No. 121367

IN THE
SUPREME COURT OF ILLINOIS

CHRISTINA YARBROUGH and DAVID GOODPASTER, on behalf of HALEY JOE GOODPASTER, a minor,	)	Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, No, 1-14-1585,
Plaintiffs-Appellees,	)	
v.	)	
NORTHWESTERN MEMORIAL HOSPITAL,	)	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,
Defendant-Appellant,	)	
and	)	
NORTHWESTERN MEDICAL FACULTY FOUNDATION,	)	The Honorable WILLIAM E. GOMOLINSKI, Judge Presiding.
Defendant.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT NORTHWESTERN MEMORIAL HOSPITAL

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ARGUMENT IN REPLY

I. Introduction

The Plaintiffs would have this Court believe that the First District's decision is nothing new, that the decision is simply a reflection of this Court's precedent. Nonsense. The underlying opinion represents an enormous expansion of *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 520 (1993), and would potentially make every hospital responsible for the acts of each and every professional with staff privileges, regardless of the circumstances of the case. Make no mistake: that is a huge shift in Illinois policy.

More than two decades ago, this Court noted a basic precept of tort law: typically, a tortfeasor should be liable to an injured party only for damages resulting from that tortfeasor's conduct. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 520 (1993). However, this Court determined, the "realities of modern hospital care" required a broader application of tort law. When hospitals hold themselves out as complete providers of medical care, and when patients rely on hospitals to provide that medical care, hospitals cannot avoid liability for negligent care based on treaters' employment status.

The question before this Court today concerns the limits of *Gilbert's* expansion. This is not a case about a patient seeking care from a hospital, only to learn after the fact that her hospital treaters were not hospital employees. Christina Yarbrough did not seek obstetrical care at a hospital or at a hospital-owned or -operated facility. She sought obstetrical care at a federally-funded

charity clinic. She claims that, over the course of her obstetrical treatment at that clinic, her treaters – employees of that charity clinic – committed malpractice. She did not sue them. She did not sue the charity clinic. She sued Northwestern Memorial Hospital, the hospital at which she had been told she would most likely deliver. The First District determined that her claim can proceed to trial.

This, however, is not the type of claim this Court envisioned more than two decades ago. This is not a case in which an individual sought treatment from a specific hospital or a specific hospital's facilities, only for the hospital to later disclaim any responsibility for that care. This is not about estoppel. This is not a case in which the hospital seeks "immunity from apparent agency claims." (Response at 44). It cannot be overstated: *the hospital had nothing to do with the care at issue in this appeal*.

This is not a case in which the facts can fit into the analytical framework announced in *Gilbert*. NMH cannot, under the doctrine of apparent agency, be responsible for allegedly negligent care given by employees of an unrelated, independent charity clinic at that unrelated, independent charity clinic. The First District's decision should be reversed.

II. None Of the Treatment At Issue Occurred At NMH Or an NMH Facility.

As a preliminary matter, it is important to reiterate the treatment at issue on appeal, the treaters who provided that care, and the location at which that care occurred.

During November, 2005, Ms. Yarbrough believed she might be pregnant. (SR 429). She had no health insurance so she searched the internet for a charity clinic at which she could receive a pregnancy test. (SR 429). In looking online, she found Erie, a charity clinic with a location near Ms. Yarbrough's home on Chicago's West Side. (SR 44, 429). Ms. Yarbrough maintains that, while at Erie's West Side clinic, she was advised she would likely "have ultrasounds done at Women's Prendice Hospital, which is part of Northwestern, and that's where I would most likely deliver the baby." (SR 382).

On November 30, 2005, Ms. Yarbrough experienced "severe bleeding" while at work. (SR 384). She sought treatment in the emergency room at Illinois Masonic Hospital. (SR 384). While at Illinois Masonic, Ms. Yarbrough underwent an examination and, for the first time, an abdominal ultrasound. (SR 384-85). In her discharge papers from Illinois Masonic, Ms. Yarbrough was advised to follow-up with her Erie treaters at the Erie clinic located at 2750 West North Avenue in Chicago. (SR 386, 420). The hospital's instructions were detailed and precise:

> Please follow up with your doctor at Erie. Call today and ask for Michelle, the OB nurse, for an appointment on Friday for a blood draw. Keep your appointment for Monday that is already scheduled. They are aware you have been bleeding, the Nurse Midwife, Betsy [McKelvey], was informed that you have a bicornuate uterus.

