No. 121367

In the

Supreme Court of Illinois

CHRISTINA YARBROUGH and DAVID GOODPASTER,
on behalf of HAYLEY JOE GOODPASTER, a minor,

Plaintiffs-Appellees,

v.

NORTHWESTERN MEMORIAL HOSPITAL,

Defendant-Appellant,

and

NORTHWESTERN MEDICAL FACULTY FOUNDATION,

Defendant.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-14-1585.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2010 L 296.
The Honorable **William E. Gomolinski**, Judge Presiding.

AMICUS CURIAE BRIEF OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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POINTS AND AUTHORITIES

I. ARGUMENT

Hospitals are big businesses. An essential component of their big business models are "affiliated" "community partners" such as Erie Family Health Center (hereinafter "Erie"). While altruism may be one component of providing care to patients at or from these "community partners," it cannot be ignored that these partnerships provide affiliated hospital systems with significant benefits, including but not limited to a steady stream of hospital revenue, new patient contacts, tax exemptions, goodwill and brand loyalty.

Northwestern Memorial Hospital (hereinafter "NMH") and its *amici* press this Court to disregard the application of longstanding principles of apparent authority and insulate them from liability for negligent care provided at community health clinics based on their claim that these clinics are "independent," "unrelated," and "not profitable." This argument raises the same question considered by this Court 17 years ago in *Gilbert v. Sycamore Municipal Hosp.*, 156 Ill. 2d 511, 522 (1993): Can a hospital always escape liability for the rendering of negligent health care because the clinic rendering the care is allegedly "independent," "unrelated" or "not profitable," regardless of how the hospital holds itself out to the public, regardless of how the clinic held itself out to the public with the knowledge of the hospital, and regardless of the perception created in the mind of the public? *Id.* The answer is that a hospital cannot always escape liability in such a case. *Id.* It would be unjust. Furthermore, such a result would not comport with the realities of modern healthcare. A look behind the curtain reveals that community partners such as Erie are intimately related to their affiliated healthcare systems and generate a steady stream of inpatient hospital revenue and benefits for their "affiliated hospitals." To the public, these clinics are held out as partners in comprehensive medical care "systems." To the government, services to these partners (and the patients flowing from them) are claimed to obtain multiple tax exemptions. On hospital balance sheets,

patients from these clinics account for a significant portion of realized revenue from Medicaid reimbursement. Therefore, under the law, the long-standing principles of apparent agency outlined in *Gilbert* should apply.

A. The Longstanding Principles of Apparent Agency Outlined in *Gilbert* Apply to the Modern Realities of Illinois' Healthcare "Systems" and their "Network" of Affiliations with Community Partners Now More Than Ever Before.

In *Gilbert*, this Court rejected the hospital's request for a shield from liability for the acts of agents they claimed were "independent," regardless of the perception of the public. *Id.* This Court joined other jurisdictions in noting that "[m]odern hospitals have spent billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities" *Id. at* 520 (*quoting Kashishian v. Port, 167 Wis.2d 24, 38, 481 N.W.2d 277,* 282 (1992)). *Gilbert* was not a change in the law. This Court specifically rejected adopting "a special rule," concluding instead that the long-standing doctrine of apparent agency commonly applied in contract cases "sufficiently recognizes the realities of modern hospital care and defines the limits of a hospital's liability." *Gilbert,* 156 Ill. 2d at 523.

Pursuant to *Gilbert* and its progeny, the hospital business, like any other big business, was *not* exempt from application of the doctrine of apparent agency when it creates the appearance that someone or some entity is its agent, and an innocent third party reasonably relies on the apparent agency and has been harmed. *O'Banner v. McDonald's Corp.*, 173 Ill.2d 208, 213 (1996); *Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107, ¶ 31. Since this Court issued its forward-thinking opinion in *Gilbert*, the business of hospitals has gone from big to *huge*. The formation of massive "healthcare systems" with extensive digital marketing campaigns makes the doctrine of apparent agency more applicable now than ever before. In

the last 17 years, NMH[1] and its *amici*, U of C, Rush, Advocate[2], Northshore, Presence[3] and Trinity,[4] have acquired, merged, affiliated and re-branded themselves as vast healthcare "systems" with expansive "networks" of hospitals, outpatient facilities and "community partners". These "community partnerships" are an essential component of their overall "system" and their brand which is critical to attracting new patients and earning loyalty to the "networks." The marketing jargon held-out for public consumption is strikingly consistent across digital and print media: "Large System," "Vast Network," and "Community Partner."

