2018 IL App (1st) 171696-U

SIXTH DIVISION
May 11, 2018

No. 1-17-1696

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NIKITA DAVIS, Special Administrator and Special Representative of the Estate of Navari White, deceased, Plaintiff-Appellant, v. INGALLS HEALTH SYSTEM d/b/a INGALLS MEMORIAL HOSPITAL, Defendant-Appellee (Midwest Emergency Associates, Ltd., Team Health, LLC, and Atul Joshi, D.O., Defendants).	)	Appeal from the Circuit Court of Cook County. No. 15 L 1457 Honorable William L. Gomolinski, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Connors dissented.

ORDER

¶ 1 ***Held:*** The circuit court erred in granting summary judgment because there is a genuine issue of material fact regarding whether the defendant physician was acting as the apparent agent of the hospital. Reversed and remanded.

¶ 2 Plaintiff Nikita Davis, as special administrator and special representative of the estate of Navari White, deceased, sued defendants Ingalls Health System d/b/a Ingalls Memorial Hospital

(Ingalls), Atul Joshi, D.O., and two healthcare corporations for negligence. The circuit court granted Ingalls' motion for summary judgment. On appeal, plaintiff contends that the court erred in finding there was no genuine issue of material fact regarding whether Dr. Joshi was acting as the apparent agent of Ingalls. We reverse the judgment of the circuit court and remand the cause for further proceedings.

¶ 3 BACKGROUND

¶ 4 On May 29, 2012, plaintiff initiated this case, which seeks damages under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2012)) and the Survival Act (755 ILCS 5/27-6 (West 2012)). Her complaint generally alleged that Dr. Joshi negligently failed to diagnosis and treat her decedent (her one-month-old son, Navari White) for a "Group B strep[tococcus]" infection. In addition to that infection, Navari eventually developed meningitis, hydrocephalus, and other disorders, resulting in his death.

¶ 5 On February 2, 2017, Ingalls filed its motion for summary judgment. Ingalls argued in relevant part that plaintiff could not establish that Joshi had acted as the apparent agent of Ingalls when he provided care to Navari.[1] Attached to Ingalls' motion was the affidavit of Linda B. Conway, the associate general counsel of Ingalls, in which she stated that there were various signs in the hospital stating in bold letters that the physicians at Ingalls were not the employees or agents of Ingalls. Conway added that each sign was 17 inches by 17 inches in size and were located at the entrance to the hospital "on the side where individuals who have parked in the parking garage would enter," in the "ER Fast Track area," in the "main ER," and in the parking garage.

[1] Ingalls also argued that plaintiff could not show that Joshi was the actual agent of Ingalls, but plaintiff conceded this point in her response, and this issue is not before us.

¶ 6 Ingalls also attached a transcript of plaintiff's and Joshi's depositions to its motion. Plaintiff testified that she did not recall seeing any signs in the hospital indicating that the physicians are not Ingalls employees. Plaintiff admitted, however, that when she brought her son to the Ingalls emergency department on May 29, 2012, she signed two consent forms acknowledging that the emergency department physicians were not employees or agents of Ingalls and were "independent medical practitioners." Plaintiff further stated that she believed Joshi was an employee of Ingalls because "he was an emergency room physician, and also everybody in the hospital works together." Plaintiff added that his "doctor's jacket" and badge were further reasons supporting her belief. When asked, however, whether Joshi's badge had "Ingalls" on it, plaintiff responded that she could not remember. In addition to the consent forms she signed on May 29, 2012, plaintiff agreed that she signed additional consent forms on April 30, 2012 (when Navari was born), and from May 3-5, 2012, all of which indicated that the physicians providing treatment at Ingalls were not employees of Ingalls.

¶ 7 Joshi stated in his deposition that, at the time he treated Navari, he had an "emergency badge." Joshi further noted that it was the same badge that he currently used, he still had it in his possession, and he was willing to produce it. In addition to his name and "ER physician," Joshi testified that it had the name "Ingalls Hospital" on it, but not the name of his employer, an entity known as "MEA." After his deposition, however, Joshi submitted an affidavit that he did not have the same physical badge that he used in May 2012 and was unable to produce it. Regarding the nursing staff's badges, Joshi stated, "They're all Ingalls badges in the ER." Joshi further admitted that his resume listed his employer from 2000 to the present as Ingalls rather than MEA, but he then stated that he needed to "update" that document. With respect to signage in

the emergency room, Joshi could not recall if there were any signs in the emergency room or nearby area informing patients that the emergency room physicians were not Ingalls employees.

