2023 IL App (5th) 220278-U

NO. 5-22-0278

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SAMANTHA BILBREY and TUESDAY BILBREY,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Macon County.
	)	
v.	)	No. 13-L-104
	)	
GERONIMO GARCIA JR., M.D.; DECATUR EMERGENCY MEDICAL SERVICES-II, S.C.; DECATUR MEMORIAL HOSPITAL, an Illinois Not-for-Profit Corporation; DENNIS HEIM, M.D.; and SPRINGFIELD CLINIC HEALTH SERVICES, LLC,	)	
	)	
Defendants	)	
	)	Honorable
(Decatur Memorial Hospital, an Illinois Not-for-Profit Corporation, Defendant-Appellee).	)	Thomas E. Little, Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Welch concurred in the judgment.
Justice Vaughan dissented.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant hospital's motion for summary judgment where there is a genuine issue of material fact regarding whether the defendant hospital was vicariously liable for the alleged negligence of a physician working in the hospital's emergency department under the doctrine of apparent agency.

¶ 2 The plaintiffs, Samantha Bilbrey and Tuesday Bilbrey, appeal from the trial court's orders granting summary judgment in favor of defendant, Decatur Memorial Hospital (DMH), and denying their motion to reconsider. The plaintiffs claim that the trial court erred in entering summary judgment because there is a genuine issue of material fact as to whether DMH was vicariously liable for the alleged negligence of a codefendant, Dr. Geronimo Garcia Jr., under the doctrine of apparent agency. For the reasons that follow, we reverse the summary judgment entered in favor of DMH and remand the case for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On October 15, 2010, Samantha Bilbrey was participating in basketball practice when she experienced a sudden numbness in her left arm and left leg. Samantha informed her coach, sat out the remainder of practice, and waited for her father, Doug Binkley, to pick her up. By the time Doug Binkley arrived, Samantha could not move the left side of her body. Samantha's teammates carried her to Doug Binkley's car. Doug Binkley drove directly to the emergency department at DMH. According to the emergency department records, Doug Binkley and Samantha arrived at 4:59 p.m.

¶ 5 Upon arrival, Doug Binkley transferred Samantha from his vehicle to a wheelchair. He then wheeled Samantha into the emergency department. Sara Hamilton, the triage nurse on duty, escorted Samantha and her father directly into the triage room. She then obtained information about Samantha's current symptoms and medical history. After completing the nursing assessment, Hamilton initiated the emergency department's "emergent stroke protocol." Hamilton moved Samantha into an examination room and immediately notified

Dr. Garcia, who was also on duty in the emergency department. Dr. Garcia examined Samantha. He ordered a CT scan and blood tests.

¶ 6 Doug Binkley remained in the examination room with Samantha until Samantha's mother, Tuesday Bilbrey, arrived sometime between 6 p.m. and 6:15 p.m. Doug Binkley then went to the registration desk to attend to the admissions paperwork, and Tuesday Bilbrey stayed with Samantha. While Tuesday Bilbrey was with Samantha, Dr. Garcia returned to the examination room and stated that the CT scan and blood work were "fine," and that Samantha was going to be released. Samantha was discharged sometime after 7:40 p.m., with instructions to keep an appointment with a neurologist in four days and to return if her symptoms recurred. Dr. Garcia's final diagnosis was "chronic intermittent numbness, left side."

¶ 7 The next day, Samantha's symptoms worsened. She was hospitalized at another medical facility. Within 36 hours after she was discharged from DMH, Samantha had a major stroke. The stroke left Samantha, then 16 years old, with permanent partial paralysis to the left side of her body.

¶ 8 On July 29, 2013, Samantha filed a medical negligence action against the defendants, Dr. Garcia, DMH, Dennis Heim, M.D., and Springfield Clinic Health Services, LLC.[1] Samantha subsequently amended her complaint, adding her mother, Tuesday Bilbrey, as a party plaintiff, and Decatur Emergency Medical Services-II, S.C., as a party

[1]On December 13, 2016, the trial court entered an order dismissing the claims against Dennis Heim, M.D. and Springfield Clinic Health Services, LLC, without prejudice, pursuant to the plaintiffs' motion. Neither Dr. Heim nor Springfield Clinic Health Services, LLC, is a party to this appeal.

defendant. At the time Dr. Garcia treated Samantha, he was a partner in the Decatur Emergency Medical Services medical group.

¶ 9 The second amended complaint, filed February 13, 2015, is at issue here. In the second amended complaint, the plaintiffs alleged, in pertinent part, that Dr. Garcia negligently and carelessly failed to pursue the possibility of a TIA or stroke in his differential diagnoses; negligently and carelessly relied upon a CT scan to rule out a TIA or stroke; negligently and carelessly failed to obtain a prompt neurovascular evaluation while Samantha was in the emergency department; negligently and carelessly failed to implement DMH's stroke protocol; and negligently and carelessly discharged Samantha home from the emergency department. The plaintiffs further alleged that as a direct and proximate result of Dr. Garcia's negligence, a dissection of Samantha's right internal carotid artery was not timely treated, resulting in a stroke, permanent physical and neurological injury, and past and future pecuniary loss and pain and suffering. The plaintiffs also brought individual counts alleging that Decatur Emergency Medical Services was vicariously liable for the negligence of its agent, Dr. Garcia, and that DMH was vicariously liable for the negligence of Dr. Garcia under theories of actual or apparent agency. An additional count was brought on behalf of Tuesday Bilbrey to recover medical expenses under the Family Expense Act (750 ILCS 65/15 (West 2014)).

¶ 10 On November 30, 2015, DMH filed a motion for summary judgment. DMH claimed that it was entitled to a judgment as a matter of law because Dr. Garcia was not an agent, apparent agent, or employee of DMH. In support of its motion, DMH argued that Samantha's father, Doug Binkley, signed a clear and unambiguous consent form that put

the plaintiffs on notice that Dr. Garcia was not an agent or employee of DMH. DMH also argued that signs posted in the emergency department provided notice that Dr. Garcia was not an agent or employee of DMH. DMH attached supporting exhibits, including excerpts of the depositions of Dr. Garcia, Doug Binkley, and Tuesday Bilbrey; the consent form signed by Doug Binkley; an affidavit by a DMH facilities technician named Larry Fore, and a copy of the signage posted in the emergency department.

¶ 11 In response to DMH's motion, the plaintiffs conceded that they did not have sufficient evidence to show that Dr. Garcia was an actual agent or employee of DMH. They claimed there was a genuine issue of material fact regarding apparent agency. The plaintiffs argued that there was sufficient evidence to demonstrate that DMH held out to the public that it was a provider of emergency medical care and that the physicians who staffed its emergency department were hospital employees. The plaintiffs pointed to posts on the "Emergency Care Center" page of the DMH website in which DMH promoted its emergency department as an effective and efficient facility, with state-of-the-art technology. DMH also promoted "our skilled team of professionals" in the emergency department who provide "fast, efficient care that far surpasses the national averages." The Emergency Care Center page also included a link to a directory listing "Emergency Medicine Doctors," including Dr. Garcia, and a link to each physician's profile page. The plaintiffs noted that Dr. Garcia's profile page identified his office address as "Decatur Memorial Hospital, 2300 North Edward Street, Decatur, Illinois," and there was no indication that he was an independent contractor and a partner in an independent emergency medicine practice.