As a result of its successful marketing campaign and mergers, NMH is far more than just a hospital located at 251 E. Huron. Rather, NMH holds itself out as a full-service

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[1] Since 1993 Northwestern has acquired various affiliates such as Cadence Health, KishHealth, Marionjoy, and most recently Centegra to fend-off rivals like Advocate Health Care. *See* Kristen Schorsch, Northwestern and Centegra: The Chicago area's next big hospital merger, CRAIN's Chicago Business (April 5, 2016) http://www.modernhealthcare.com/article/20160405/NEWS/304059998

[2] In May 2013, Sherman Health and Advocate merged to become the largest "integrated hospital network" in the state. See Bruce Jaspen, Hospitals, Under Fire For High Prices, Say Mergers Overblown, FORBES (June 3, 2013). https://www.forbes.com/sites/brucejapsen/2013/06/03/hospitals-under-fire-for-market-clout-say-they-arent-so-bad/#5bb261701803

[3] In 2011 Resurrection Health Care merged with Provena Health, to become the newly named "Presence" and the second largest system in the state with $2.8 billion in total revenue from its "network." Kristen Schorsch, *Presence Health is new name of combined Provena-Resurrection*, CRAIN'S Chicago Business, HealthCare Daily (Feb. 17, 2012). http://www.chicagobusiness.com/article/20120217/NEWS03/120219790/presence-health-is-new-name-of-combined-provena-resurrection

[4] In 2012 Mercy Health System officially become part of Trinity Health, one of the largest Catholic hospital networks in the nation. As part of the merger announcement, Mercy's CEO stated that "this *affiliation* will better enable Mercy Hospital to continue building on its strong 160-year history of service to the Chicago community." Kristen Schorsch, *Mercy, Trinity Finalize Merger* (April 2012) CRAIN's Chicago Business http://www.chicagobusiness.com/article/20120402/NEWS03/120409968/mercy-trinity-finalize-merger-deal

healthcare-system with an expansive and accessible outpatient presence and a "network" of locations in the community. These networks are branded as affiliated providers or community partners and advertised through digital media directly to patients. NMH and NMHC, its parent corporation, spend considerable resources advancing their "brand" to the public promoting their wide range of services, reputation and "community partnerships" (S.R. 164, 253, 256). NMH's *amici* have engaged in similar campaigns. Presence Health brands itself as "the largest integrated health care *system* in Illinois," referencing its more than 150 outpatient facilities in the Presence "family" and its "dozens of doctor's offices."[5] Advocate holds itself out as the "largest health *system* in Illinois" and a "faith based, not-for-profit health system" with "more than 450 sites of care," and "the state's largest physician *network*."[6] Rush advertises as a "health *system* whose mission is to improve the health of the patients and the diverse *communities* it serves with nationally recognized health care, education, research and a commitment to *community partnerships*" which is comprised of "numerous outpatient facilities."[7] Northshore touts its numerous "community wellness"[8] programs and its "more than 1900 primary care physicians and specialists"[9] representing a "vast array of specialties" and assures their patients they are "at the heart of a *vast network*" of locations.[10] Trinity is held-out as "a national Catholic health *system* with an enduring legacy and a steadfast mission to be a transforming and healing presence *within the communities* we serve."[11]

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[5] *See* http://www.presencehealth.org/this-is-presence
[6] *See* http://www.advocatehealth.com/overview-of-advocate
[7] *See* https://www.rush.edu/about-us/rush-health-care-education-research-not-profit-chicago
[8] *See* https://www.northshore.org/community-events/community/community-wellness/
[9] *See* https://www.northshore.org/apps/findadoctor/
[10] *See* https://www.northshore.org/locations
[11] *See* http://www.trinity-health.org/