¶ 8 Plaintiff's responded to Ingalls' motion with her own affidavit, stating that she went to Ingalls not to see a particular doctor, but rather because she believed that "Ingalls would provide full medical care to Navari through its staff, including its physicians." Plaintiff reiterated her statement that she believed Joshi was an employee of Ingalls because "everyone at the emergency room *** seemed to be working together as a staff," and that "there was something about Dr. Joshi's badge and lab [coat] that made me believe he was an employee." She noted that Joshi's deposition transcript indicated that his badge had "Ingalls Hospital" and "ER physician" on it. Plaintiff admitted that she did not remember the badge but nonetheless stated that "if" she had seen his badge with that information on it at the time, it would have led her to believe that Joshi was an Ingalls employee. She added, however, that she did recall seeing a nurse who wore a similar identification badge, which "further reinforced" her belief that the physicians and nurses were all Ingalls employees. Plaintiff also said that she did not recall seeing any signs suggesting that the doctors were not employed at Ingalls.

¶ 9 Plaintiff also attached the deposition of Bernard Heilicser, D.O., a physician at the Flossmoor urgent care clinic. Heilicser stated that he had been associated with Ingalls for over 30 years. On May 29, 2012, plaintiff brought Navari to the urgent care clinic, and Heilicser noted that Navari had a slightly elevated temperature of 99.9 degrees and a distended abdomen. He spoke to a pediatrician at the Ingalls emergency department, Dr. Wright, who recommended that Navari be brought to the emergency department for observation. Heilicser stated that, at that time, he was an employee of MEA and not Ingalls. When asked about his badge, Heilicser believed that his current badge was the same one that he had on May 29, 2012, and that he would

be willing to provide it. Plaintiff's response included an exhibit depicting a photograph of Heilicser's current badge, which does not have in Ingalls name or logo on it. The attached cover letter attached to the photograph, however, indicates that Heilicser no longer believed that his current badge "was the same badge that he wore in 2012, as the badges often crack or malfunction," and that his current badge was the only one in his possession. With respect to signage, Heilicser "believe[d]" there was "some signage" indicating that emergency room physicians were not employees of Ingalls, but Heilicser admitted he did not know where they were located or what the signs said.

¶ 10 Plaintiff also attached the transcript of the deposition testimony of Shirley McManus, R.N. McManus stated that, on May 29, 2012, she was a nurse in the Ingalls emergency department, and she attended Navari with Dr. Joshi. McManus stated that her badge at the time had the name "Ingalls" at the top with the Ingalls logo, and although McManus stated that the physicians at Ingalls also had badges, she did not remember what was printed on them.

¶ 11 Finally, plaintiff attached what she represented were printouts from the Ingalls website at around the time of Navari's treatment. Plaintiff admitted that the printouts were obtained from third-party archive websites bearing the addresses of either "www.felder.com" or "web.archive.org." The website printouts referred to "physicians on our [Ingalls'] medical staff" and "Physicians on Ingalls staff," or provided a link to "Find A Doctor on staff at Ingalls."

¶ 12 On June 7, 2017, following a hearing, the circuit court granted Ingalls' summary judgment motion, dismissing it from the case with prejudice. The court commented that "the only evidence" that plaintiff wanted the circuit court to rely upon was "a doctor's coat that says Ingalls Memorial Hospital on it *** and that they're working together." The circuit court further

made a finding that its order was "final, enforceable and appealable pursuant to Supreme Court Rule 304(a)" (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)). This appeal follows.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiff claims that the circuit court erred in finding no genuine issue of fact as to whether Joshi was acting as an apparent agent of Ingalls. Specifically, plaintiff argues that Joshi's badge & "uniform," Joshi's description of his employer in his resume, plaintiff's observation that Joshi and the hospital staff worked together, and Ingalls' advertising all raise at least a disputed fact regarding Joshi's apparent agency that would preclude summary judgment.

¶ 15 Summary judgment is appropriate "if 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). To determine whether a genuine issue as to any material fact exists, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). If reasonable people would draw divergent inferences from undisputed facts, summary judgment must be denied. *Id.* In essence, summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Id.* We review the decision on a motion for summary judgment *de novo*. *Id.*

¶ 16 The central dispute in this case is whether Dr. Joshi was the apparent agent of Ingalls. In *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993), our supreme court held for the first time that a hospital may be variously liable for medical or professional negligence if there is merely an *apparent* agency relationship between the hospital and the treating physicians. The decision in *Gilbert* reflected the "reality of modern hospital care" in which patients rely on

the reputation of the hospital, rather than individual doctors, in seeking emergency treatment and naturally assume the doctors are hospital employees. *Id.* at 521.