(SR 420). There is no mention of NMH.

Ms. Yarbrough followed Illinois Masonic's instructions and, on December 2, 2005, she presented for a follow-up at Erie. (SR 386). Dr. Suarez, an Erie employee and one of Ms. Yarbrough's Erie-based treaters, performed an abdominal ultrasound. (SR 387). Ms. McKelvey was also present. (SR 387). According to Ms. Yarbrough, Dr. Suarez told her that he saw no evidence of a bicornuate uterus. (SR 387). Ms. Yarbrough testified that she was also told that she had a shortened cervix. (SR 387-88). That December 2, 2005 care is the only treatment at issue on appeal. (*See* Response at 1).

On February 21, 2006, Ms. Yarbrough went to NMH's Prentice Women's Hospital at 333 East Superior, in the lakefront-adjacent Streeterville neighborhood of Chicago, for her 20-week fetal anatomy ultrasound. (SR 389-91). The perinatologist responsible for reading Ms. Yarbrough's February 21, 2006 NMH ultrasound, Dr. William Grobman, was an employee of the Northwestern Medical Faculty Foundation, a defendant in this case. (SR 430-31). Ms. Yarbrough also alleges negligence related to that scan, but that care is not at issue in this appeal.[1] (*See* Response at 1).

On April 5, 2006, Ms. Yarbrough called Erie to complain of cramping and severe back pain. (SR 393). Her Erie treaters advised Ms. Yarbrough to go to NMH's emergency room. (SR 393). She was admitted and, three days later,

[1] The circuit court has already determined that Dr. Grobman was NMH's apparent agent. NMH did not seek certification of that issue and that claim remains pending in the circuit court.

delivered her daughter. (SR 394). The Plaintiffs do not allege any negligence related to Ms. Yarbrough's labor and delivery. (*See* SR 1).

In her response brief, Ms. Yarbrough argues, for the first time, that because she was told that she would most likely have ultrasounds performed at NMH, she assumed that "NMH was the provider of the prenatal ultrasound testing she received at Erie on December 2, 2005." (Response at 31). To be clear, that December 2, 2005 ultrasound was performed at Erie's West Side clinic, not at NMH's Streeterville location. Unlike November 30, 2005, when Ms. Yarbrough deliberately chose to present at a hospital emergency room for treatment from that hospital; and unlike on February 21, 2006, when Ms. Yarbrough presented at NMH's facility in Streeterville for treatment at *NMH*, on December 2, 2005, she presented at *Erie* for treatment at *Erie*. That is the only treatment at issue before this Court.

III. The Policy Concerns Animating *Gilbert* Do Not Exist In This Case.

NMH is not responsible for that care – for care given by Erie employees at Erie's clinic. Although Ms. Yarbrough spends most of her response arguing that she satisfies *Gilbert's* holding out and reliance arguments, that analysis skips past the threshold issue for this Court: whether *Gilbert's* framework applies to the facts of this case at all. Can NMH be responsible for care given *by Erie employees at Erie's clinic*? That threshold question, even more than an evaluation of the holding out and reliance factors, animates this Court's review. The answer is straightforward: no. This is not a case in which a plaintiff reasonably believed

that her treaters were employees of the hospital facility at which she treated – Ms. Yarbrough *did not treat at NMH*.[2] *Gilbert* cannot be stretched to apply to these facts.

A. This Court Designed *Gilbert* to Protect Patients Seeking Care *From a Specific Hospital*.

In *Gilbert*, this Court repeatedly emphasized its concern that a patient *who seeks treatment from a specific hospital* should not be penalized by "whatever private contractual arrangements the physicians and the hospital may have entered into, unbeknownst to the public, in an attempt to insulate the hospital from liability for the negligence, if any, of the physicians." *Gilbert*, 156 Ill. 2d at 521. This Court's concern was for those individuals who, again, sought treatment *from a specific hospital*:

> Modern hospitals have spent billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities. All of these expenditures have but one purpose: to persuade those in need of medical services to obtain those services at a specific hospital.
>
> * * *
>
> Generally people who seek medical help through the emergency room facilities of modern-day hospitals are unaware of the status of the various professionals working there.