¶ 12 The plaintiffs also argued that the independent contractor disclosure in the DMH consent form was ambiguous, and that it was not relevant because the consent form had been presented to and signed by Doug Binkley only after Dr. Garcia began to treat Samantha. In addition, they claimed they did not see the signs posted in the waiting area of the emergency department. The plaintiffs noted that during his deposition, Dr. Garcia acknowledged that he did not inform them that he was not employed by DMH. The plaintiffs also noted that they did not choose Dr. Garcia as a treating physician. They claimed that they relied on the hospital itself, rather than a particular physician, to provide emergency care for Samantha. The plaintiffs attached several supporting exhibits, including the depositions of Dr. Garcia, Doug Binkley, and Tuesday Bilbrey; an affidavit by Doug Binkley; a copy of pages from Samantha's emergency room record; and copies of pages from the DMH website.

¶ 13 DMH filed a reply, reasserting its previous argument that the plaintiffs could not establish the "holding out" element of apparent agency. DMH also challenged the plaintiffs' claims that the consent form was unclear and provided no notice of Dr. Garcia's status as an independent contractor. DMH argued that Doug Binkley and Tuesday Bilbrey had signed the same consent form for prior hospital admissions, and therefore, they should have known the emergency department physicians were independent contractors.

¶ 14 As noted, a number of supporting exhibits, including discovery depositions of the parties, were appended to the parties' pleadings. During his deposition, Dr. Garcia testified that at the time he evaluated Samantha, he was not employed by DMH. Dr. Garcia was a partner in the Decatur Emergency Medical Services group, and DMH had contracted with

his group to provide emergency medicine services in its emergency department. Dr. Garcia testified that he did not notify Samantha or her parents that he was not a DMH employee. Dr. Garcia also testified that he could not think of any way that Samantha and her parents would have known that he was not an employee of DMH. He acknowledged that his name tag did not notify patients that he was not employed by DMH, and that he did not provide any paperwork that would have informed patients that he was not employed by DMH.

¶ 15 Doug Binkley testified that he received a call to pick up Samantha from basketball practice because she was having trouble standing up on her own. When he arrived at the school, Samantha's teammates carried her to his car, and he drove her directly to DMH. Doug Binkley took Samantha to DMH because it was the preferred hospital under his health insurance plan. He stayed with Samantha from the time they entered the emergency department, until sometime between 6 p.m. and 6:15 p.m., when Tuesday Bilbrey arrived. After Tuesday Bilbrey arrived, Doug Binkley went to the registration desk to fill out admissions paperwork. He recalled that there was "a whole packet of stuff" to sign. He testified that he signed a consent form, and he identified his signature on that form. He also testified that Dr. Garcia never said anything about his affiliation or employment status with DMH.

¶ 16 In his affidavit, Doug Binkley averred that he remained with his daughter from the time they arrived at the hospital, through triage and Dr. Garcia's examination, and until the time Tuesday Bilbrey arrived. He did not register his daughter or sign any forms until after Tuesday Bilbrey arrived. Doug Binkley also averred that he did not observe any signs in

the emergency department at DMH indicating that Dr. Garcia was an independent contractor.

¶ 17 Tuesday Bilbrey testified that she arrived at the emergency department at approximately 6 p.m. or 6:15 p.m. and went directly to the examination room. Doug Binkley and Samantha were in the examination room, and one of them indicated that Samantha had undergone a CT scan and blood work. Dr. Garcia did not reexamine Samantha and no additional scans or tests were done while Tuesday Bilbrey was with Samantha. Tuesday Bilbrey recalled that Dr. Garcia came into the room and said that the CT scan and blood tests were fine, and that Samantha was going to be released. Subsequently, a nurse came in with the discharge papers. Tuesday Bilbrey testified that Dr. Garcia never said anything to her about his affiliation or employment status with DMH.

¶ 18 The consent form that Doug Binkley signed was a one-page document. The heading in the first section of the form was "Consent for Treatment." There were three paragraphs in the first section. The independent contractor disclosure was in the second paragraph.

> "**1. Consent for Treatment.** I am asking for and consent to care in Decatur Memorial Hospital. I agree to receive this care including (1) diagnostic procedures, (which may include blood tests for Hepatitis-B virus antigen and core body, ALT [liver function], HIV antibody [AIDS virus], RPR [Syphilis screen], and X-ray examinations), and (2) surgical and medical treatment, and (3) blood transfusion. I permit the doctor who attends me, his or her associates and assistants, the Hospital and its employees, and all other persons caring for me in the Hospital to treat me in ways they judge are beneficial to me. No guarantees have been made to me about

the outcome of this care. If I should leave the Hospital without the consent of my attending doctor, the doctor and the Hospital are relieved of all responsibility for any ill effects which might result from my action.

You are notified that the emergency physicians, pathologists, radiologists, and anesthesiologists as well as some other hospital-based physicians are not employees or agents of the hospital. For a list of those physicians not covered by the foregoing statement, please contact the hospital's medical staff office at 217-876-***.

The undersigned acknowledged that he/she has read the consent for treatment and conditions of admission listed above, receiving a copy of this form, and further acknowledges that he/she is the patient or duly authorized by the patient as legal representative to execute and accept the terms set as forth above."

¶ 19 The consent form contained three other sections beneath the "Consent-for-Treatment" section: "2. Release of Information"; "3. Financial Disclosure Statement and Financial Agreement"; and "4. Authorization to Pay Insurance Benefits." Near the bottom of the form, there were signature lines for the patient or legal representative, a witness, and the person responsible for payment. The signature of Doug Binkley appeared on the lines for the patient's legal representative and the person responsible for payment.

¶ 20 In an affidavit, Larry Fore, a DMH facilities technician, averred that his duties included maintaining signage. Fore stated that in October 2010, he personally placed signs, referenced as "Identification of Physicians" signs, near the registration desks in the waiting area of the DMH emergency department. A copy of the "Identification of Physicians" sign

was appended to Fore's affidavit. The sign contains the same independent contractor disclosure that was printed in the consent form. The disclosure is printed in a type of bubble-letter font. The outline of each letter is black, with a white fill, against a white background. The signage does not contain any safety symbols or safety colors.

¶ 21 On May 31, 2016, DMH's summary judgment motion was called for hearing and taken under advisement. On June 27, 2016, the trial court entered an order granting DMH's motion for summary judgment. In its order, the court initially noted that the plaintiffs did not argue or present any facts to establish that Dr. Garcia was an actual agent or employee of DMH. The court next considered whether DMH could be held vicariously liable for the acts of Dr. Garcia under a theory of apparent agency. After reviewing the pleadings, exhibits, and affidavits on file, the court concluded that the plaintiffs could not establish that DMH held Dr. Garcia out as its agent or employee. The court found that the language in the consent form "clearly and unequivocally" provided that emergency physicians were not employees or agents of DMH. The court also found that the informational signs posted in the waiting area of the emergency department provided notice that emergency physicians were not employees or agents of the hospital. In addition, the court found that the information posted on DMH's website was insufficient to establish the "holding out" element of apparent agency, and that the plaintiffs could not establish the "reliance" element of apparent agency.