¶ 17 For a hospital to be liable under the doctrine of apparent authority, a plaintiff must establish that: " '(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 524-25 (quoting *Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 423 N.W.2d 848, 855-56 (1988)). The first two elements are typically referred to collectively as the "element of 'holding out,' " whereas the third element is generally referred to as the "element of justifiable reliance." *Id.* at 525.

¶ 18 The "holding out" element "does not require an express representation by the hospital that the person alleged to be negligent is an employee. Rather, the element is satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors." *Id.* The "justifiable reliance" element is established "if the plaintiff relies upon the hospital to provide complete emergency room care, rather than upon a specific physician." *Id.* On this element, the critical distinction is whether the plaintiff is (a) seeking care from the hospital itself or (b) looking to the hospital merely as a place for her personal physician to provide medical care. *Id.*

¶ 19 Turning to the arguments in this case, we reject at the outset plaintiff's reliance upon various Ingalls website pages that purportedly existed around the time of Navari's treatment. It is well established that, in determining the genuineness of a fact, a court should consider only

facts admissible in evidence. *Seefeldt v. Millikin National Bank of Decatur*, 154 Ill. App. 3d 715, 718 (1987). The proffered web pages, however, contain no foundation as to their authenticity. Instead, there is only a bald assertion that the third-party websites have archived various pages from the Ingalls internet presence at certain points in time before Navari's treatment. Since this evidence lacks a proper foundation, we do not consider these documents to be dispositive.

¶ 20 We further reject plaintiff's claim that Joshi's description of his employer as Ingalls in his resume creates a disputed factual issue regarding apparent agency. As noted above, to establish Ingalls' liability under apparent authority, plaintiff must show, *inter alia*, that *Ingalls* acted in manner that would lead a reasonable person to conclude that Joshi was an agent of Ingalls, and that *Ingalls* had knowledge of Joshi's acts (here, describing his employer in his personal resume) and acquiesced in them. *Gilbert*, 156 Ill. 2d. at 524-25. There is nothing in the record before us to indicate that *Ingalls* required Joshi to denote Ingalls as his employer or that Ingalls knew of and acquiesced in this. Plaintiff's claim on this point is therefore unavailing.

¶ 21 Nonetheless, construing the evidence strictly against Ingalls and liberally in favor of plaintiff, as we must (see *Williams*, 228 Ill. 2d at 417), we believe that there is a genuine issue of material fact as to whether Dr. Joshi was the apparent agent of the hospital.

¶ 22 We first consider the first holding-out factor, namely, whether the hospital or its agent acted in such a manner that a reasonable person would believe the negligent individual was the hospital's employee or agent. *Gilbert*, 156 Ill. 2d. at 524-25. Joshi wore his badge at the time of Navari's treatment. He unequivocally stated that his badge had "Ingalls Hospital" on it, and as to the nursing staff's badges, Joshi added, "They're all Ingalls badges in the ER." McManus (the emergency room nurse who attended Navari), produced a photocopy of her badge and agreed that her badge had the Ingalls name and logo. We note that the photocopy of McManus's badge

was included in the record on appeal and is consistent with her deposition testimony, whereas Joshi's badge is no longer in his possession despite his statement at his deposition that he still had that badge. Construing this evidence in the light most favorable to plaintiff, there is a genuine issue of material fact as to whether a reasonable person would have considered Joshi an Ingalls employee because he was wearing a badge with the name "Ingalls" on it, which was similar to nurse McManus's badge.

¶ 23 The second holding-out factor is whether the hospital had knowledge of and acquiesced in the acts of the agent that created the appearance of authority. *Gilbert*, 156 Ill. 2d. at 524-25. Again, Joshi's testimony was that he was wearing his "emergency badge" at the time he treated Navari, which had his name, his title ("ER physician"), and "Ingalls Hospital" on it, but not MEA, his actual employer. Viewing this evidence and all reasonable inferences in plaintiff's favor, this also creates a genuine issue of material fact as to whether Ingalls knew of and acquiesced in Joshi's wearing an "Ingalls" and not "MEA" badge in the Ingalls emergency department.

