2018 IL App (2d) 180022-U
No. 2-18-0022
Order filed November 7, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NORMA MARTIN, Plaintiff-Appellant, v. RUSH-COPLEY MEDICAL CENTER, INC; NAVEEN DIVAKARUNI, D.O.; DREYER MEDICAL CLINIC, Indiv. and d/b/a VITAL ITY MEDSPA; and RUSH-COPLEY HEALTHCARE SYSTEM, INC., Defendants (Rush-Copley Healthcare System, Inc., Defendant-Appellee).	)	Appeal from the Circuit Court of Kane County. No. 16-L-312 Honorable Susan Clancy Boles, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted the defendant hospital summary judgment, as plaintiff raised no genuine issue of material fact as to whether the defendant physician was the hospital's apparent agent: the hospital's disclosure form, which plaintiff signed, clearly indicated that the physician was not.

¶ 2 Plaintiff, Norma Martin, filed an amended complaint alleging that defendant Naveen Divakaruni, D.O., was negligent and that the remaining defendants were vicariously liable.

Rush-Copley Medical Center, Inc. (Rush), moved for summary judgment (735 ILCS 5/2-1005(c) (West 2016)), asserting that Divakaruni had not been its actual or apparent agent. The trial court granted the motion. Plaintiff appealed (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)). She contends that the court erred in holding that as a matter of law there was no apparent agency. We affirm.

¶ 3 Plaintiff's four-count amended complaint alleged the following facts. On June 20, 2014, at approximately 2 p.m., she went to Kishwaukee Community Hospital (Kishwaukee), complaining of pain, nausea, and vomiting. Tests revealed a kidney stone and indicated a urinary tract infection. At approximately 7:30 p.m., she was transferred to Copley Memorial Hospital (Copley), Rush's facility, where she came under the care of Divakaruni. At approximately 10 p.m., he evaluated her in light of the test results from Kishwaukee. Divakaruni did not then perform a cystoscopy with a stent placement to relieve the obstruction caused by the kidney stone but negligently waited until the next day. At approximately 4 a.m. on June 21, 2014, plaintiff experienced vomiting, shortness of breath, tachypnea, and tachycardia. Despite being notified of the foregoing, Divakaruni delayed arranging for the "emergent decompression" of plaintiff until 12:50 p.m. After performing a cystoscopy, he placed a stent into her ureter and inserted a catheter to drain the pus that had accumulated behind the kidney stone.

¶ 4 Count I of the amended complaint alleged that, as a result of Divakaruni's delay in performing the cytoscopy and inserting the stent and the catheter, plaintiff's infection spread, and she went into septic shock with multiple organ failure. Counts II, III, and IV were based on the same facts and alleged, respectively, that Dreyer Clinic, Inc. (Dreyer), Rush-Copley Health Care System,[1] and Rush were vicariously liable for Divakaruni's negligence.

[1] Count III of the amended complaint named "Rush-Copley Medical Group NFP" as the defendant thereunder but the caption of the amended complaint did not include this name. Also,

¶ 5 Rush answered the amended complaint and moved for summary judgment. Its motion alleged the following facts. At 9:10 p.m. on June 20, 2014, within minutes of arriving at Rush's emergency department, plaintiff signed a one-page form entitled "Disclosure of Physician Employment Status." The form's first two paragraphs read:

> "Thank you for choosing Rush-Copley Medical Center and Copley Memorial Hospital for your health care needs. Because you may receive medical services from unfamiliar or unseen physicians, we believe it is important to help you understand the employment status of these physicians. Physicians are either employed by Copley Memorial Hospital, Inc. or Rush-Copley Medical Group NFP, or they are independent physicians. Independent physicians have been granted privileges to use the hospital's facilities for the care and treatment of their private patients. You will receive a separate bill for the services provided by independent physicians.
>
> Non-Employed Hospital-Based Physicians:
>
> Physicians providing Emergency Medicine (Emergency Department/Express Care), Neonatology, Radiology, Anesthesiology/Pain Management, Maternal-Fetal Medicine, Intensive Care, Occupational Health, and Pathology medical services are not agents or employees of Rush-Copley Medical Center, Inc., Rush-Copley Medical Group NFP or Copley Memorial Hospital, Inc. These physicians are employees of one of the following: EMPact Emergency Physicians, LLC (Emergency Medicine); Advocate Medical Group (Neonatology and Maternal Fetal Medicine); Valley Imaging Consultants, LLC, (Radiology); Guardian Anesthesia Associates, SC (Anesthesia/Pain Management);

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the caption listed Rush and "Rush/Copley Health Care System, Inc." separately, but count IV was directed at both entities.