¶ 22 On July 29, 2016, the plaintiffs asked the trial court to make an express finding that there was no just reason to delay enforcement or appeal of the summary judgment order, pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). DMH opposed the

plaintiffs' request. Following a hearing on September 1, 2016, the court denied the motion for a 304(a) finding. Subsequently, the court denied the plaintiffs' motion to reconsider the denial of their 304(a) motion and their motion to reconsider the entry of summary judgment in favor of DMH. In December 2021, the plaintiffs reached a settlement of their claims against Dr. Garcia and Decatur Emergency Medical Services. Those claims were dismissed with prejudice on March 29, 2022. This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, the plaintiffs challenge the trial court's order granting summary judgment in favor of DMH. The plaintiffs claim there is a genuine issue of material fact as to whether Dr. Garcia was the apparent agent of DMH when he treated Samantha Bilbrey.

¶ 25 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, demonstrate there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). In determining whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). The purpose of summary judgment is not to try an issue of fact but to determine whether one exists. *Gilbert*, 156 Ill. 2d at 517. A triable issue exists where the material facts are disputed or where reasonable people might draw different inferences from the undisputed facts. *Gilbert*, 156 Ill. 2d at 518. A circuit court's order granting a motion for summary judgment is reviewed *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 26 In 1993, the Illinois Supreme Court first held that a hospital may be vicariously liable for the negligence of independent contractor physicians providing care at the hospital under the doctrine of apparent agency. *Gilbert*, 156 Ill. 2d at 524. In so holding, the supreme court recognized two realities of modern health care: (a) hospitals have become big businesses, essentially holding themselves out to the public as providers of health care and competing for health care dollars, and (b) patients have come to rely on the reputation of the hospital in seeking out care, and naturally assumed the physicians providing the care, such as emergency room physicians, were employees of the hospital. *Gilbert*, 156 Ill. 2d at 520-21. Given those realities, our supreme court concluded that when a patient is not aware that the person providing treatment is not the employee or agent of the hospital, that patient should have a right to hold the hospital liable for negligence in providing treatment. See *Gilbert*, 156 Ill. 2d at 522 (citing *Pamperin v. Trinity Memorial Hospital*, 423 N.W.2d 848, 855 (Wis. 1988)).

¶ 27 Under the doctrine of apparent agency, "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 524. To establish vicarious liability under the doctrine of apparent agency, a plaintiff must show 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." (Internal quotation marks omitted.) *Gilbert*, 156 Ill. 2d at 525.

¶ 28 The first two components of *Gilbert* encompass the "holding out" element of apparent agency. The "holding out" element requires proof that the hospital "held itself out" in a manner that would lead a reasonable person to believe that the physician was employed by the hospital. *Gilbert*, 156 Ill. 2d at 525. A plaintiff is not required to show that the hospital made an express representation that the person alleged to be negligent was an employee. *Gilbert*, 156 Ill. 2d at 525. The "holding out" element may be satisfied by showing that the hospital "held itself out" as a provider of care without informing the patient that an independent contractor provided the care. *Gilbert*, 156 Ill. 2d at 525. The third element of apparent agency, "justifiable reliance," may be satisfied by showing that the plaintiff relied upon the hospital itself to provide care, rather than a specific physician. *Gilbert*, 156 Ill. 2d at 525-26 (citing *Pamperin*, 423 N.W.2d at 857).

¶ 29 Generally, whether an agency relationship exists is a question of fact. *Gilbert*, 156 Ill. 2d at 524. If, however, there is only one conclusion that can be drawn from the undisputed facts, a court may decide the question as a matter of law. *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 632 (1998).

¶ 30 With these principles in mind, we consider whether the trial court erred in finding as a matter of law that the plaintiffs failed to satisfy the "holding out" element of apparent agency. Here, there was testimony showing that Doug Binkley took his daughter, Samantha, to DMH because it was the preferred hospital under his insurance plan. DMH

had contracted with Dr. Garcia's medical group to provide emergency medicine physicians for the emergency department, and Dr. Garcia happened to be the attending physician on duty in the emergency department when Samantha was admitted on October 15, 2010. Dr. Garcia acknowledged that he did not inform Samantha or her parents that he was not employed by DMH, and that he could not think of any way that Samantha and her parents would have known he was not an employee of DMH.

¶ 31 The plaintiffs also presented pages from the DMH website to show that DMH held itself out as a provider of emergency medicine care. On the website, DMH promoted its emergency department as an effective and efficient facility, with state-of-the-art technology. DMH proclaimed that "our skilled team of professionals" in the emergency department provide "fast, efficient care that far surpasses the national averages." Dr. Garcia was listed as one of the emergency department physicians, and he had a dedicated profile page on the DMH website. The profile page identified Dr. Garcia's office address as "Decatur Memorial Hospital, 2300 North Edward Street, Decatur, Illinois." There was no notation that Dr. Garcia was an independent contractor.

¶ 32 DMH argues here, as it did in the trial court, that the plaintiffs had adequate notice that Dr. Garcia was an independent contractor. DMH relies upon the independent contractor disclosures in the consent form that Doug Binkley signed and the "Identification of Physicians" signage in support of its argument. [2]

[2]We note that DMH cited *Prince v. Kiel*, 2020 IL App (4th) 190773-U, among other cases, in support of its argument, and that plaintiffs objected to the citation of the unpublished order. In *Prince*, the Fourth District considered similar arguments about the same disclosure language in a different medical

¶ 33 In response, the plaintiffs argue that the independent contractor disclosure was ambiguous. They claim that the first sentence in the disclosure seemed to say that emergency room physicians, pathologists, radiologists, and anesthesiologists, as well as some hospital-based physicians, were not employees of DMH, while the second sentence took back what was said in the first sentence, making it unclear whether any given emergency physician, pathologist, radiologist, anesthesiologist, or other hospital-based physician was or was not an independent contractor. The plaintiffs also argue that the consent form did not provide adequate notice that Dr. Garcia was not employed by DMH because the consent form was provided to Doug Binkley only after Dr. Garcia had begun to treat Samantha.

¶ 34 The consent form contained the following disclosure language:

> "You are notified that the emergency physicians, pathologists, radiologists, and anesthesiologists as well as some other hospital-based physicians are not employees or agents of the hospital. For a list of those physicians not covered by the foregoing statement, please contact the hospital's medical staff office at 217-876-***."