¶ 24 Finally, we examine the third element, justifiable reliance, *i.e.*, whether 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 524-25. Plaintiff stated in her deposition that there was "something" about Dr. Joshi's lab coat and badge that reinforced her belief that he was an Ingalls employee. In addition, there is nothing in the record on appeal to indicate that plaintiff brought Navari to the Ingalls emergency room specifically to have Dr. Joshi or her personal physician treat him. Viewing this evidence in the light most favorable to plaintiff, this also creates a disputed factual issue as to whether plaintiff justifiably relied upon the conduct of Ingalls or Joshi.

¶ 25 We recognize that Ingalls provided multiple notices that physicians were neither its employees nor its agents, and we also acknowledge that plaintiff could not recall at the time of her deposition precisely what was printed on Joshi's badge. Nevertheless, at the summary judgment stage, it is improper to "weigh evidence, decide facts and make credibility determinations." *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 30. Our holding is simply that, based upon the limited record before us, the hospital's right to summary judgment is not "clear and free from doubt." *Williams*, 228 Ill. 2d at 417. Therefore, summary judgment should have been denied. *Id.*

¶ 26 In so holding, we find Ingalls' reliance upon *Frezados v. Ingalls Memorial Hospital*, 2013 IL App (1st) 121835, *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081 (2009), and *Churkey v. Rustia*, 329 Ill. App. 3d 239 (2002), unavailing. Although each of those cases held that the consent forms that the plaintiff signed vitiated any claim of apparent agency between the hospital and the physician, none of those cases, unlike the case before us, had any evidence that the treating physician's badge explicitly stated the name of the hospital on it. Since those cases are factually distinct, they do not alter our holding.

¶ 27 In addition, Ingalls' reliance upon *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, is also misplaced. In that case, unlike the case before us, there was no evidence that the doctor's badge had the hospital's name on it. The *Mizyed* court quoted the defendant doctor's deposition testimony as follows:

> "Q: What specifically does the badge say?
>
> A: Medical staff.
>
> Q: It says Palos Community Hospital?

A: That you are a doctor, you are not a nurse. Just to identify that you are a doctor." *Id.* ¶ 27.

¶ 28 The *Mizyed* court first rejected the plaintiff's argument that, because he could not understand English and required his daughter to serve as a translator, the independent-contractor notices on the consent forms could not protect the defendant hospital from vicarious liability. *Id.* ¶¶ 41-62. The court then noted, "[t]he consent form, by itself, would not necessarily warrant summary judgment in [the hospital's] favor, if there was other evidence that [the hospital] was 'holding out' [the defendant doctor] as its agent or employee." *Id.* ¶ 63 (citing *Churkey v. Rustia*, 329 Ill. App. 3d 239, 245 (2002). The court, however, noted that the record in that case indicated "no other evidence to support the 'holding out' element," specifically recounting that the doctor "did not indicate that her badge identified her as a [hospital] employee." *Id.*

¶ 29 Here, by contrast, Joshi unequivocally stated that his badge—at the time of Navari's treatment—had his name, "ER physician," and "Ingalls Hospital" on it, but not the name of his actual employer, MEA. *Mizyed* is therefore unavailing.

¶ 30 In sum, Dr. Heilicser, who worked in the Ingalls Family Care Center (*i.e.*, its urgent care facility), testified that his name badge bore the Ingalls name. Dr. Heilicser referred the plaintiff to the emergency room at Ingalls. Dr. Heilicser even called ahead to notify the emergency room staff of the baby's symptoms. Plaintiff suggested she believed that everyone worked for the hospital. She was referred to the emergency room from the Ingalls urgent care facility, and in her observation, everyone in the emergency room at Ingalls worked together in treating her child. Plaintiff further denied seeing the signs posted by the hospital to warn patients that it disavowed any employment relationship with the doctors working in its emergency room. Whether these facts are sufficient to establish apparent

agency remains to be determined. One thing is certain, however: summary judgment for the hospital should not have been granted.

¶ 31 CONCLUSION

¶ 32 We reverse the judgment of the circuit court and remand the cause for further proceedings consistent with this order.

¶ 33 Reversed and remanded for further proceedings.

¶ 34 JUSTICE CONNORS, dissenting:

¶ 35 I respectfully dissent, and would affirm the trial court's grant of summary judgment in favor of Ingalls. The primary basis for my divergence from the majority's holding is the consent forms at issue in this case, and the effect of those forms in light of our supreme court's decision in *Gilbert* and other precedent.