Gilbert, 156 Ill. 2d at 520-21 (internal quotations, brackets, and citations omitted).

That specific concern, and the way in which this Court addressed that

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[2] Again, Ms. Yarbrough *did* treat at NMH's Streeterville hospital *later*, but that care is not at issue in this appeal. The only treatment at issue in this appeal occurred at Erie's West Town clinic.

concern, gave rise to the particular and precise language this Court used to express its holding: "we hold that, 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*, 156 Ill. 2d at 525 (emphasis added). This Court later described that general principle of apparent agency as functioning like "an estoppel" – "[w]here the principal creates the appearance of authority, a court will not hear the principal's denials of agency to the prejudice of an innocent third party, who has been lead to reasonably rely on the agency and is harmed as a result." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999) (internal citations omitted).

B. The Facts Of This Case Do Not Satisfy That Threshold Concern: Here, Ms. Yarbrough Did Not Seek Care at NMH.

The threshold question in evaluating the instant case, then, is not whether the holding out and justifiable reliance elements of *Gilbert* are satisfied. Rather, this Court must determine whether it intended *Gilbert* to apply beyond its carefully-worded holding.

1. NMH Is Not Responsible For the Actions of Ms. Yarbrough's Erie Treaters.

NMH has never disputed that *Gilbert* may be applicable beyond the emergency room. As the First District explained in *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 727 (1st Dist. 1997), if a plaintiff can meet the holding out and

reasonable reliance requirements, she may be able to seek damages for treatment given by an independent contractor outside the four walls of the hospital. That holding is reasonable, particularly given one of the ways in which the healthcare industry has evolved in the 20 years since *Malanowski* was decided. Like many hospital networks, NMH (now Northwestern Medicine) owns or operates many facilities in the Chicago area outside of the main hospital campus, including six hospitals and multiple small immediate care clinics in various neighborhood locations. *See* <nmimmediatecare.nm.org> (visited July 6, 2017). Those locations are specifically identified as part of Northwestern Medicine, bearing Northwestern's name, logo, and trademark purple color. NMH has never disputed that, depending on the circumstances of the case, a plaintiff could argue apparent agency against NMH arising out of treatment at one of those facilities. That is why NMH has reiterated, throughout briefing in this case, that the care at issue must have occurred at a hospital-owned or -operated facility, as opposed to simply "at the hospital."

Here, however the treatment here did not occur at a hospital or at a hospital-owned or –operated facility. It occurred at Erie, an independent charity clinic located on the *other side of the city from NMH*. Unlike in *Malanowski*, where the plaintiff treated at a Loyola-owned facility, adjacent to Loyola's hospital, bearing Loyola's logo, after having been referred to that facility by Loyola, NMH's name was not on the door, NMH's logo and standard marketing were not visible inside or outside the facility, and no one affiliated with NMH referred

Ms. Yarbrough to Erie. Simply put, Ms. Yarbrough did not treat at NMH or an NMH-owned or –operated facility. She treated at an entirely separate, independent, federally-operated charity clinic. The public interest this Court sought to protect in *Gilbert* – individuals who seek medical care from a specific hospital and reasonably believe their physicians are hospital employees – does not exist in this case.

The Plaintiffs dismiss NMH's emphasis on this threshold question as unsupported. (Response at 36). "Nothing in *Malanowski*," the Plaintiffs argue, "or any other case – states or implies that apparent authority liability under *Gilbert* is restricted to care rendered at hospital-owned or –operated facilities." (Response at 36). They add: "Although the situs of care may be relevant, NMH cites no authority indicating that a hospital may escape apparent agency liability altogether merely because the negligent care occurred on property it does not own or control." (Response at 36).