¶ 35 The first sentence of the disclosure notified the reader that four categories of physicians—emergency physicians, pathologists, radiologists, and anesthesiologists—

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negligence case. The *Prince* case was decided before the amendment that allowed for Rule 23 orders to be considered as persuasive authority. See Ill. S. Ct. R. 23(e)(1) (eff. Jan. 1, 2021). Although counsel may use the reasoning employed in an unpublished decision, counsel is not permitted to cite an unpublished Rule 23 order as precedential authority. Counsel should refrain from citing unpublished orders in violation of Rule 23. We further note that while the Fourth District's reasoning in *Prince* was helpful in interpreting the independent contractor disclosure language at issue, we have determined that the facts and circumstances in the present case are distinguishable from those in *Prince*, and, therefore, lead to a different result.

were not employees or agents of the hospital. The first sentence also referred to a fifth category of physicians—"other hospital-based physicians," and provided that some of the physicians in that category were not agents or employees of the hospital. This implies that some hospital-based physicians, whose employment status was unknown, were agents or employees of the hospital. Because the employment status of "some other hospital-based physicians" was unclear, the second sentence provided a telephone number for inquiries. Notably, however, unlike those cases cited by the dissent, the consent form at issue did not use the words "independent contractor," and it did not state that Dr. Garcia was, indeed, an independent physician, or that the hospital was not legally liable for the physicians' acts. See, *e.g.*, *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, ¶ 8 (consent form provided " 'all physicians providing services to me, including emergency room physicians, radiologists, pathologists, anesthesiologists, my attending physician and all physician consultants, are independent medical staff physicians and not employees or agents' " of the hospital); *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 4 (consent form provided that hospital " 'utilizes independent physicians and consultants,' " and " 'NONE OF THE PHYSICIANS WHO ATTEND TO ME AT THE HOSPITAL ARE AGENTS OR EMPLOYEES OF THE HOSPITAL,' " and, therefore that they, not the hospital, " 'are legally liable for the physicians' acts' "); *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1083 (2009) (" '[P]hysicians who provide professional services to me *** are not the employees or agents of Alexian Brothers Medical Center, but they are independent contractors ***. Alexian Brothers Medical Center is not responsible for the services these physicians

provide.' "). Nevertheless, after reviewing the consent form, we do not agree that the disclosure was ambiguous as argued by the plaintiffs. The disclosure language was sufficient to inform patients that emergency room physicians were not employees or agents of the hospital. That said, independent contractor disclosure in the consent form is not dispositive of the "holding out" element in this case.

¶ 36 Although the existence of an independent contractor disclosure in a consent form is an important factor to consider in determining whether a hospital held a physician out as its agent, it is not always dispositive of the "holding out" issue. *Fragogiannis v. Sisters of St. Francis Health Services, Inc.*, 2015 IL App (1st) 141788, ¶ 22; *James*, 299 Ill. App. 3d at 633. Courts may also consider the circumstances surrounding the execution of the consent form, the language in the provision, and the font size and location of the disclosure. *Williams v. Tissier*, 2019 IL App (5th) 180046, ¶ 33; *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 196-97 (2006). In addition, courts have recognized that there may be situations where a plaintiff has signed a consent form containing an independent contractor disclosure, but the existence of additional facts would create a triable issue of fact as to whether the hospital held out a physician as its agent. *Fragogiannis*, 2015 IL App (1st) 141788, ¶ 22; *Churkey v. Rustia*, 329 Ill. App. 3d 239, 245 (2002). Accordingly, each case must be decided on its own specific facts.

¶ 37 In this case, the plaintiffs claimed that Dr. Garcia made a number of medical decisions that deviated from the applicable standard of care before Doug Binkley ever signed the consent form, and therefore, the consent form could not have provided timely

notice of Dr. Garcia's status as an independent contractor. They pointed to entries in the emergency department records and the deposition testimony to support this contention.

¶ 38 The emergency department records indicated that Samantha and her father arrived in the emergency department at 4:59 p.m. Sara Hamilton, the triage nurse, testified that she recorded the results of Samantha's vital signs at 5:11 p.m., and completed triage at 5:22 p.m. Nurse Hamilton identified Samantha as an emergent stroke protocol patient and immediately notified Dr. Garcia of Samantha's condition. Dr. Garcia made an entry at 5:46 p.m. The note indicated that by 5:46 p.m., Dr. Garcia had evaluated Samantha and obtained information about her present symptoms and her prior history of similar symptoms. Dr. Garcia testified that he created a list of reasonably possible diagnoses, including a stroke, and he ordered a CT scan for the purpose of ruling out a stroke.

¶ 39 Tuesday Bilbrey arrived at the hospital sometime between 6 p.m. and 6:15 p.m. When Tuesday Bilbrey entered the treatment room, either Samantha or Doug Binkley told her that Samantha had already undergone a CT scan and blood work. Shortly after Tuesday Bilbrey arrived, Doug Binkley went to see about the admissions paperwork and Tuesday Bilbrey stayed with Samantha. Tuesday Bilbrey testified that after she arrived, Dr. Garcia did not examine Samantha again. Tuesday Bilbrey recalled that Dr. Garcia returned to the room to inform them that the CT scan and blood tests were fine, and that Samantha would be discharged. The emergency department record indicates that the results of the blood tests were entered in the medical record at 6:37 p.m., and that Dr. Garcia recorded his final diagnosis and discharge note at 7:29 p.m.

¶ 40 During his deposition, Dr. Garcia testified that the standard of care required an emergency room doctor to utilize "the differential diagnosis method" to treat patients. He acknowledged that it would be a breach of the standard of care for an emergency medicine doctor to reach a diagnosis without using "the differential diagnosis method." Dr. Garcia testified that there were several steps in the process. During the first step of the differential diagnosis method, the physician acquires information about the patient's condition, including current symptoms, medical history, and risk factors. During the second step, the physician creates a list of reasonably possible diagnoses or causes for the patient's condition. Then, during the third step, the physician attempts to rule out the possible diagnoses on the list. The physician begins with the possible diagnosis that is most dangerous for the patient and uses diagnostic tools to rule the diagnosis in or out. Dr. Garcia testified that he used the differential diagnosis method in evaluating and treating Samantha. Dr. Garcia stated that he included stroke as a possible diagnosis, and he ordered a CT scan, and not an MRI MRA, to rule out a stroke. He did not include a carotid artery dissection in his list of possible diagnoses. He did not pursue the emergent stroke protocol or seek a neurovascular consultation. As further explained hereafter, all of this was done prior to the execution of any consent form.