¶ 36 At her deposition, plaintiff testified that she recalled being given consent forms each time she took Navari to Ingalls. The record reflects that, in total, plaintiff signed ten consent forms. Specifically, when she brought Navari to the emergency room on May 29, 2012, she signed two consent-related documents (collectively referred to hereinafter as "consent forms"). The majority recognizes that all ten of the consent forms that plaintiff signed "indicated that the physicians providing treatment at Ingalls were not employees of Ingalls." Although the majority has not quoted the language of the consent forms, I find it necessary to do so. One of the two consent forms that plaintiff signed before Navari received treatment at the emergency room on May 29, 2012, was titled "CONSENT FOR TREATMENT." That form contained the following relevant language:

> "I have been informed and understand that physicians providing services to me at Ingalls, including, but not limited to,

> 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 and may not be participating providers in the same insurance plans and networks as the hospital, which could cause a greater out of pocket financial responsibility."

On May 29, 2012, in addition to the consent for treatment form, plaintiff also signed a form titled "LEGAL NOTICE TO PATIENTS PHYSICIANS ARE NOT EMPLOYEES OR AGENTS OF HOSPITAL." In its entirety that form stated:

> "Please read carefully.
>
> The law in Illinois requires Ingalls Memorial Hospital ('Ingalls') to tell you that:
>
> - Your physicians, including but not limited to, your personal attending physician, emergency room and urgent aid physicians, radiologists, pathologists, anesthesiologists, on-call physicians, consulting physicians, surgeons, obstetricians / gynecologists, and allied health care providers working with those physicians, are not employees or agents of Ingalls.

- Your physician and the allied health care professional working with those physicians are independent medical practitioners who have been permitted to use Ingalls for the care and treatment of their patients. As independent medical practitioners, they exercise their own professional judgment in caring for their patients and they are not supervised or controlled by Ingalls.
- Your physicians will bill you separately from Ingalls for their services.
- You have the right to choose your own physicians and the right to change of your physicians at any time.

I have read and understand all of this form. I understand all of the information being provided to me in this document. I understand and agree that the physicians and the allied health care professionals working with those physicians are not employees or agents of Ingalls. By accepting this form, I am saying that I understand and agree to what it says."

¶ 37 In addition to the consent forms she signed on May 29, 2012, plaintiff was also informed of the physicians' independent contractor status by signs posted throughout the hospital. Plaintiff testified that she did not remember seeing the signs but her testimony conflicted with the affidavit of Linda B. Conway, the associate general counsel for Ingalls, which was attached to Ingalls's motion for summary judgment. In Conway's affidavit, she attested that the signs were in place in May and June of 2012, that the signs were 17 inches by 17 inches, and were

located in the hospital's entrance used by those who parked in the parking garage, in the "Fast Track" area of the emergency room, in the main emergency room, and in the parking garage. She specifically stated, "Based on my knowledge of the placement of the signs, Ms. Davis would have been exposed to one or more of the signs during her visits to the Hospital in 2012." Each sign stated as follows:

> "LEGAL NOTICE TO PATIENTS
>
> PHYSICIANS ARE NOT EMPLOYEES OR AGENTS OF HOSPITAL
>
> The physicians providing services to you at Ingalls including but not limited to your personal / attending physician, emergency room and urgent aid physicians, radiologists, pathologists, anesthesiologists, on call physicians, consulting physicians, surgeons, obstetricians / gynecologists, and allied health care providers working with those physicians are not employees or agents of Ingalls but are independent medical practitioners who have been permitted to use Ingalls for the care and treatment of their patients. Your physician will bill you separately for their services. You have the right to choose your own physicians and the right to change physicians at any time."

¶ 38 According to our supreme court in *Gilbert*, and as stated by the majority above, there are three requirements a plaintiff must establish in order for a hospital to be liable under the doctrine of apparent authority: (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 an 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 524-25. The first and second *Gilbert* requirements are referred to as the "holding out" element. *Id.* at 525.

¶ 39 In my opinion, the majority misconstrues the requisite analysis of the "holding out" element. The majority quotes *Gilbert* for the proposition that the "holding out" element "is satisfied if the hospital holds itself out as a provider of emergency room case *without informing the patient that the care is provided by independent contractors.*" *Id.* However, it seems the majority has disregarded the latter part of that sentence. Here, there is no dispute that the consent forms were unambiguous and clear. Thus, there is no question that Ingalls informed the plaintiff that the care would be provided by independent contractors. Based on the language of *Gilbert*, it seems that a court should only consider other evidence, *i.e.* whether the doctor's badge stated the name of the hospital, when the hospital has not adequately informed the patient that he or she would be treated by independent contractors, which did not occur here. The "holding out" element was not met here because the consent forms and the signage posted around the hospital clearly indicated that physicians were not employees or agents of Ingalls.