> Pathology Associates of Aurora, LLC (Patology)[;] The Intensivist Group (Intensive Care), or TeamHealth (Occupational Health)."

¶ 6 Following these paragraphs is the heading "Employed Physicians," under which is printed, "Physicians listed below are either [*sic*] employees of Copley Memorial Hospital, Inc., or Rush-Copley Medical Group NFP." There follows a list in alphabetical order of 70 physicians. Divakaruni is not on the list. Immediately under the list, the form continues:

> "____ (Initials). I understand that if my physician is *not* listed above, then he or she is *not* an agent or employee of Rush-Copley Medical Center, Inc., Rush-Copley Medical Group NFP or Copley Memorial Hospital, Inc.
>
> *I have read and understand this entire form. I acknowledge that the employment or agency status of physicians who treat me is not relevant to my selection of Rush-Copley Medical Center or Copley Memorial Hospital for my care. Any questions I had about this form and the important information contained in it have been answered to my satisfaction.*" (Emphases in original.)

¶ 7 Plaintiff's initials appear in the designated space, and her signature is on the form.

¶ 8 Rush's motion attached the affidavit of Ryan Asmus, its vice president of legal affairs. As pertinent here, he stated as follows. On June 20, 2014, Divakaruni was an independent physician employed by Dreyer. He had never been employed by Rush. On June 21, 2014, plaintiff executed a consent form for surgical procedures to be performed by Divakaruni. The form did not mention Divakaruni's employment status; this was deliberate, as the disclosure form had already done so. In June 2014, Rush's website listed Divakaruni as an independent practitioner who was not employed by Rush or any of its affiliates.

¶ 9 Rush's motion argued as follows. Generally, a hospital is not liable for the negligence of a physician who is not its employee or agent. A plaintiff who seeks to hold a hospital vicariously liable for a physician's negligence must prove actual or apparent agency. Divakaruni had not been an actual agent of Rush; he was employed by Dreyer and not Rush, as shown by Asmus's affidavit. Thus, to hold Rush liable, plaintiff would have to rely on apparent agency. To establish such a relationship, a plaintiff must prove that (1) the hospital acted in a manner that would lead a reasonable person to conclude that the physician was its employee or agent; (2) if the physician's acts created the appearance of authority, the hospital knew of and acquiesced in them; and (3) the plaintiff acted in reasonable reliance on the conduct of the hospital. See *Gilbert v. Sycamore Memorial Hospital*, 156 Ill. 2d 511, 525 (1993).

¶ 10 Rush's motion contended that plaintiff could not satisfy either of the first two *Gilbert* criteria, known collectively as " 'holding out' " (*id.* (first two criteria are satisfied if hospital "holds itself out as a provider *** without informing the patient that the care is provided by independent contractors.")). The disclosure form had unambiguously informed plaintiff that Divakaruni was not an employee or agent of Rush; by signing it, she acknowledged that fact. Further, Rush had told the public the same thing on its website. Rush also contended that plaintiff could not meet the reliance element of *Gilbert*, as there was no evidence that she had chosen to be treated at Rush because of its reputation or because she believed that Divakaruni was its employee or agent.

¶ 11 In her response to Rush's motion, plaintiff first set out the following facts, based primarily on her affidavit and deposition. After experiencing vomiting and pain in her side, she went by ambulance to Kishwaukee, where an emergency CT scan showed a kidney stone. Because Kishwaukee lacked urology services, the emergency-room physician had her transferred

to Copley, where she was admitted under Divakaruni's care. Until then, she had never been treated there or been a patient of Divakaruni. Plaintiff could recollect little of her stay at Copley and did not recall signing any forms on June 20 or 21, 2014. Immediately after being admitted, she was disoriented and confused and then passed out. Other than a brief and confusing conversation with a nurse about signing a consent form, her first recollection was waking up from a coma a few days before her discharge on July 7, 2014. She did not recall seeing Divakaruni until after she reawoke. During her stay, she had believed that Divakaruni was employed by Rush, because he treated her there and had to clear her to be discharged.

¶ 12 Plaintiff's response argued as follows. First, there were genuine issues of material fact on holding out. That she signed the disclosure form did not defeat apparent agency, because a reasonable fact finder could conclude that the form was ambiguous and confusing. It did not clearly state that Divakaruni was an independent contractor. Its second paragraph listed multiple medical services that did not have any Rush employees, but urology was not among them. The next section listed 70 physicians but did not state their practice areas. Further, the consent forms that plaintiff signed on June 21, 2014, added confusion and ambiguity; they were Rush forms with Rush insignia and named Divakaruni as plaintiff's doctor who would perform her operation.