The latter point is remarkable for two reasons. First, in NMH's opening brief, it observed that research showed only two Illinois cases discussing an apparent agency claim against a hospital arising out of medical negligence allegedly occurring outside the four walls of the hospital: *Malanowski*, 293 Ill. App. 3d at 728, where the First District allowed that claim to proceed, and *Robers v. Condell Med. Ctr.*, 344 Ill. App. 3d 1095 (2nd Dist. 2003), where the Second District affirmed summary judgment for the hospital. (*See* Opening Brief at 24-29). In both, the claims passed the threshold question before this Court today:

the defendant hospitals or a related entity owned or operated the buildings in which the alleged malpractice occurred. Second, and more importantly, the Plaintiffs cite to no authority to the contrary of NMH's position. Other than the appellate court's opinion in this case, NMH has not found, and the Plaintiffs do not cite to, any Illinois hospital cases which apply *Gilbert* beyond a facility owned or operated by the defendant hospital.

Perhaps most remarkably, although the Plaintiffs argue that this case is entirely contemplated by *Gilbert*, they seem to also agree that this Court should approve the vast expansion of the doctrine of apparent agency created by the First District's opinion. If, as the First District determined, there is no requirement that the care at issue occur in a hospital or hospital-owned or – operated facility, a plaintiff could proceed to trial on a medical negligence claim against a hospital for conduct occurring in any private physician's office, simply because that physician has staff privileges at a specific hospital. Ms. Yarbrough, the Plaintiffs argue, assumed that NMH (and not Erie) was responsible for her care, in part because her Erie-employed, Erie-based treaters were on staff (i.e., had privileges to practice) at NMH. (*See* Response at 28-29). The Plaintiffs maintain that advising patients of *any* relationship between a hospital and a physician could create an apparent agency relationship. (*See* Response at 28-29, *see also* RA 10-11).

Indeed, the Plaintiffs contend, NMH could have avoided any confusion by requiring "Erie patients to sign a standard disclosure indicating that Erie and its

physicians are not affiliated with NMH[.]" (Response at 25). How? Erie's patients are not *NMH's* patients. Were the Plaintiffs' position the law of Illinois, it would be necessary for hospitals to require that every patient of a private physician sign a similar standard disclosure. Presumably, physicians with staff privileges at multiple hospitals would be required to make similar disclosures about each hospital to every patient. If private physicians failed to make those disclosures, the Plaintiffs would have this Court believe, the hospital would have to defend at trial liability claims arising out of treatment at a private physician's office. The impact of the First District's decision is hardly a "light burden" (*see* Response at 17) for Illinois hospitals to shoulder.

2. The Estoppel Concerns Discussed In *Petrovich* Are Irrelevant Here.

The Plaintiffs argue in their response that NMH seeks to "abolish hospitals' apparent agency liability for care occurring outside hospital facilities," an issue addressed and resolved by this court in *Petrovich*, 188 Ill. 2d at 33-34. (Response at 33-35). The Plaintiffs misunderstand NMH's point. NMH is not asking this Court to abolish the possibility of a hospital's liability as an apparent agent. Beyond that, *Petrovich* is not applicable to the facts of this case.

In *Petrovich*, the plaintiff's healthcare was provided through Share Health Plan of Illinois, Inc., a for-profit health maintenance organization (HMO) with a limited network of participating physicians from whom participants could seek care. 188 Ill. 2d at 22-23. Share's member handbook advised that Share provided "all your healthcare needs," described network physicians as "Share physicians"

and "our staff," and identified physicians' offices as "your Share physician's office." *Id*. at 26. Share then contracted with medical groups and physicians to provide that care to Share's members. *Id*. at 25. According to Share's contracts with physicians and hospitals, those physicians and hospitals were independent contractors. *Id*. at 26-27. As required under the terms of her insurance, the plaintiff treated with several Share network physicians; she later claimed that treatment was negligent. *Id*. at 24-45.

On appeal, this Court addressed the question of whether Share could be liable for medical malpractice. *Id*. at 29. Share did not dispute that principles of apparent agency applied to HMOs; rather, Share maintained that it had not held out its physicians as its agents. *Id*. at 33-34. Ultimately, this Court determined that a reasonable person could find a holding out: "We hold that the . . . testimony of the plaintiff and Share's member handbook support the conclusion that Share held itself out to plaintiff as the provider of her health care, without informing her that the care was actually provided by independent contractors." *Id*. at 38.