¶ 40 I find it important to emphasize the significance of explicit consent forms. "We have routinely held that a plaintiff's signature on consent forms containing similar language disclaiming an agency relationship is an important factor to consider when determining whether the 'holding out' requirement has been satisfied." *Frezados*, 2013 IL App (1st) 121835, ¶ 18. The majority rejects Ingalls's reliance on *Frezados*, *Lamb-Rosenfeldt*, *Wallace*, and *Churkey*. I, however, find those cases to be instructive and essential to resolving the issues before this court.

The majority explains that none of these cases "had any evidence that the treating physician's badge explicitly stated that [*sic*] name of the hospital on it." *Supra* ¶ 26. While this may be true, I do not believe that whether the treating doctor was wearing a badge with "Ingalls" on it has any impact on the issue of apparent agency given the clear and unambiguous language of the consent forms and signage. Additionally, for reasons more fully explained later in this dissent, I do not believe the testimony of Dr. Joshi or the plaintiff definitively established that "Ingalls" was on the front of the badge in 2012, or that the plaintiff ever saw the name "Ingalls" on the badge.

¶ 41 I find *Frezados* is directly on point, and applicable to the case at bar. There, the plaintiff sued Ingalls, the same defendant here, and had signed a consent form with a relevant provision nearly identical[2] to the one at issue here. *Id.* ¶ 5. The defendant hospital filed a motion for summary judgment, arguing that there was no issue of fact regarding whether the defendant doctors were actual or apparent agents of the defendant hospital, which was granted by the trial court. *Id.* ¶ 10. The motion included an affidavit from the hospital's general counsel, stating that signage with language almost the same as here was posted in the waiting and examination rooms. *Id.* ¶ 10. On review, this court first addressed whether the action of the defendant hospital or of the defendant doctors led the plaintiff to believe that the doctors were the hospital's employees or agents. *Id.* ¶ 16. Citing *Gilbert*, the court explained that the "holding out" element is satisfied "if the hospital presents itself as a provider of emergency room care without informing the

[2] The only difference between the consent forms is that the one in *Frezados* stated: "physicians, providing services to me at Ingalls, *such as* my personal physician, Emergency Department and Urgent Aid physicians" instead of "physicians providing services to me at Ingalls, *including, but not limited to,* my personal physician, Emergency Department and Urgent Aid physicians," which was the language included in the consent forms here. (Emphasis added.) Interestingly, it seems the consent form in this case included the broad language "including, but not limited to" in order to possibly clear up any confusion that could have resulted from the use of the phrase "such as."

patient that the care is being provided by independent contractors." *Id.* The *Frezados* court recognized that contrary to *Gilbert*, where the defendant hospital's consent form stated that patients would be treated by physicians and employees of the hospital, the consent form before it included "an explicit acknowledgement" that emergency room physicians were independent medical practitioners, not employees of the defendant hospital. *Id.* ¶¶ 16-17. The court also noted that although the plaintiff countered the motion for summary judgment with an affidavit stating that he believed the anesthesiologist was an employee of the defendant hospital, the court nonetheless concluded that based on his testimony, wherein he admitted that the defendant doctors did nothing to make him believe they were the defendant hospital's employees, and the language of the consent forms, "no reasonable person could have believed the doctors were the agents of defendant [hospital]." *Id.* ¶ 20.

¶ 42 The consent form in the instant case is at least as clear as the form in *Frezados*, and thus, construing the evidence in the light most favorable to the plaintiff, as is required (*Federal Insurance Co v. Lexington Insurance Co.*, 406 Ill. App. 3d 895, 897 (2011)), no genuine issue of material fact remains. There is simply no evidence that Ingalls took any actions that would lead the plaintiff to reasonably believe that Dr. Joshi was its employee or agent. Ingalls required the clear and unambiguous consent forms to be signed and included the same language regarding the physicians' status as independent contractors in both the consent form and the legal notice, making it doubly as clear that physicians were not Ingalls's employees. Additionally, as Ingalls points out in its brief, there is no dispute that the present case involves the same hospital, the same consent forms, and the same signage as *Frezados*. In fact, it seems that the consent forms at issue here were even clearer than the one in *Frezados* because in addition to the form titled "Consent for Treatment," the plaintiff here also signed a form titled "LEGAL NOTICE TO