¶ 13 Moreover, plaintiff argued, the disclosure form was not dispositive, as additional facts created a genuine issue on holding out. There was evidence that, when she was admitted to Copley, plaintiff was under the influence of narcotic pain medicine she had been given at Kishwaukee and that, when she signed the form, she was complaining of dizziness and vision problems and was confused because of her medical condition. Thus, she argued, there was an issue of whether she had had "sufficient mental ability" to appreciate the effect of her actions.

¶ 14 Plaintiff argued further that genuine issues of material fact existed as to the third *Gilbert* factor, reliance. She noted that, according to her medical records, she was transferred to Rush under Divakaruni's care solely because he was covering urology that evening for another doctor.

¶ 15 Plaintiff's affidavit stated as follows. She did not recall much of her stay but did recall being "confused when [she] was awake in the early part of this admission." The only time that she could recall having met Divakaruni was right before she was discharged on July 7, 2014. During her admission and right after she was discharged, she had been under the impression that he was an employee of Rush, because he saw her as a patient there and had to clear her for discharge.

¶ 16 In her deposition, plaintiff testified as follows. On June 20, 2014, she went to Kishwaukee because she was vomiting and feeling pain. She recalled none of her stay there. The next thing that she did recall was waking up in a hospital bed with a nurse in the room and her aunt calling on her cell phone. Plaintiff was in pain and she handed the phone to the nurse. The nurse was telling her "to sign a paper for surgery." Plaintiff testified, "She's handing me a paper and she said to sign it because if I didn't sign it I wouldn't be able to get the surgery that I needed. So I just signed the paper. I don't even know what the paper was for." Shortly afterward, she passed out. She woke up a few days before she was discharged. She did not recall meeting Divakaruni when she first went to Rush but recalled seeing him right before she left.

¶ 17 Plaintiff testified further as follows. She had never been to Copley before June 20, 2014, and went there solely because doctors at Kishwaukee sent her. She did not recall signing the disclosure form. She could not recall whether she had been given any pain medicine at Kishwaukee or how she had felt there. However, she did recall that, when she woke up at

Copley and the nurse was telling her about the disclosure form, she was "really out of it" and "didn't know where [she] was or what was going on."

¶ 18 Rush filed a reply to plaintiff's response, arguing as follows. Plaintiff conceded that Divakaruni was not Rush's actual agent. She had not raised a genuine issue of apparent agency. The disclosure form had unambiguously informed her that he was not an employee of Rush. She had not been unconscious, and there was no evidence of any defect in her mental capacity. Moreover, according to Divakaruni's report, she had been alert and oriented and was able to describe her medical history. Plaintiff's affidavit and deposition did not contradict this evidence but alleged only that she could not later recollect what she had said and done and that she had felt confused at the time. Her subjective belief that Divakaruni was employed by Rush was irrelevant to whether Rush had held him out as its employee.

¶ 19 In his "Documents Review Report," a copy of which was attached to the reply, Divakaruni stated, in part, "[Plaintiff] is being seen this evening and is now complaining of some persistent left flank pain. She denies any nausea or vomiting or fevers, or chills." Also, "In further discussion with [plaintiff], she notes that she did have a stone previously back in 2003 ***." Under the heading "Physical Examination," Divakaruni recorded, in part, "General: No apparent distress"; "Psych: Alert and oriented x 3." The rest of the document set out the treatment plan for the evening of June 20, 2014, and later.

¶ 20 The trial court granted summary judgment to Rush and made a Rule 304(a) finding. Plaintiff timely appealed.

¶ 21 On appeal, plaintiff contends that summary judgment for Rush was erroneous because genuine issues of material fact remained as to whether Rush was liable for Divakaruni's negligence under a theory of apparent agency. Plaintiff reiterates her argument that she raised a

factual issue as to whether the disclosure form and the surrounding circumstances created ambiguity. She also asserts that evidence relating to her mental capacity barred any conclusion as a matter of law that Divakaruni was not Rush's apparent agent.

¶ 22 We review *de novo* a grant of summary judgment. *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, ¶ 35. Summary judgment is proper when the pleadings, depositions, and other matters on file establish that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Gilbert*, 156 Ill. 2d at 517-18. A court ruling on a summary judgment motion must construe the evidence strictly against the movant. *Id.* at 518; *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 590 (2006). However, a court should not strain to adduce some remote factual possibility that would defeat a motion for summary judgment. *James River Insurance Co. v. TimCal, Inc.*, 2017 Il App (1st) 162116, ¶ 19. If what is in the file would be all the evidence before the trial court and would be insufficient to go to the jury but require the court to direct a verdict, then summary judgment is proper. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989).