¶ 41 According to undisputed evidence in the record, Doug Binkley did not see or sign the consent form containing the independent contractor disclosure until sometime after 6:15 p.m. By that time, Dr. Garcia had spoken with Samantha and her father, and learned of her medical history. Based upon the information he gathered and his examination of Samantha, he created his list of reasonably possible diagnoses for the patient's condition—

step two in the differential diagnosis method, and he ordered diagnostic tests to rule out the most serious diagnosis—step three in the differential diagnosis method. The plaintiffs alleged that Dr. Garcia made several medical decisions during this process that were deviations from the standard of care for an emergency room physician. These included the decision to order a CT scan, rather than an MRI MRA, to rule out a stroke; the decision not to pursue the hospital's emergent stroke protocol; and the decision not to obtain a neurovascular consultation. Based upon the timeline and the testimony in this record, these allegedly negligent decisions were all made prior to the time that Doug Binkley was presented with and signed the consent form. Therefore, we find that there is a genuine issue of material fact as to whether the independent contractor disclosure in the consent form provided the plaintiffs with timely notice of Dr. Garcia's employment status before the aforementioned negligent acts allegedly occurred. *Fragogiannis*, 2015 IL App (1st) 141788, ¶ 22 (independent contractor disclosure in an "after-the-fact" consent form was insufficient to sever the vicarious link between the physician and the hospital).

¶ 42 The dissent disagrees. In its analysis, rather than looking at the facts contained in the record, the dissent contends that plaintiffs have "waived" the right to argue the facts of the case. Incredibly, the dissent chastises our thorough review of the record, claiming that we scoured "the numerous deposition testimonies and medical records contained in the record" to develop a definitive timeline of events. *Infra* ¶ 65. The dissent then acknowledges the rule that "a court may overlook forfeiture where necessary to reach a just result." *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, 2022 IL 127177, ¶ 94. The dissent must take this position because there is evidence in the record to support the

plaintiffs' allegations that Dr. Garcia failed to pursue the possibility of stroke or TIA, failed to obtain a prompt neurological consultation, failed to implement the emergent stroke protocol, and ordered a CT scan, not an MRI MRA, all before Doug Binkley signed the consent form. To find otherwise would reveal a fundamental misunderstanding of the elements of medical negligence and a misapprehension of the evidence in the record.

¶ 43 To prevail on a claim for medical negligence,[3] the plaintiff must establish the existence of a physician/patient relationship, the applicable standard of care against which the medical professional's conduct is measured, a deviation from that standard of care, and a resulting injury proximately caused by the deviation. See *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986). A physician's deviation from the applicable standard of care can be established through an action or a failure to act. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 294-96 (2000); Illinois Pattern Jury Instructions, Civil, No. 105.01 (rev. Apr. 2020). The question of whether there has been a deviation from the standard of care applies at each individual step in the differential diagnosis process, from the gathering of information from the patient and obtaining a medical history, to the creation of a list of reasonably possible diagnoses, to ordering diagnostic studies, to ruling in or out the

[3]The word "negligence" is often used in the law to mean either (a) the cause of action or theory of liability, including all of its elements, or (b) the breach of a duty of care. See *Johnson v. Armstrong*, 2022 IL 127942, ¶ 54. In this case we are dealing with the second meaning, *i.e.*, the alleged breach of a duty of care owed by a physician. In addressing "duty" in a professional negligence case, our civil jury instructions provide that "[a] [physician] must possess and use the knowledge, skill, and care ordinarily used by a reasonably careful [physician]," and that the "failure to do something that a reasonably careful [physician] would do, or the doing of something that a reasonably careful [physician] would not do, under circumstances similar to those shown by the evidence, is 'professional negligence.' " Illinois Pattern Jury Instructions, Civil, No. 105.01 (approved June 24, 2020) (hereinafter IPI Civil No. 105.01). The instruction further provides, "The phrase 'deviation from the standard of [care] [practice]' means the same thing as 'professional negligence.' The law does not say how a reasonably careful person would act under these circumstances. That is for you to decide." IPI Civil No. 105.01

possible diagnosis, and to making a final diagnosis. The deviation from the standard of care occurs at the time the physician acts or fails to act as a reasonable physician would under similar circumstances. So, for example, Dr. Garcia's decision to forgo the emergent stroke protocol was made very early in his process of evaluating Samantha, as the triage nurse had identified Samantha as a stroke protocol patient and immediately notified Dr. Garcia. The plaintiffs alleged that Dr. Garcia's decision was a deviation from the standard of care, and that it was made before Doug Binkley left Samantha's side. A deviation from the standard of care is a separate question from whether the patient suffered an injury proximately caused by that deviation from the standard of care.

¶ 44 Again, the record shows that by 5:46 p.m., Dr. Garcia had taken a history from Samantha, created his list of reasonably possible diagnoses, including stroke, and he had ordered a CT scan instead of an MRI MRA, to rule out stroke. He had also decided that he would not implement the emergent stroke protocol and he would not seek a neurovascular consultation. Dr. Garcia made these allegedly negligent decisions prior to the time Doug Binkley went to sign the consent form. Consequently, there is adequate evidence that these medical decisions, which the plaintiffs claimed were deviations from the standard of care for an emergency room physician, were made before Doug Binkley signed the consent form. Thus, we find that there is sufficient evidence from which a reasonable factfinder could find or infer the consent form did not timely notify the plaintiffs about Dr. Garcia's employment status. *Fragogiannis*, 2015 IL App (1st) 141788, ¶ 22.

¶ 45 The dissent then contends that even if the timing of the signing of the consent form was considered, the timing was "irrelevant when considered in conjunction with the

number of consents previously signed by Samantha's parents on her behalf." *Infra* ¶ 67. In this case, DMH argued that the plaintiffs should have known that the emergency department physicians were independent contractors because they signed five consent forms containing the same independent contractor disclosure in the past. DMH appended those forms as supporting exhibits. One of the exhibits indicated that Doug Binkley signed a similar DMH consent form in October 2007—three years prior to the emergency room visit at issue. Doug Binkley was not questioned about that consent form in his deposition, and there is no information regarding the circumstances surrounding the execution of that form. Thus, this is not a case, such as *Lamb-Rosenfeldt*, where the patient signed seven hospital consent for treatment forms and two payment authorization forms during the course of a year-long treatment for a recurrent cancer, and where the forms provided that the hospital utilized independent physicians, and that that the hospital was not legally liable for acts of those physicians. *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶¶ 4, 6. The DMH exhibits indicated that Tuesday Bilbrey signed similar consent forms in July 2004, March 2007, September 2008, and June 2010. Tuesday Bilbrey was not questioned about those forms during her deposition, and there is no information regarding the circumstances surrounding the execution of those old forms. The dissent finds that these old, prior consent forms "unequivocally reveal that plaintiffs 'should have known' that the hospital's emergency physicians were neither agents nor employees of the hospital." *Infra* ¶ 72. We disagree. It is undisputed that Tuesday Bilbrey neither saw nor signed the consent form at issue, and that she arrived after Dr. Garcia had begun treating her daughter—facts overlooked by the dissent. Notwithstanding the dissent's finding that these prior consent

forms are entitled to great weight, at trial, DMH will have to lay a proper foundation for the forms and demonstrate their relevancy.[4] Additionally, we will not speculate on whether a reasonable factfinder would ultimately find that these prior consent forms were relevant to whether the plaintiffs knew or should have known that Dr. Garcia was an independent contractor at the time he treated Samantha in October 2010 and, if so, what weight to assign the evidence. The purpose of summary judgment is not to try an issue of fact but to determine if one exists. *Gilbert*, 156 Ill. 2d at 517.

