to profit from the medical care, nor possess the ability to foster its improvement. And such absence of control frankly lays bare that no patient could claim reasonable reliance on the hospital for the

negligent treatment, nor reasonably believe that the treater was a hospital agent when the services were not even provided in a hospital facility.

The appellate court's opinion here thus confounds *Gilbert's* purpose and implementation. It must be reversed, and the predictability of apparent-agency liability restored.

A. The economic impetus underlying apparent agency liability does not exist when the apparent agent is employed by an independent, unrelated clinic from which a hospital derives no profit.

The *Gilbert* opinion reviews the emergence of a national common-law consensus to impose apparent-agency liability in hospital settings. 156 Ill.2d at 519-21. Citing cases from Mississippi, New Jersey, Georgia, among others, *Gilbert* fully adopted the reasoning that a hospital's motivations for and efforts to profit from providing medical care "speak much louder than the words of whatever private contractual arrangements the physicians and the hospitals have entered into... in an attempt to insulate the hospital" from the physician's negligence. *Id* at 521.

The three-prong test adopted therein originates in large part from the Wisconsin Supreme Court's decision in *Pamperin v. Trinity Memorial Hosp.*, 144 Wis.2d 188 (1988). *Pamperin* similarly uses the hospital's profit motives as the primary basis for imposing liability on a hospital even for the negligent acts of an independent contractor physician. *Id.* at 204-05. The court also cited two Restatement (2d) of Torts sections as support for the imposition of liability "when

one who employs an independent contractor to perform services for another." *Id.* at 205.

The hospital defendant in *Pamperin* argued that acceptance of the doctrine "would make a hospital liable for all acts of negligence within the hospital." *Id.* at 208. The Wisconsin Supreme Court deemed this argument unfounded, because "where a patient seeks care from a physician who then uses the hospital facilities, the hospital would not be liable under the doctrine of apparent authority." *Id.* *Gilbert* and *York* likewise hold the same. *Gilbert*, 156 Ill.2d at 525; *York*, 222 Ill.2d at 193.

That is precisely what happened in the instant case. Christina Yarbrough sought a pregnancy test from the Erie Family Health Center. *Yarbrough v. Northwestern Mem. Hospital*, 2016 IL App (1st) 141585 *("Opinion")* ¶¶6, 7. She was told that if she received prenatal care from Erie, she would ultimately deliver the child at Northwestern Memorial Hospital ("NMH"). *Id.* The appellate court's opinion disregards the accepted admonition that apparent agency cannot be found when the patient seeks care from a physician who then uses hospital facilities. But furthermore, the appellate court's opinion inverts and ultimately imposes the very type of economic "anomaly" *Gilbert* is designed to avoid.

Again, *Gilbert* recognized a hospital generally profits from patients seeking treatment from the independent contractor physicians working there, and resolved it would be an "anomaly" to allow a hospital to "escape from liability"

where a patient receives negligent treatment in the emergency room simply because the physician was not an employee of that hospital. 156 Ill.2d at 520-21.

But NMH does not charge Erie patients for any care they receive at Erie, and the hospital certainly does not profit from the free care it gratuitously underwrites at Erie. *Opinion*, ¶16. So while this Court created the *Gilbert* test to avoid an "anomaly," *i.e.*, a hospital trying to avoid liability through contract terms despite its pursuit of profit, the appellate court's decision here creates another incongruity: a hospital can now be held liable *via* apparent agency because it helps a non-profit clinic and its patients, without any retained profit motive. Nothing in the current circumstance brings this case within the economic principles underlying *Pamperin* and *Gilbert*.[1]

Additionally, a lack of professional guidance and control is inherent in any circumstance where two parties have not entered into a profit-driven contract. *York* recognized a hospital's desire to not only improve patient care but create revenue through "better supervision and quality control over the independent

[1] The circumstance here is analogous to this Court's recent Good Samaritan Act interpretation, describing the Act's purpose as to promote volunteerism, thus abrogating a series of decisions which had more broadly allowed the Act's protections if the treater had not charged the patient a fee. *Home Star Bank & Fin. Servcs. v. Emergency Care & Health Org., Ltd*, 2014 IL 115526, ¶¶ 19, 50. The Court determined that only a treater who, like NMH here, neither charged a fee nor was compensated for the service time could find protection under the Act. ¶50.

physicians working in their facilities." 222 Ill.2d at 202. But here, NMH and Erie (or, importantly, NMH and Erie physicians) are not contractually related to drive profit to NMH. NMH does not profit from Erie's patients, either for treatment at the clinic or for tests at NMH.