That is not this case. In *Petrovich*, the HMO was the gatekeeper for plaintiff's healthcare. She started the process of getting healthcare by considering her HMO-allowable options and choosing one of those physicians, identified specifically as a "Share physician" at a "Share physician's office." *See id*. at 26. The plaintiff assumed, rightly or wrongly, that the physicians from whom she sought treatment were the HMO's employees. That is akin to seeking

care from a specific hospital, a gatekeeper which would provide care through its physicians, and assuming those physicians are hospital employees. The hospital is estopped from disclaiming responsibility for the actions of individuals who appear to be the hospital's agents. *See id*. at 32.

Here, Ms. Yarbrough sought care at *Erie*, not at *NMH*. *Erie*, not NMH, was the gatekeeper for coordinating Ms. Yarbrough's healthcare, and her healthcare was then provided by Erie employees. Ms. Yarbrough has never denied understanding that her Erie treaters were *Erie* employees, not *NMH* employees. NMH, therefore, did nothing to act as a "principal" in this case. It cannot now be estopped from disclaiming that position, because NMH *never took that position in the first place.*

The concerns this Court identified in *Gilbert* – protecting *hospital patients* who reasonably believed that the *hospital-based* physicians treating them were *hospital* employees – do not apply to individuals like Ms. Yarbrough. *Gilbert* did not make limitless the scope of apparent agency. Hospitals are not responsible for the alleged negligence of private physicians occurring in private offices, or the alleged negligence of charity clinic employees working at an independent clinic.

IV. The Plaintiffs Ignore the Fundamental Premise On Which Any Interpretation of *Gilbert's* Factors Rests.

Rather than addressing the policy reasons underlying the *Gilbert* decision, the practical ramifications of expanding it, or even the unusual premise of their claims – that NMH should be liable for care given by Erie treaters at Erie's

facility, to a patient who had never been to NMH – the Plaintiffs focus primarily on an argument constructed of circular logic. Essentially, the Plaintiffs are arguing that they can satisfy *Gilbert* by claiming that "NMH held out and we reasonably relied." Not so. The facts discussed by the Plaintiffs are not tethered to the logical progression described in *Gilbert*: whether a hospital held itself out as the patient's care provider, and whether the patient reasonably relied on that holding out.

A. The Facts In This Case Do Not Connect to the Policy Concerns Addressed By *Gilbert's* Holding Out Test.

This Court designed its multi-part test for establishing apparent agency based on two concepts. First, did the hospital, or its agent, hold themselves out as principal and agent? *See Gilbert*, 156 Ill. 2d at 525. Two branches of precedent flow from that question: one involving hospital consent forms, *see*, *e.g.*, *Mizyed v. Palos Comm. Hosp.*, 2016 IL App (1st) 142790; *Gore v. Provena Hosp.*, 2015 IL App (3d) 130446; *Frezados v. Ingalls Mem. Hosp.*, 2013 IL App (1st) 121835, and another concerning hospital advertising, *see*, *e.g.*, *Spiegelman v. Victory Mem. Hosp.*, 392 Ill. App. 3d 826 (2009). Second, did the plaintiff act in reliance on the conduct of the hospital and its alleged agent, "consistent with ordinary care and prudence"? *See Gilbert*, 156 Ill. 2d at 525. A separate branch of precedent evaluates that question, typically considering whether the patient deliberately selected her physician regardless of hospital affiliation, or instead intended to treat at a

specific hospital. *See York v. Rush-Presbyterian-St.Luke's Med. Ctr.*, 222 Ill. 2d 147 (2006).

None of that that analysis can exist in a vacuum. Courts do not look simply at whether a hospital advertised its services. Courts do not rule based on a plaintiff's vague "impression" (*see* Response at 31) of agency. No. Whether *Gilbert's* factors are satisfied must begin with a preliminary determination of whether sought care from the principal through the principal's apparent agent. Here, that question turns on whether Ms. Yarbrough sought treatment from NMH or an NMH facility, or not. She did not. She sought treatment at a charity clinic.