¶ 46 In arguments before the trial court and on appeal, DMH also argued that the "Identification of Physicians" signs posted in the emergency department waiting area provided notice that the emergency room physicians were not employees or agents of the hospital. The record contains evidence showing that Samantha and her father were quickly moved to a triage room, and then to an examination room. Samantha's father averred he did not observe any signs in the emergency department indicating that Dr. Garcia was an independent contractor. This testimony is uncontradicted and DMH has not offered any evidence that these signs were displayed in the areas occupied by Samantha and her father upon their arrival at the hospital. In addition, DMH offered a copy of the sign as a supporting exhibit. The text of the disclosure was printed in a "bubble" font. Each letter is outlined in black, with a white fill, against a white background. The signage does not

[4]The dissent contends that "the circumstances surrounding the prior execution of the prior consents are irrelevant." *Infra* ¶ 72. Such a statement, as it pertains to the admission of a business record, runs afoul of the rules of evidence. See Ill. R. Evid. 803(6) (eff. Sept. 28, 2018). In determining the genuineness of a fact for summary judgment, a court should consider only facts admissible in evidence, and basic rules of evidence require that a party lay the foundation for the introduction of a document into evidence and establish relevance. *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 247 (1991).

contain standardized colors or symbols that would draw attention to it. After reviewing the record, including the copy of the sign, we find that there are genuine issues of fact as to whether the plaintiffs had a reasonable opportunity to observe those signs and whether the signs clearly and effectively communicated the independent contractor disclosure.

¶ 47 The dissent takes exception to our discussion of the signage, initially finding the discussion of no importance to the notice issue because the undisputed evidence revealed that the plaintiffs did not see the signs. Subsequently, the dissent proceeds to consider the language in the signage, asserting that it was sufficient for the hospital to post the signs, as plaintiffs' failure to "review the signs" did not create a question of fact.

¶ 48 As noted above, the signage was a component of DMH's argument regarding notice in the trial court, and it was offered as a supporting exhibit. On appeal, DMH argued that the signage provided notice and that the plaintiffs' failure to see it was not an excuse. Therefore, we have considered those arguments. Under the doctrine of apparent agency, "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 524. A hospital may not escape liability where it "held itself out" as a provider of care without informing the patient that an independent contractor provided the care. *Gilbert*, 156 Ill. 2d at 525. Under *Gilbert*, the relevant inquiry is whether the plaintiff knew, or should have known, that the physician was an independent contractor, and the burden is on the hospital to inform the patient of that information. *Gilbert*, 156 Ill. 2d at 522. Thus, a hospital bears the burden to *effectively* communicate information

regarding the employment status of physicians working in its emergency department to patients. A sign is a form of communication designed to convey information or instructions in a written or symbolic form. Whether the signage at issue clearly and effectively communicated the information that Dr. Garcia was an independent contractor presents a question of fact precluding summary judgment.

¶ 49 In summary, DMH primarily relied upon its consent form and its "Identification of Physicians" signs as evidence that the plaintiffs had notice that the emergency department physicians, including Dr. Garcia, were not agents or employees of the hospital. The plaintiffs, however, provided evidence to show that the disclosures in the consent form were provided after Dr. Garcia allegedly deviated from the applicable standard of care in diagnosing the patient, and that Samantha and her parents were not in areas of the emergency department where the signs were posted. The plaintiffs also presented evidence that DMH held itself out as a provider of emergency medicine. The DMH website promoted its emergency department as an effective and efficient facility, with state-of-the-art technology, and a skilled team of professionals. The DMH website also provided links to dedicated profile pages for Dr. Garcia and other emergency physicians, and listed Dr. Garcia's office address as the hospital. There was testimony that the plaintiffs chose DMH, rather than a specific physician, for emergency medical care. In addition, Dr. Garcia testified that he did not inform the plaintiffs that he was an independent contractor, and he could not think of any way that the plaintiffs would have known he was not employed by DMH.

¶ 50 At the summary judgment stage of the proceedings, it is improper to weigh the evidence, decide facts, and make credibility determinations. The purpose of summary judgment is not to try an issue of fact but to determine whether one exists. *Gilbert*, 156 Ill. 2d at 517. After reviewing the record, we find that there are genuine issues of material fact regarding the "holding out" element of apparent agency. These issues of material fact are not based on illusion or pretense, but rather on evidence in the deposition testimony, affidavits, medical records, and other supporting exhibits in the record; and the dissent's contentions to the contrary are disingenuous and not borne out by the record.

¶ 51 Again, we reiterate here that summary judgment is inappropriate unless the pleadings, depositions, admissions, and affidavits, construed strictly against the moving party and liberally in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact. An issue of material fact arises either where the facts are disputed or where reasonable people might draw different conclusions from the facts. Here, there is sufficient evidence from which a reasonable factfinder could infer that the consent form did not timely notify the plaintiffs about Dr. Garcia's independent contractor status and that they did not have a reasonable opportunity to observe the "Identification of Physicians" signs. We therefore conclude that summary judgment in this case was inappropriate, and remand for further proceedings to determine these issues of fact.

¶ 52 Finally, we consider the "justifiable reliance" element of apparent agency. The "justifiable reliance" element may be satisfied by showing that a plaintiff relied upon the hospital itself, rather than a specific physician, to provide care. *Gilbert*, 156 Ill. 2d at 525. In this case, Samantha's father took Samantha to the emergency room at DMH because she

was experiencing left-sided paralysis—a critical medical condition. The plaintiffs did not go to DMH to obtain treatment from any particular physician. They sought medical care from the hospital itself and relied upon the hospital to choose the physician who would treat Samantha. Thus, for purposes of summary judgment, we find that the plaintiffs presented sufficient evidence to satisfy the justifiable reliance element.

¶ 53 III. CONCLUSION

¶ 54 Construing the evidence strictly against the defendants and in a light most favorable to the plaintiffs, as we must, we find that there is a genuine issue of material fact as to apparent agency, and that the trial court erred in granting summary judgment in favor of DMH on the issue of apparent agency. Accordingly, the summary judgment is reversed, and the cause is remanded for further proceedings.

¶ 55 Reversed and remanded.

¶ 56 JUSTICE VAUGHAN, dissenting:

¶ 57 While I concur in my colleagues' ultimate conclusions that the "disclosure language was sufficient to inform patients that emergency room physicians were not employees or agents of the hospital" (*supra* ¶ 35) and that the element of justifiable reliance was met because plaintiffs sought treatment from the facility and not any particular physician, I respectfully dissent from their disposition of this case. I would affirm the trial court's order granting summary judgment to the hospital.

¶ 58 When determining whether a genuine issue of material fact exists that would preclude summary judgment, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the

nonmoving party. 735 ILCS 5/2-1005 (West 2020). The issue in this appeal is whether the hospital held out Dr. Garcia as its employee or agent. My colleagues claim that triable issues of material fact preclude summary judgment; however, I find the triable issues illusory when considered in conjunction with the undisputed facts in this case, the pleadings filed herein, and the arguments advanced by plaintiffs.