¶ 23 Plaintiff contends that genuine factual issues prevented the trial court from concluding that, as a matter of law, Rush did not meet the "holding out" test of *Gilbert*. She focuses primarily, although not exclusively, on the disclosure form that she signed on June 20, 2014, shortly after she was admitted to Copley. She also relies on the evidence of her mental acuity at that time and on the consent forms that she signed the next day. We consider these in turn.

¶ 24 Plaintiff argues first that there is at least a factual issue of whether the disclosure form did not sufficiently inform the reader that Divakaruni was an independent contractor. She relies on three aspects of the form. First, although Divakaruni was a urologist, the paragraph headed "Non-Employed Hospital-Based Physicians" did not include urology in the numerous specialties

whose providers were *per se* not employed by Rush. Second, the list of physicians under "Employed Physicians" did not specify the practice areas of the named people. Third, the form did not expressly state that Divakaruni was not an employee of Rush.

¶ 25 We fail to see how, individually or cumulatively, these features of the form made it ambiguous. Read as a whole—including parts that plaintiff does not mention—the form unmistakably indicated that Divakaruni was not employed by Rush.

¶ 26 The second paragraph told plaintiff that any physician who provided one of the types of medicine listed was automatically excluded as a Rush employee. That could not be read to imply that anyone with a practice *not* listed in the paragraph *was* an employee. If there were any such implication, the third paragraph dispelled it by stating plainly that the physicians listed therein *were* employees. The line below it stated plainly that any physician not listed was not an employee. We see nothing ambiguous or unduly confusing. The form told plaintiff that the only physicians who were Rush employees were those listed alphabetically under "Employed Physicians." It was not unduly difficult to check the list and see that Divakaruni was not on it. That the list did not specify the areas of practice of the people on it was logically irrelevant. And there was no requirement that the form expressly state that Divakaruni was not an employee of Rush. Although that might have been desirable (though perhaps not practical), the obvious indication of what the form said was sufficient.

¶ 27 The cases on which plaintiff relies are distinguishable, as is to be expected of an area where the resolution of issues is necessarily fact-specific.

¶ 28 In *Schroeder*, the disclosure statement on which the defendant hospital relied was one of six disclaimers or releases in the same document. It stated in part, " 'Your care will be managed by your personal physician or other physicians *who are not employed by Northwest Community*

Hospital' " and, as to consultants whom " '[y]our physician' " might choose to call in, " 'Like your physician, those consultants have privileges to care for patients at this facility, *but are not employed by Northwest Community Hospital*.' " (Emphases in original.) *Schroeder*, 371 Ill. App. 3d at 587. The court agreed with the plaintiff that the inclusion of multiple subjects in one form, combined with the quoted language, had raised a genuine issue as to whether the plaintiff's decedent had reasonably believed that the allegedly negligent physicians were the hospital's employees. Here, the disclosure form was limited to one subject and it did not set up a potentially confusing disjunction between "your physician" and unspecified others who were not employees.

¶ 29 In *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826 (2009), the appellate court emphasized that the document that the plaintiff signed had a "multipart format and contained various provisions unrelated to the independent contractor disclaimer." *Id.* at 837. The signature line was placed beneath a separate paragraph concerning the release of property. *Id.* Moreover, immediately preceding the paragraph stating that the physicians were independent contractors and not employees was one stating that, during the plaintiff's stay, " 'hospital employees will attend to my medical needs as necessary.' " (Emphasis omitted.) *Id.* This language was conducive to confusing the plaintiff. *Id.* Here, the disclosure form was concerned solely with the employee or nonemployee status of the physicians who worked at Rush or Copley, and it did not tend to point in two directions as did the form in *Spiegelman*.

¶ 30 Finally, in *Hammer v. Barth*, 2016 IL App (1st) 143066, the disclosure form stated, " 'I acknowledge and understand that some or all of the physicians who provide medical services to me at the hospital are not employees or agents of the hospital ***. Non-employed physicians may include, but are not limited to, those practicing [several categories].' " *Id.* ¶ 5. Not

surprisingly, the appellate court held that this model of vagueness did not clearly state that the cardiologist who had treated the plaintiff's husband was an independent contractor. *Id*. ¶ 24.

¶ 31 We conclude that the disclosure form was unambiguous and clearly indicated that Divakaruni was not an employee of Rush. Nothing about the one-page, single-subject form undermined this clear indication.