The Plaintiffs skip that first step. To be sure, they rely on the same buzzwords: "holding out" and "reasonable reliance." Those buzzwords, though, are meaningless if not tied back to the concerns this Court raised in *Gilbert* – the realities of modern hospital care, in which hospitals benefitted from advertising and promotion, but avoided liability through legal technicalities. The mere fact that a hospital advertises does not satisfy *Gilbert's* holding out test; the mere fact that a plaintiff generally intended to treat with a hospital does not mean that she reasonably relied on any holding out.

The Plaintiffs avoid that problem, arguing instead that NMH and Erie *both* held themselves out as providers of obstetrical care, and NMH advertised its services to the public. (Response at 23-24). Moreover, the Plaintiffs contend, NMH "allowed" Erie to advise Erie patients that NMH was one of several

hospitals affiliated with Erie, and that patients requiring services not available at Erie were eligible to receive care at those hospitals. (Response at 23-30). "Representations made on Erie's website and made directly to patients (such as telling Yarbrough that ultrasounds and labor and delivery services would be provided by NMH, and providing literature about NMH services) may reasonably have led a patient to conclude that NMH and Erie had an agency relationship." (Response at 28). However, that alleged holding out is not relevant here: NMH did *not* advertise that it offered a full range of services, including prenatal and obstetrical care, *at Erie*. It makes no difference that NMH "held itself out as a provider of prenatal and obstetrical care, without disclosing that that care was provided by independent contractors." (Response at 30). Those facts do not connect to create a principal-agent relationship.

By the Plaintiffs' logic, any hospital identified Erie's website would be potentially liable as a principal to Erie's agent. For example, that website identified one of its hospital affiliations – a location where clients can receive "services that are not offered at Erie" – as Childrens Memorial Hospital. (RA 10-11). Childrens Memorial Hospital advertised its services to the public. The Plaintiffs would have this Court believe that, based on those two things (Erie's website and Childrens' advertisements), a pediatric patient could treat at Erie for months, maybe years; could never require treatment at Childrens' for any issue; but could sue Childrens' for malpractice arising out of any pediatric care and treatment provided at Erie.

The Plaintiffs also maintain that NMH "directly and expressly held *Erie* out to the public as an agent in providing obstetrical care." (Response at 28, emphasis added). NMH did so, the Plaintiffs argue, in two ways: first, by representing that "prenatal care at Erie was provided through a partnership with Erie and NMH," and second, because "one of Plaintiff's treating physicians was on staff at NMH and a key player in that partnership." (Response at 28-29). Neither contention is accurate. True, NMH referred, in its annual community service reports, to the percentage of women who received prenatal care and later delivered at NMH. (*See* S.R. 256). However, those community service reports also repeatedly and carefully explain that Erie and the Near North Health Service Corporation, another charity clinic with whom NMH has a "collaborate relationship[]," are "Federally Qualified Community Health Centers." (SR 252; *see also* SR 256-57). Observing that Erie provides medical care to its patients is merely a statement of fact. There is no representation that those charity clinics are *part of NMH*, or that the patients treating at those charity clinics are treating *at NMH* – the type of holding out which would be necessary to satisfy *Gilbert*. (*See* SR 252-57). And, as noted above, the Plaintiffs' second contention on this point – that NMH held Erie out NMH's agent because an Erie physician had staff privileges at NMH – would constitute a previously-unrecognized expansion of *Gilbert* to include any private physician with hospital privileges.

The Plaintiffs also point to Erie's and NMH's "Affiliation Agreement" – a private, non-binding formalization of the parties' collaborative relationship – as

evidence of both a legal partnership and the existence of marketing about their affiliation. (Response at 27). The Plaintiffs are incorrect. The Affiliation Agreement is not a public statement of any legal partnership. On the contrary, the document specifies that the parties are *not* part of any legal partnership or joint venture. (SR 233). There is no evidence in the record of any joint marketing efforts by NMH and Erie. NMH's representatives testified that none existed. (SR 154, 172). The Plaintiffs point to none. Further, there is also no evidence that Erie "publiciz[ed] and refer[ed] to the Agreement. (*See* Response at 25). Erie merely referred, on its website, to the multiple area hospitals including NMH, Childrens Memorial Hospital, Advocate Illinois Masonic, Stroger Hospital, and Resurrection-Stains Mary and Elizabeth Hospital, at which "clients who need to receive services *that are not offered at Erie* are eligible to receive care[.]" (RA 10-11, emphasis added).