Consistent with this modern reality, a patient who presents to a "community partner" of a large "healthcare *system*" and is told the clinic *exclusively* affiliates with the NMH *system* for comprehensive obstetrical care, but not informed that the persons providing treatment are not the agents of that system, should have a right to look to the hospital system in seeking compensation for any negligence in providing obstetrical care. The fact that unbeknownst to the patient the hospital included "independent contractor" language in its affiliation agreement with its "community partner" should not prohibit applying agency principles in seeking compensation from the hospital.

B. The Care Provided by NMH to Christina Yarbrough Was Not "Free"

NMH and its *amici* claim that *Gilbert* cannot apply because the care provided was "free" and thus lacking the "economic motive" required by *Gilbert.* NMH and its amici cite *no authority* for their theory that the application of the apparent agency doctrine requires a showing of direct economic benefit by the principal from the patient. The duty of Illinois hospitals to provide safe care does not hinge on a showing of economic interest or collection of a fee. If this were the case, any healthcare provider aware that a potential apparent agent had committed malpractice could simply choose not to send a bill or refuse to compensate its agent for the care provided to avoid liability. This would create a gaping hole in the apparent agency doctrine based on the "economic impetus" principle invented by the IADTC *amici. Gilbert* focuses on the appearance of authority from the perspective of the patient. No prong of the test requires a showing of a derived economic interest. The "principle" underlying *Gilbert* is equitable estoppel; not economic gain. When a principal creates the appearance of authority he cannot deny the agency to the prejudice of an innocent party who was led to rely upon the appearance of authority. *Gilbert v. Sycamore Municipal. Hosp.,* 156 Ill. 2d 511, 524 (1993) *citing Union Stock Yard & Transit Co. v. Mallory, Son & Zimmerman Co.* (1895).

Regardless, any statement or implication that NMH provided Ms. Yarbrough or her infant with "free care" is not true. The bills in evidence as testified to by the Plaintiff show that NMH charged Ms. Yarbrough a total of $66,000 for their medical treatment and was reimbursed by Medicaid. (S.R 399). As discussed further *supra,* statements by NMH and its *amici* implying that NMH realized no economic benefit from Erie patients like Ms. Yarbrough are also false. NMH and its *amici* realize a triple economic benefit from treating patient like Ms. Yarbrough: 1) third-party reimbursement from the government 2) fulfillment of the "charitable care" quotas for substantial state and federal tax exemptions and 3) the goodwill of the community as recognized by the appellate court.

C. NWH and its Hospital *Amici* Will Not "Retrench" From the Millions of Dollars in Steady Revenue from Medicaid Reimbursement and Substantial Tax Exemptions Derived from Community Partners and their Patients.

NWH and its *amici's* threat to "retrench" from providing care to patients through community partner clinics for fear of liability is an *empty* threat. NMH and its *amici* derive a significant portion of their patient population insured by Medicaid from their affiliations with community partners like Erie. This patient population accounts for a steady flow of patient service revenue from hospital admissions. Per the most recent data published by the Illinois Department of Public Health, 15.33% of all patients admitted to NMH's Gold-Coast location were insured by Medicaid.[12] Per NMH's annual filings, these admissions accounted for 9% of NMH's overall patient service revenue, which totaled approximately $24,724,000 in revenue derived from Medicaid reimbursement.[13] NMH reported that 26,316 patients were admitted to its Gold-Coast location, of which approximately 77% were delivering mothers (vaginal and

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[12] *See* IDPH Report Card, http://www.healthcarereportcard.illinois.gov/hospitals/view/101281

[13] *See* Ernest and Young LLP, Consolidated Financial Statements, Northwestern Memorial HealthCare, https://tinyurl.com/korykf4 at 54-55.