Finally, *York* twice repeats that the allegedly-negligent independent contractor physician work in a hospital facility. 222 Ill.2d at 202. There is no indication that Erie is an NMH facility; moreover the physician who allegedly provided negligent treatment was not even an independent contractor of NMH.

The appellate court's strained extension, or perhaps outright abandonment, of *Gilbert's* economic principles further reveals the difficulty in applying the three-prong test to alleged negligence that takes place outside a hospital facility. The manner in which the appellate court applied the test in this case attests to that conclusion.

B. The appellate court's "holding out" analysis misconstrues the economic concerns animating *Gilbert*.

The *Gilbert* and *York* decisions provided well-defined parameters for whether a hospital is "holding out" a doctor as its apparent agent. When the hospital is a "complete provider of medical care," and it does not tell the patient that her doctor is not an employee of the hospital, the "holding out" requirement is met. *York*, 222 Ill.2d at 185. The acts of a hospital agent can also meet the "holding out" requirement if the hospital knows of and acquiesces to those acts. *Gilbert*, 156 Ill.2d at 525. However, these tests for whether the hospital is "holding out" the doctor

are meaningless where the allegedly negligent treatment is rendered by a non-contracted treater outside of a hospital facility, before the patient ever receives services at the hospital.

For instance, there is no question here that NMH is a "full service" hospital, and the hospital did not tell Yarbrough that the Erie physicians and nurse midwives were not NMH employees. *Opinion,* ¶¶ *53, 55.* But even the appellate opinion determined it would be unjust to find, on these facts alone, that the holding out requirement was met. ¶ *53.* Instead, the appellate court created a different test: whether NMH holds itself out as a "community oriented hospital that collaborates with neighborhood centers, like Erie, to make quality health care available to those in need." ¶ *53. See also,* ¶ *51,* wherein the issue is stated as whether NMH and Erie held themselves out as having "close ties."

And although the panel recognized that Yarbrough's treatment at Erie was without cost to her and no financial benefit to NMH, the court still determined that "the concerns animating *Gilbert*" were present in the case. In particular, the court resolved that "in holding itself out as a close partner with Erie to provide specialized and acute care to a targeted population, NMH attempted not only to be a good citizen of the community but also ***to attract patients.***" ¶ *58* (***emphasis added***).

This reasoning ignores that "the concerns animating *Gilbert*" are economic, and apparent agency liability was designed to preclude the hospital from "anomalous" profits. Yet here, the alleged negligence occurred at Erie before

Yarbrough ever became an NMH patient. Only through a particularly cynical viewpoint would underwriting a community clinic be considered an economic driver of patient dollars, particularly from those whose initial interest in the clinic stemmed from its offering of free medical treatment.

Gilbert's apparent agency decision was not inspired by the mere attraction of potential patients. Indeed, the economic incentive is particularly absent where, as here, the alleged negligence took place in the independent Erie clinic, from which NMH certainly derives no profit whatsoever, and in fact subsidizes.

This Court must reinforce the parameters of *Gilbert* and find that the *Gilbert* test for apparent agency is inapplicable to alleged negligence outside a hospital facility. *York*, 222 Ill.2d at 202.

Conclusion

This *amicus curiae*, the Illinois Association of Defense Counsel, respectfully requests that the appellate court's decision, answering the certified question in the affirmative, be reversed; and that this court order the entry of judgment in favor of Northwestern Memorial Hospital.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The word count of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters appended, is 1,902 words.

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