Indeed, the Plaintiffs' arguments about the Affiliation Agreement would turn this Court's instruction about private contracts on its head. In *Gilbert*, this Court specified that a hospital could not *escape* the appearance of agency through "whatever private contractual arrangements the physicians and the hospital may have entered into, unbeknownst to the public[.]" *Gilbert*, 156 Ill. 2d at 522. Similarly, in *Petrovich*, this Court refused to allow the HMO to avoid agency liability by pointing to its "private contractual agreements" with its physician providers. 188 Ill. 2d at 35. Yet, the Plaintiffs now argue that they should be allowed to use a private agreement, unknown to the public, to *prove* the

appearance of agency. (Response at 27). The Plaintiffs cannot do so: aside from the fact that the Affiliation Agreement creates no such relationship, if a hospital cannot use a private agreements in its defense, it cannot separately be penalized by a Plaintiff's (inaccurate) interpretation of a different private agreement.

At its core, the Plaintiffs' discussions of advertising and "partnership" are untethered from this Court's concerns. This is not a case in which a hospital advertised its services in a general effort to attract patients, only to later seek to avoid responsibility for that patient's care. And, no reasonable person would conclude that, based on NMH's conduct, NMH held Erie out as an NMH facility. There has been no improper holding out.

B. The Facts In This Case Do Not Connect to the Policy Concerns Addressed By *Gilbert's* Reasonable Reliance Test.

The Plaintiffs' reasonable reliance argument is even more attenuated from *Gilbert's* policy concerns. The Plaintiffs argue that Ms. Yarbrough "did not decide to treat at Erie based on information about Erie's own capabilities . . . . Rather, she decided to treat at Erie based on what she was told concerning the prenatal care NMH would provide." (Response at 32). That argument fails.

Part of the Plaintiffs' argument appears premised on a claim not consistent with the facts. According to the Plaintiffs, "Yarbrough's interest in being treated by NMH arose *prior* to her decision to receive prenatal care at the Erie Clinic's West Town location." (Response at 32). That statement is consistent with neither Ms. Yarbrough's testimony nor her behavior. Ms. Yarbrough did not go to NMH

when she first sought treatment. Rather, she testified at her deposition that she went to Erie because she had no insurance and she could receive a free pregnancy test there. She added that she elected to become an Erie patient after learning she would, eventually, have an ultrasound and deliver at NMH. (SR 71). NMH was, to Ms. Yarbrough, a large hospital in the city. (SR 71). As far as Ms. Yarbrough was concerned, "any good hospital would do." (SR 71).

That is not the reasonable reliance element *Gilbert* discussed. This Court sought to protect a patient who sought treatment from a *specific facility*. Ms. Yarbrough suggests that she "was under the impression Erie was just Northwestern." (SR 45; *see* Response at 31). Although nothing at Erie created that impression – the clinic at which Ms. Yarbrough treated has a different name, no NMH-related marketing or branding, is neither owned nor operated by NMH, and is not located at or near NMH's hospital campus – Ms. Yarbrough insists that her mistaken impression is NMH's fault, because no one told her otherwise. (*See* Response at 25). That contention is simply not reasonable. If Ms. Yarbrough wanted to treat at NMH, she could have *gone to NMH*. She could have sought a pregnancy test at NMH. She could have sought treatment at *NMH's* charity obstetrical clinic. She did neither. In short, the facts here do not speak to the policy this Court addressed in *Gilbert*, protecting hospital patients who reasonably believed that the hospital was responsible for their care.

Importantly, this Court must also consider how the First District's opinion would affect hospitals in cases involving patients with insurance. Any insured

pregnant patient treating with a private physician would be told where she would most likely deliver. That same insured patient would likely receive ultrasounds and possibly additional testing at a hospital, rather than in the private physician's office. Based on the logic employed by the First District, that hospital – the hospital at which the private physician had staff privileges, at which the patient would have been told she would likely deliver and receive additional testing – might face liability for any treatment occurring in that private physician's office, merely because the obstetrical patient had been told where she would likely deliver.