PATIENTS PHYSICIANS ARE NOT EMPLOYEES OR AGENTS OF HOSPITAL." It is apparent to me that the consent form and legal notice clearly and concisely state that none of the physicians at Ingalls 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. Further, there are no additional terms on the consent form that would raise a question of fact regarding whether the plaintiff knew or should have known that the physicians who treated Navari were independent contractors. Additionally, Ingalls's general counsel submitted an affidavit in this case, like in *Frezados*, that unambiguous signage was posted throughout the area where the plaintiff here would have viewed them. Thus, like the court in *Frezados*, I would affirm the trial court's grant of summary judgment.

¶ 43 Further, I find this case distinguishable from the more-recent case of *Hammer v. Barth*, 2016 IL App (1st) 143066, a case heavily relied on by the plaintiff. In *Hammer*, the court found that a genuine issue of material fact existed as to whether the consent form at issue adequately informed the plaintiff's husband that the treating physician was an independent contractor. *Id.* ¶ 24. The consent form at issue stated, "I acknowledge and fully 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." *Id.* ¶ 5. The court found the reference to "some or all of the physicians" to be ambiguous. *Id.* ¶ 24. Only after it determined that the consent form was ambiguous did the *Hammer* court turn to whether the record contained any support for the plaintiff's allegations that the hospital held the doctor out as its agent. *Id.* ¶ 25. In this case, it is undisputed that the consent forms were unambiguous, and the plaintiff simply has not presented any evidence showing that she reasonably believed Dr. Joshi was Ingalls's agent or employee.

¶ 44 In addition to the case law supporting my position, I do not believe the testimony in the record before this court creates a question of fact. In my opinion, a close examination of both Dr. Joshi's and the plaintiff's testimony reveals that the plaintiff never testified that she saw Dr. Joshi wearing a badge that stated "Ingalls" on it, and thus could not have reasonably believed that Dr. Joshi was an employee of Ingalls based on his badge. Relevant to this issue, Dr. Joshi testified at his deposition as follows:

"Q. I assume when you worked in the emergency room of Ingalls in 2012, you had some form of emergency badge?

A. That's correct.

Q. And do you still have that badge?

A. Yes.

Q. Is it the same badge?

A. It's the same badge.

Q. So you could provide us -- or provide your attorney with a copy of that badge?

A. Absolutely.

Q. So tell me what it says on your badge.

A. It has my name and ER physician.

Q. Anything other than your name and ER physician?

A. I don't think I've ever looked at that badge that clearly -- with that much scrutiny.

Q. Well, do you know whether it has the name of Ingalls Memorial Hospital?

A. It does have the name of Ingalls Hospital on it."

¶ 45 At her deposition, the plaintiff's entire testimony regarding whether she believed Dr. Joshi was an employee of Ingalls occurred as follows:

"Q. I want to go back to May 29th when you saw Dr. Joshi in the emergency room. Did you have an understanding of who Dr. Joshi's employer was then?

A. Ingalls.

Q. Okay. And why did you think that he was employed by Ingalls?

A. Because he was an emergency room physician, and also everybody in the hospital works together.

Q. Got you. So not to change your testimony, but just so that I understand it, let me try to rephrase it. You thought he was an employee of Ingalls because he was there at Ingalls providing treatment in the emergency room?

A. Yes.

Q. Okay. Was there any other reason besides the fact that he was treating people at the Ingalls emergency room that made you think he was an employee of Ingalls?

A. He had on a doctor's jacket.

Q. Okay.

A. Badge.

Q. Did the badge say Ingalls?

A. I'm not sure. I don't remember.

Q. Okay. Was there anything Dr. Joshi did to make you think he was employed by Ingalls? Anything he said that made you think he was employed by the hospital?

A. Yeah, he introduced himself.

Q. As what?

A. Dr. Joshi.

Q. Okay. And did he -- but specifically did he say anything about I am Dr. Joshi, and I am employed by Ingalls? Did he say anything specifically that made you think not just that he was a doctor working there, but that his employer was Ingalls? Did he say anything like that?