¶ 32 Plaintiff contends that, even granting as much, other circumstances created ambiguity on the matter of Divakaruni's employment status. We note that under the case law the existence of a signed form acknowledging a physician's status as an independent contractor is "not always dispositive on the issue of 'holding out' " but is certainly "an important factor to consider." *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1087 (2009).

¶ 33 Plaintiff relies primarily on the consent-to-surgery form that she signed the day after she signed the disclosure form. She notes that this form did not state that Divakaruni was an independent contractor. Although that is correct, we do not see how this created a factual issue on the elements of holding out. The form that plaintiff had signed the previous day had told her that Divakaruni was not an employee of Rush and nothing on the consent form suggested otherwise. The most that can be said is that the form bore the heading, in the upper left corner, "Rush-Copley." But that simply reflected that the operation took place there. Plaintiff also notes that Divakaruni cleared her for discharge from the hospital on July 7, 2014, but even if this fact contributed to her impression then that he was Rush's employee, it proved nothing about any holding out at the pertinent time—when Divakaruni took her case and operated on her. Plaintiff's subjective impression later on was legally irrelevant, especially as it would have had no pertinence to the reliance element of *Gilbert*.

¶ 34 We hold that plaintiff did not raise a genuine issue as to whether any ambiguity created by the disclosure form or Rush's subsequent conduct satisfied the "holding out" element of *Gilbert*. We need not discuss the reliance element.

¶ 35 We turn to plaintiff's second argument: that the evidence of her deteriorating medical condition when she signed the form prevented the trial court from concluding as a matter of law that Rush did not hold out Divakaruni to her as its agent. Plaintiff contends that her confusion and lack of alertness created a factual issue as to whether Rush adequately informed her that Divakaruni was an independent contractor. We disagree.

¶ 36 Plaintiff cites *Spiegelman*, in which the court held that the jury had properly found that the defendant hospital had held out the allegedly negligent physician as its agent. As we noted earlier, the court reasoned that the consent form had been ambiguous and that, as a result, "the jury could rightfully infer that [the] the plaintiff was confused as to which doctors were [the hospital's] employees." *Spiegelman*, 392 Ill. App. 3d at 837. The court added, "Further, in the emergency room, plaintiff had complained of dizziness and problems with her vision, and there was evidence that plaintiff's condition rapidly worsened. For these reasons, a jury could reasonably conclude that the consent form was confusing and ambiguous and therefore did not adequately inform plaintiff of her doctor's independent contractor status." *Id.*

¶ 37 *Spiegelman* is distinguishable. Its resolution of the "holding out" issue was based on its conclusion that the consent form did not clearly inform the plaintiff that her physician was an independent contractor. The opinion did note the evidence that the plaintiff had been confused when she signed the form, but it did not hold that such evidence *by itself* would have supported the jury's finding that the hospital had held out the physician as its employee. Logically, it is hard to see how the court could have done so: the first two *Gilbert* factors say nothing about the

specific patient's intellectual or physical condition but speak only to what the actions of the hospital and the physician would have conveyed to a reasonable person. To the extent that *Spiegelman* can be read to stand for the proposition that a patient's medical condition or alertness is pertinent to the "holding out" factors in *Gilbert*, we decline to follow it.

¶ 38 In any event, the evidence did not raise a jury question as to plaintiff's capacity. Although she did testify in her deposition that she had been tired or confused, it is undisputed that she initialed and signed the disclosure form. There was no evidence that she was mentally incapacitated. Her nonspecific testimony that she had felt confused would be at best a shaky foundation for a finding that she did not know what she was doing. Against that testimony was Divakaruni's near-contemporaneous statements that plaintiff was alert and oriented, was able to describe her pain, and recounted that she had had a kidney stone in 2003. To the extent that plaintiff's ability to understand the consent form was relevant to the issue of holding out, the evidence was so one-sided that it did not raise a genuine issue of material fact.

¶ 39 *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, is pertinent. In *Steele*, the appellate court entered a judgment *n.o.v.* for the defendant Provena, holding that the disclosure form that the patient (the plaintiff's daughter and decedent) signed barred vicarious liability. The evidence showed that the plaintiff took the form, printed her daughter's name on it, and told her to sign it, and that the daughter did so. *Id.* ¶ 112. Neither the plaintiff nor her daughter read the form. *Id.* ¶ 114. The appellate court agreed with the hospital that their failure to read the form did not vitiate its effect. *Id.* The court then held that the daughter's assent had been effective despite her weakened condition. The court observed that, although she had been in pain, she had been conscious, ambulatory, and able to discuss her symptoms and her medical history. *Id.* ¶ 125. The situation is similar here. Plaintiff's second argument on appeal fails.

¶ 40 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 41 Affirmed.