The holding out and reliance factors this Court discussed in *Gilbert* are not mere buzzwords. They must be evaluated in the context of both this case and the policy issue this Court sought to address. It is not enough to argue that a hospital advertised its services and, therefore, engaged in holding out. Rather, did it hold itself out as a provider of the services relevant *to this case*? It is not reasonable for a patient to have concluded that, because her physician has staff privileges at a hospital, the hospital is providing that patient's care. Rather, did the patient *seek care from the hospital*? Only when viewed through the lens of *Gilbert* can those fact be interpreted properly.

III. The First District's Opinion Will Have a Chilling Effect On Hospital Support For Community Healthcare Initiatives.

Finally, the Plaintiffs disregard NMH's concerns about supporting community healthcare initiatives in light of the First District's opinion. They

decry those concerns as "highly dubious" (Response at 17), "unsubstantiated and lacking in merit" (*id*. at 45), while proceeding to argue, without any evidentiary support, that NMH is somehow obligated to support Erie in order to maintain NMH's status as a not-for-profit entity. (Response at 17, 40-45). They further posit that NMH's goal is not to clarify existing Illinois law, but to "seek immunity from apparent agency liability for all care provided off hospital premises, not simply for charitable care." (Response at 18).

NMH's concerns are neither pretextual nor trivial. As explained by both the Hospital Amici and NMH, they all provide direct charitable care to patients. Among other things, NMH has an in-house charity obstetrical clinic (SR 92, 196) – an in-house clinic Ms. Yarbrough declined to use. The Hospital Amici describe in detail their extensive direct charitable activities, including providing free or discounted charitable care to hospital patients. (*See* Brief of *Amici Curiae* Hospitals at 3-5). Those services – services which clearly qualify as charity care – are not in question. However, the extensive support the Hospital *Amici* give to the larger community, including assistance and support given to charitable clinics in medically-underserved communities, could be chilled if that general support created specific potential liability. Contrary to the Plaintiffs' baseless suppositions, hospitals would have little incentive to support external charity care if hospitals could face liability for that care, regardless of how attenuated the hospital's relationship to that care may be.

Fundamentally, the Plaintiffs seek to punish hospitals for being good community citizens. That is not a productive public policy. At a time when access to insurance coverage is uncertain, access to quality community charity care is especially important. Expanding *Gilbert* to create liability for hospitals supporting community charity care would undermine the policy purpose of the decision: it would hurt, not protect, the public.

In sum, Ms. Yarbrough's claims do not, as a threshold question, fall within the context of the claims allowed by *Gilbert*; and the facts of this case do not satisfy the policy bases on which *Gilbert's* holding out and reliance tests are based. The First District's opinion should be reversed, and the certified question in this case answered in the negative. A hospital cannot be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert* for the acts of the employees of an unrelated, independent clinic.

CONCLUSION

WHEREFORE, Defendant-Appellant Northwestern Memorial Hospital hereby asks that this Court answer the certified question in the negative and remand this case to the circuit court for further proceedings consistent with that conclusion.

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Dated: July 7, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 341

I, Catherine Basque Weiler, certify that this Reply Brief conforms to the set forth in Illinois Supreme Court Rule 341(a) and (b). According to the word processing program used to write this Reply Brief, the brief contains 5,854 words, exclusive of the cover and certification pages.

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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.	Petition for Leave to 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.

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PLEASE TAKE NOTICE that on July 7, 2017, I electronically with the Clerk of the Illinois Supreme Court Defendant-Appellant's NORTHWESTERN MEMORIAL HOSPITAL Reply Brief and, further, that on July 10, 2017, I mailed original and twelve copies to the Clerk of the Illinois Supreme Court, 200 E. Capitol Avenue, Springfield, Illinois 62701 by depositing same in US mail located at 330 N. Wabash, Chicago, Illinois.

Respectfully submitted,

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PROOF OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct, that three copies of the attached Defendant-Appellant's NORTHWESTERN MEMORIAL HOSPITAL Reply Brief was served on the attorneys listed below by mailing in United States mail located at 330 North Wabash Street, Chicago, Illinois, 60611, on July 7, 2017, by 5:00 p.m. in properly addressed envelope bearing sufficient postage prepaid.

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