A. No."

¶ 46 Contrary to the plaintiff's contentions, this testimony does not establish that the plaintiff believed that Dr. Joshi was an employee of Ingalls because he was wearing a badge that said "Ingalls." In fact, at times during this testimony, it appears the plaintiff was under the impression she was being asked how she knew Dr. Joshi was, in fact, a doctor. She refers to his "doctor's jacket" and refers to his introduction of himself as "Dr. Joshi." Neither of which would lead a reasonable person to believe that Dr. Joshi was an employee of Ingalls. Additionally, Dr. Joshi never testified that his badge said "Ingalls" on the front of it or in a place that would have been visible to the plaintiff or other patients.

¶ 47 Most significantly, the plaintiff testified that she was "not sure" whether the badge said Ingalls. When directly asked whether she "thought [Dr. Joshi] was an employee of Ingalls

because he was there at Ingalls providing treatment in the emergency room," the plaintiff responded, "Yes." Although the majority seems to rely on the plaintiff's affidavit that was submitted with her response to the motion for summary judgment, I find her affidavit unavailing. In relevant part, the plaintiff's affidavit states:

> "As stated in my deposition, I thought Dr. Joshi was an employee of Ingalls Hospital for basically two reasons: *** Second, there was something about Dr. Joshi's badge and lab. Jacket [*sic*] that made me believe he was an employee of the hospital. I know from looking at his deposition, that his badge said, 'Ingalls Hospital' and had the words 'ER physician' on it. While I do not remember that, I believe that if I saw that, at the time, that would have led me to believe he was employed as an 'ER physician' at 'Ingalls Hospital.' "

This is essentially a hypothetical. *If* the plaintiff saw the words "ER physician" and "Ingalls Hospital" on Dr. Joshi's badge, then she *would have* believed he was employed by Ingalls. The plaintiff did not attest that she *did*, in fact, see the badge or that because she saw that it stated "Ingalls" on it, she *believed* that Dr. Joshi was an employee. Thus, I simply disagree that the testimony before this court creates a question of fact.

¶ 48 I believe the majority's analysis on this issue misconstrues the objective standard that applies here. In *Gilbert*, our supreme court expressly defined apparent authority as that 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. Here, it would not have been reasonable for the plaintiff to have believed Dr. Joshi was an employee of

Ingalls in light of the fact that she signed two explicit consent forms on the date at issue, and eight similar forms on previous occasions within the prior one-month timeframe, coupled with the explicit signage located throughout the hospital. The plaintiff testified that she believed Dr. Joshi was an employee of Ingalls because he was at Ingalls, he provided treatment there, and "everyone in the hospital works together." To allow such testimony to create a question of fact would effectively defeat summary judgment on every case where an independent contractor physician provided care in an emergency room and did so by working together with other people in the emergency room. In my view, there is nothing in the record that creates a question of fact regarding apparent agency, because no reasonable person could have concluded that Ingalls was Dr. Joshi's employer due to the unambiguous consent forms and signage, and the lack of any evidence establishing that the plaintiff held a reasonable belief that Dr. Joshi worked for Ingalls.

¶ 49 To be clear, it is not my position that every case in which a plaintiff signs an unambiguous consent form, like the one here, will result in the grant of summary judgment in favor of defendant hospitals. Rather, I believe that when the plaintiff here was presented with the unambiguous consent forms, one of which was titled "LEGAL NOTICE TO PATIENTS PHYSICIANS ARE NOT EMPLOYEES OR AGENTS OF HOSPITAL," it made it nearly impossible for the plaintiff to satisfy the "holding out" element, which is not a new interpretation of the law. See *Wallace*, 389 Ill. App. 3d 1081, 1088 (2009) (where plaintiff signed a consent form referring to physicians as independent contractors and stating that physicians and hospital would be paid separately, no issue of fact existed to survive summary judgment); *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 633 (1998) ("[c]ertainly having the patient sign a consent form which expressly states that 'the physicians on staff at this hospital are not

employees or agents of the hospital' may make the proving of [the holding out] element extremely difficult").

¶ 50 As a final matter, having found that the "holding out" element was not met, I would not address the "justifiable reliance" element. See *Frezados*, 2013 IL App (1st) 121835, ¶ 25 (recognizing that "[b]ecause we conclude that plaintiff has failed to raise a factual question as to the 'holding out' element of his cause of action, we need not determine whether there is evidence going to show plaintiff's justifiable reliance.) Thus, I find irrelevant whether Dr. Heilicser referred the plaintiff to the emergency room at Ingalls, because that is only relevant as to the "justifiable reliance" element, which I would not address. Based on the foregoing reasons, I respectfully dissent.