cesarean births) and their newborns (normal newborns and complicated neonates), accounting for approximately 20,279 billable patient admissions (10,074 mothers and 10,202 newborns).[14] The statistics are similarly staggering for NMH's hospital *amici*. In 2015 the U of C reported that 33.4% of its hospital inpatients were insured by Medicaid.[15] Revenue derived from Medicaid insured patients accounted for 19% of the center's total revenue and totaled approximately $28,500,000.[16] In 2015, a reported 22.89% of all patients admitted to Rush were insured by Medicaid.[17] According to Rush's 2015 financial statement, the total revenue realized from Medicaid was $48,949,000.00 representing approximately 5% of net patient service revenue.[18]

In addition to providing a steady revenue stream discussed above, Medicaid patients funneled to hospitals from their "community partners" provide a second substantial economic benefit: *tax exemptions, including complete exemption from state property tax for numerous land parcels.* Following this Court's decision in *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 377 (2010) the General Assembly "working with the Illinois hospital community" amended the Illinois Tax Code by enacting 35 ILCS 200/15-86 entitled *"Exemptions related to access to hospital and health care services by low-income and underserved individuals."* Pursuant to the Code, if

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[14] *See* IDPH Report Card, http://www.healthcarereportcard.illinois.gov/hospitals/view/101281

[15] *See* IDPH Report Card, http://www.healthcarereportcard.illinois.gov/hospitals/view/101195

[16] *See* PWC, The University of Chicago Medical Center Financial Statements 2015-2016, http://www.uchospitals.edu/pdf/uch_046195.pdf at 11, 30. The figure is derived by subtracting reported Medicaid payments from Medicaid provider tax.

[17] *See* IPDH Report Card,http://www.healthcarereportcard.illinois.gov/hospitals/view/101213

[18] *See* Rush University Medical Center Obligated Group Consolidated Financial Statement 2015-2014 at 14-15 https://www.rushu.rush.edu/sites/default/files/Research/a-133-report-2015.pdf

the value of charitable services or activities listed in subsection (e) for the hospital year equals or exceeds the relevant hospital entity's estimated property tax liability, as determined under subsection (g), for the year for which exemption is sought, a hospital satisfies the conditions for complete property tax exemption. 35 ILCS 200/15-86 (c). Subsection (e) of the amended code provides numerous ways in which NMH and its *amici* can claim their affiliation with and their treatment of Medicaid patients from community partners to satisfy this equation. For example, NMH can claim the value of its employees' services at Erie [§15-86 (e)(2)], the value of training residents or other employees rotating at Erie [§15-86 (e)(6)], the full amount of monetary support it provides Erie [§15-86 (e)(2)], and the amount it is reimbursed by Medicaid for services provided to patients from Erie, such as Ms. Yarbrough and all the women from Erie that deliver at NMH. §15-86 (e)(4). Simply put, NMH and its *amici's* exclusive affiliations with their "community partners" and their treatment of Medicaid patients at and from these clinics is necessary for these hospitals to claim substantial property tax exemptions. As such, the goodwill and publicity gained from these affiliations is, in effect, subsidized by the Illinois taxpayer. According to *An Analysis of the Tax Exemptions Granted to Non-Profit Hospitals in Chicago and the Metro Area and Charity Care Provided in Return*, published by the CTBA in 2009,[19] the estimated value of the property tax exemptions claimed by NMH and its studied *amici,* reflected in Chart 3, totaled $198, 402, 090.00.[20] This figure is higher when estimates for non-studied *amici,* such as Presence Health, are added to the total. Based on an analysis of

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[19] *See* Plaintiffs-Appellees R.A. 19-29, also available at http://www.ctbaonline.org/reports/update-analysis-tax-exemptions-granted-cook-county-non-profit-hospitals-and-charity-care

[20] Based on a county assessor search (see http://cookviewer1.cookcountyil.gov/jsviewer/) NMH alone applies for tax exemptions for numerous land parcels in Cook County- Parcel PINS 17-10-200-089, 17-10-200-058, 17-10-200-040, 17-10-200-018, 17-10-202-100, 17-10-202-099, 17-10-202-091, 17-10-202-092, 17-10-202-093, 17-10-202-095, 17-101-202-096, 17-101-202-097.