¶ 59 In order to establish apparent agency,

> "a plaintiff must show 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." (Internal quotation marks omitted.) *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 525 (1993).

The burden remains with the plaintiff to prove the necessary elements.

¶ 60 Following DMH's motion for summary judgment on the issue of apparent agency based on the consent signed by Samantha's father, Doug, plaintiffs filed a response arguing the following points: (1) DMH held itself out to the public as a provider of emergency medical care via content on its website listing Dr. Garcia as a physician, providing his address as that of the hospital, failing to disclaim any employment or agency relationship on the website and Dr. Garcia's failure to personally advise plaintiffs that he was not an agent or employee of DMH at the time treatment was rendered; (2) the DMH disclaimers

found in the consent for treatment and on signage at the hospital were too vague to undermine the "holding out information" addressed in the first argument because the language in the disclaimers was confusing and ambiguous; and (3) plaintiffs were not given a meaningful opportunity to read or understand the disclaimers because plaintiff was immediately triaged and taken to a room within the emergency department. As to the third argument, plaintiffs argued that Samantha's father could not have seen and signed the consent until after 6 or 6:15, "after Dr. Garcia already undertook treatment of Samantha," citing *Fragogiannis v. Sisters of St. Francis Health Services*, 2015 IL App (1st) 141788. In response, defendant argued, *inter alia*, that Samantha's parents had signed consents for treatment, containing the same disclaimer language, five times prior to the October 15, 2020, visit.

¶ 61 My colleagues place great emphasis on the third argument and ultimately hold that questions of material fact preclude a finding of summary judgment. The majority's conclusion, which is based on *Fragogiannis*, contends that the timing surrounding (1) when the negligence occurred and (2) when the consent with the disclaimer language was signed is necessary to determine whether the signed document was signed "after the fact." While interesting, ultimately, I find both the argument and the majority's analysis uncompelling.

¶ 62 In *Fragogiannis*, Georgia Tagalos suffered from asthma; after twice using her inhaler with no relief, her ability to breathe declined resulting in respiratory distress. *Fragogiannis*, 2015 IL App (1st) 141788, ¶ 3. Her son, Ted Fragogiannis, called 911 and an ambulance transported Georgia to the hospital. *Id*. When Georgia arrived at the hospital

at 1:45, she could no longer speak but remained responsive. *Id*. ¶ 4. Eleven minutes after arriving, and before any attempt at intubation was started, Georgia became unresponsive. *Id*. Thereafter, four failed attempts at intubation were made. *Id*. ¶ 5. Between 2:07 and 2:10 p.m., which was over 20 minutes after Georgia's arrival, tracheal surgery to create an airway was performed; however, by that time, Georgia was brain dead. *Id*.

¶ 63 Following those events, Ted, signed a consent that stated the emergency physicians were independent contractors of the hospital. *Id*. ¶ 22. Ted later filed a complaint alleging the physicians and the hospital were negligent because it took approximately 25 minutes to establish an airway in a patient experiencing respiratory distress. *Id*. ¶ 6. On review of the hospital's appeal contending that a directed verdict should have been rendered in its favor based on, *inter alia*, the consent signed by Ted, the court found the consent had "no bearing on this case," noting that Georgia did not sign the form or even know of its existence. *Id*. ¶ 22.

¶ 64 The court also found that by the time Ted signed the consent, Georgia was "already brain dead," "the negligent acts had already occurred," and there was no evidence as to how Ted "could have legally bound his mother by his signature." *Id*. The *Fragogiannis* court stated that an "after-the-fact 'consent' [was], as a matter of law, insufficient to abrogate a vicarious link between the hospital and attending physician." *Id*. The court concluded, "Suffice it to say that a third party signing a consent form after the negligence has occurred and after the patient is brain dead would not inform any unsuspecting patient that the four doctors that treated the individual were independent contractors." *Id*. As such,

there were two issues in *Fragogiannis*: a lack of authority to sign the consent and an "after-the-fact" signing.

¶ 65 While I appreciate my colleagues' efforts to add substance to plaintiffs' argument regarding when the negligence occurred, I must respectfully disagree for two reasons. First, the timing of the negligence was poorly demonstrated by the plaintiffs. While they claimed the negligence occurred prior to the signing of the consent, their argument was undeveloped and lacked citation to the record in support of their claim. It is only through the majority's scouring of the record to develop a definitive timeline based on its review of the numerous deposition testimonies and medical records contained in the record that any depth to this argument is found. The majority's efforts to further bolster the plaintiffs' argument on appeal is also seen by my colleagues' summary of Dr. Garcia's testimony addressing how differential diagnoses are determined, which was also largely ignored and unargued by the plaintiffs.

¶ 66 Given plaintiffs' ill-defined, and poorly cited arguments, I find the argument regarding the timing of the negligence was waived and my colleagues' decision ignores the plaintiffs' waiver of these arguments. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). While it is well-established that waiver is a limitation on the parties and not the court, waiver should only be overlooked by the reviewing court where it is necessary to reach a just result or maintain a sound body of precedent. *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, 2022 IL 127177, ¶ 94. Here, I can only presume my colleagues find it necessary to reach a just result since the decision is contrary to sound precedent by both our own and our sister appellate districts.

¶ 67 Second, even if plaintiffs' arguments regarding the timing of the negligence and execution of the consent with the disclaiming language had been as well presented and composed as that by my colleagues, I do not believe it creates a question of fact. I find the timing becomes irrelevant when considered in conjunction with the number of consents previously signed by Samantha's parents on her behalf. The hospital submitted evidence revealing that Samantha's parents signed consent forms on behalf of Samantha on July 6, 2004, March 1, 2007, October 18, 2007, September 7, 2008, and June 8, 2010. It is undisputed that these consents contained the exact same disclaimer language stating that the emergency physicians were not agents or employees of the hospital, as that found in the October 15, 2010, consent.

¶ 68 While my colleagues claim the facts surrounding the execution of these earlier consents are relevant to the analysis, again I must disagree. The consents were presented in reply to plaintiffs' response to defendant's motion for summary judgment. At no time before the trial court did plaintiffs present *any* argument regarding the prior consents. It was only in their reply brief that plaintiffs addressed the additional consents, at which time they argued that language in those consents was ambiguous and then contended that defendant failed to "explain why the consent forms signed by Tuesday Bilbrey [were] relevant to the apparent agency analysis" when Tuesday was not involved in the decision to take Samantha to DMH.

¶ 69 Our supreme court rules prohibit parties from raising new arguments in the reply brief. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). Accordingly, the only argument presented by plaintiffs on the issue of the prior signed consents was also waived by plaintiffs. Despite

the prohibition, my colleagues again overlook waiver and provide additional arguments related to foundation and the veracity of the documents, neither of which was ever raised by plaintiffs. Our supreme court recently addressed the issue of foundation, ironically involved with a waiver issue, and ultimately found the issue was not dispositive to the case. *People v. Smith*, 2022 IL 127946, ¶¶ 59-62. I find the same result here.