exemption applications, the CTBA concluded that this annual tax break was worth nearly three times the cost of "charity care" provided. The local property tax exemption was the most valuable tax benefit conferred on hospitals and totaled 89% of the value of the tax subsidies granted by the state government. Given the substantial value of the property tax exemptions, it is disingenuous to frame the question before this Court as a "Hobson's choice." Unless these entities are prepared to forfeit millions of dollars in estimated property tax exemptions, NMH and its *amici* will continue to provide services to community partners and Medicaid patients from those clinics and reaping the benefits.

D. Granting Hospitals Immunity for Care Provided at Community Partner Clinics Would Disproportionately Impact Lower Income Individuals Relying on Medicaid and/or Medicare.

Lastly, since medical negligence does not discriminate based on socioeconomic status, neither should the available recourse for its harms and burdens. A majority of patients seeking care at community partners like Erie are lower income individuals insured through Medicaid. In Illinois, adults ages 19 - 64 with incomes under 133% of the poverty level are eligible for Medicaid. However, studies comparing legal claims filed by Medicaid versus those filed by non-Medicaid patients found no difference in the incidence of claims between the two. [21]

NMH and its *amici* are asking this Court to recognize an exception to the longstanding principles of apparent agency for liability for care provided at community clinics regardless of a patient's perception. If allowed, this exception would largely punish a population of patients that seek complete care from large health care systems through "community partners" that accept Medicaid. By its very nature, any such exception would disproportionately impact

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[21] *See* McClellan, White and Jimenez, *Do Poor People Sue Doctors More Frequently?* Clin Orthop Relat Res (2012) 470:1393-1397, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3314751/pdf/11999_2012_Article_2254.pdf

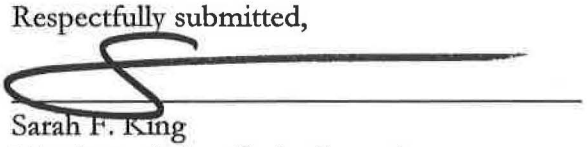
lower income patients, further widening the gap between the rich and the poor. Moreover, this type of exception would increase the burden on Illinois taxpayers to pay for necessary medical care to treat injuries caused by the medical negligence of a healthcare system's "independent contractor."

Patients covered by Medicaid/Medicare rely upon community partners that accept their government-funded health insurance and are affiliated with institutions that provide complete hospital care. They are persuaded by marketing campaigns and digital media to take comfort in the fact that their care will be provided as part of a reputable healthcare system they can count on for complete care going forward. Why should NMH be exempt from the longstanding principles of apparent agency for the provision of care to a patient paying with Medicaid at one of its advertised community partners? The longstanding principles of apparent agency and *Gilbert* are not limited to certain classes of facilities or individuals. The principle of the hospital's duty to provide safe care applies to all.

II. CONCLUSION

This *amicus curiae*, the Illinois Trial Lawyers Association, respectfully requests that this Court affirm the decision of the appellate court and answer the certified question in the affirmative.

Respectfully submitted,



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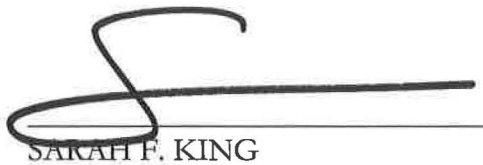
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief is 10 pages, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of filing, and the certificate of service.



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Defendant.	)	

The undersigned, being first duly sworn, deposes and states that he filed the original and 19 copies of the *Amicus Curiae* Brief of the Illinois Trial Lawyers Association in Support of Plaintiffs-Appellees with the above court via Federal Express and that he also served 3 copies of the Brief in the above entitled cause by depositing the same in the United States Mail at Chicago, Illinois on the 2nd day of June, 2017 properly stamped and addressed to:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Ross Fletcher