¶ 70 While the majority admits that both Doug and Tuesday signed the prior consents, it states there is "no information regarding the circumstances surrounding the execution" of those consents. *Supra* ¶ 45. While accurate, the issue addressed by the majority was never raised, not even in the reply brief, by the plaintiffs. Therefore, the majority's "unwillingness to speculate" as to the relevance of these prior consents is incredulous. The consents were submitted by defendants with neither an objection nor a responsive argument by plaintiffs while the claim was before the trial court, and therefore require this court's attention.

¶ 71 A history of signing documents with the same notice language as the current document indicates that "plaintiff knew, or at the very least should have known, that the physicians at defendant hospital were independent contractors" if the language is clear and unambiguous. See *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1094 (2009); see also *Lamb-Rosenfeldt v. Burke Medical Group, Ltd*., 2012 IL App (1st) 101558, ¶ 30 ("After signing *nine* forms containing the aforementioned clear disclosure statement in bold, capitalized print, we find that decedent knew or should have known that Doctor Burke was an independent contractor at the time she sought treatment from her at St. James." (Emphasis in original.)). There is a "long-standing principle that one who signs

a document is charged with knowledge of its contents, regardless of whether he or she actually read the document." *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, ¶ 54. " 'An individual "who has had an opportunity to read a contract before signing, but signs before reading, cannot later plead lack of understanding." [Citation.]' " *Id*. (quoting *Hawkins v. Capital Fitness, Inc*., 2015 IL App (1st) 133716, ¶ 14); see also *Oelze v. Score Sports Venture, LLC,* 401 Ill. App. 3d 110, 117 (2010); *Magnus v. Lutheran General Health Care System*, 235 Ill. App. 3d 173, 184 (1992).

¶ 72 Further, our courts have held that a patient in pain (*Frezados v. Ingalls Memorial Hospital*, 2013 IL App (1st) 121835, ¶ 24), a patient in labor (*Prutton v. Baumgart*, 2020 IL App (2d) 190346, ¶ 51), a patient who does not have the consent form explained to him (*Gore v. Provena Hospital*, 2015 IL App (3d) 130446, ¶ 31), or a patient unable to read or comprehend the language in which the notice was written was insufficient to find that the language did not place the patient on notice of the lack of apparent agency between the physician and hospital (*Mizyed*, 2016 IL App (1st) 142790, ¶ 51). As such, the circumstances surrounding the prior execution of the prior consents are irrelevant and I find that the prior consents signed by Doug and Tuesday Bilbrey unequivocally reveal that plaintiffs "should have known" that the hospital's emergency physicians were neither agents nor employees of the hospital.

¶ 73 Finally, the majority also addresses the signage found on the walls at the hospital. Those signs also disclaimed any employment or agency relationship between the emergency physicians and the hospital with language identical to that contained in the consents. As noted above, my colleagues admit the language was "sufficient to inform

patients that emergency room physicians were not employees or agents of the hospital." *Supra* ¶ 35. Accordingly, there is no dispute that DMH's signs inform patients that the emergency physicians were neither employees nor agents of the hospital.

¶ 74 Here, plaintiffs' only argument was that they did not see the signage. No evidence to the contrary was presented. As such, whether plaintiffs had a reasonable opportunity to observe the signs is of no import when the undisputed evidence revealed *they did not see the signs*. Nor does their failure to review the signs create a question of fact.

¶ 75 The issue is whether the hospital held itself "out as a provider of emergency room care *without informing the patient that the care is provided by independent contractors*." (Emphasis added.) *Gilbert*, 156 Ill. 2d at 525. The language used by the supreme court is salient. Inform is defined as "to communicate knowledge to" or "to impart information or knowledge."[5] "Impart" is defined as "to communicate the knowledge of."[6] The burden on the party providing the information is simply to provide the information. My colleagues interpret *Gilbert* to require the hospital to effectively communicate the information, *i.e.*, make sure the patient is aware of the information. However, *Gilbert* provides no such burden, and such requirement has been dispelled by our sister districts. See *Gore*, 2015 IL App (3d) 130446, ¶ 31; *Mizyed*, 2016 IL App (1st) 142790, ¶ 51.

¶ 76 We are required to apply binding precedent from the Illinois Supreme Court to the facts of the cases before us. See, *e.g.*, *Yakich v. Aulds*, 2019 IL 123667, ¶ 13. Such

[5]Merriam-Webster. (n.d.). Inform. In Merriam-Webster.com dictionary. Retrieved July 4, 2023, from https://www.merriam-webster.com/dictionary/inform.

[6]Merriam-Webster. (n.d.). Impart. In Merriam-Webster.com dictionary. Retrieved July 4, 2023, from https://www.merriam-webster.com/dictionary/impart.

application does not include altering precedent to create a burden higher than that set by the Illinois Supreme Court. Had the court intended to create a burden that the hospital "effectively communicate information" it would have; however, it did not. As such, I find the majority's increased burden contrary to law.

¶ 77 Nor do I find the majority's reliance on the "bubble" font or lack of safety colors relevant. Similar to issues addressed above, plaintiffs never raised issues regarding the font or the color of the signage before the trial court, or on appeal. As such, the majority's comments have no basis in this matter. Given plaintiffs' failure to ever present this argument, the font and lack of safety color cannot be used to claim a material issue of fact precluded summary judgment.

¶ 78 In summary, my colleagues and I agree that the language found in both the consent and the signage—disclaiming any employment or agency relationship between the hospital and its emergency physicians—was not ambiguous and was sufficient to inform plaintiffs that the emergency physicians were not agents or employees of the hospital. The burden of proving an apparent agency relationship remains with the plaintiffs at all times. While plaintiffs submitted evidence of the hospital holding out Dr. Garcia as its employee via the website, and further argued that Dr. Garcia did nothing to dispel a belief that he was its employee or agent, there was no evidence that Doug, Tuesday, or Samantha ever visited or saw the hospital's website. Instead, the undisputed evidence revealed that the only reason Doug took Samantha to DMH was because DMH was the preferred hospital under his insurance plan.

¶ 79 Plaintiffs' reliance on the timing of Doug's execution of the consent after treatment began is equally uncompelling because both Doug and Tuesday previously signed five other consents that included the same disclaimer language clearly evincing the lack of agency status of the emergency physicians. Such undisputed fact evinces a conclusion that plaintiffs, at a bare minimum, should have known that emergency physicians were not agents or employees of the hospital. Finally, while it was equally undisputed that plaintiffs stated they did not see the signage at the hospital, the hospital's sole burden is to inform the patient, and our sister districts have rejected requests to impose a burden higher than that established by our supreme court in *Gilbert*.

¶ 80 Viewing the pleadings, depositions, and affidavits liberally in plaintiffs' favor, and considering the arguments actually presented by the plaintiffs, I can only conclude that no material question of fact precludes the entry of summary judgment. As such, I believe the trial court did not err in granting summary judgment to DMH.

¶ 81 For these reasons, I respectfully dissent.