No. 121367

IN THE
SUPREME COURT OF ILLINOIS

CHRISTINA YARBROUGH and DAVID GOODPASTER, on behalf of HALEY JOE GOODPASTER, a minor,	)	Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, No, 1-14-1585,
Plaintiffs-Appellees,	)	
v.	)	
NORTHWESTERN MEMORIAL HOSPITAL,	)	There Heard on Application for Leave to Appeal from an Order of the Circuit Court of Cook County, County Department, Law Division, No. 2010 L 296;
Defendant-Appellant,	)	
and	)	
NORTHWESTERN MEDICAL FACULTY FOUNDATION,	)	The Honorable WILLIAM E. GOMOLINSKI, Judge Presiding.
Defendant.	)	

BRIEF OF DEFENDANT-APPELLANT NORTHWESTERN MEMORIAL HOSPITAL

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

This interlocutory appeal arises out of a medical negligence claim brought by Plaintiffs Christina Yarbrough and David Goodpaster on behalf of their daughter, Hayley Joe Goodpaster. While pregnant with Hayley, Ms. Yarbrough treated at Erie Family Health Center, an independent, federally-run clinic. Ms. Yarbrough alleges that her Erie treaters failed to properly diagnose her with a bicornuate uterus, a physical abnormality which Ms. Yarbrough contends led her to prematurely deliver Hayley.

Neither Erie nor any Erie-based treaters are defendants in this case. Rather, Ms. Yarbrough alleges that Northwestern Memorial Hospital (NMH), the hospital at which her Erie treaters told her she would likely deliver, should be vicariously liable for actions taken by her Erie-employed obstetrical treaters at one of Erie's facilities. NMH moved for summary judgment, reasoning that because Ms. Yarbrough was not an NMH patient at the time of the alleged malpractice, the public policy this Court articulated in *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (1993), under which a hospital may be liable to a hospital patient for the acts of independent contractor physicians, is not applicable here. NHM also explained that no reasonable person could conclude that Erie's employees were NMH agents, that no one held Erie's employees out as NMH's agents, and that Ms. Yarbrough did not justifiably rely on any holding out. The circuit court denied NMH's motion but certified a question for appeal under Supreme Court Rule 308.

The appellate court initially refused to review the certified question, but on this Court's order, allowed NMH's petition for review. The appellate court then answered the certified question in the affirmative, substantively affirming the circuit court. This appeal followed.

ISSUE PRESENTED

Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (Ill. 1993), and its progeny for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation?

STATEMENT OF FACTS

I. Background.

This medical negligence case arises out of prenatal care given to Christina Yarbrough in 2005-2006. (SR 379).[1] At the time, Ms. Yarbrough was a resident of Chicago. (SR 379). During November, 2005, Ms. Yarbrough took a home pregnancy test which indicated that she might be pregnant. (SR 381). Because Ms. Yarbrough did not have health insurance, she searched online for a free health clinic and found Erie Family Health Center, a facility near her home. (SR 44, 381).

A. Erie Family Health Center and NMH.

Erie is an independent, Chicago-based, federally-qualified community health center (FQHC) which operates as a public charity. (SR 137-38, 140, 154, 172). It was founded in 1957 as a free clinic serving the West Town neighborhood of Chicago. (SR 148, 154). At the time, the clinic was a project coordinated by volunteer physicians affiliated with NMH and the Erie Neighborhood House, a community center in West Town. (SR 148, 154).[2] Since

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[1] Documents attached to the supporting record filed with NMH's application for leave to appeal are identified as (SR ___). Documents included in the appendix are identified as (A. ___).

[2] The appellate court mistakenly described Erie as "a project between NMH and Erie Neighborhood House." *Yarbrough v. Northwestern Mem. Hosp.*, 2016 IL App (1st) 141585, ¶9. Although the volunteer physicians who founded Erie were *affiliated* with NMH, Erie was not *founded* by NMH. (SR 154).

that time, it has grown to a federally-funded community health center with 13 different locations, providing primary health care, case management, and dental services to more than 80,000 patients per year. (SR 130, 148).[3] In 2006 - the time relevant to the Plaintiffs' claims - Erie's operating budget totaled approximately $25 million. (SR 138). Of that, approximately 60 percent came from patient revenue, most of which was paid by Medicaid. (SR 138). Another $3-$4 million came from a grant through the federal Health Resource Service Administration. (SR 138). The remainder of the budget came from private contributions. (SR 138).

Erie has its own management structure, budget, board of directors, staff, physicians, and facility. (SR 130, 133-34, 138, 154). As a federally-funded public charity, Erie must follow strict federal guidelines related to its operations. (SR 130). In 2006 the Board included between 20-25 individuals, the majority of whom were Erie patients - members of the communities which Erie serves. (SR 130, 138). The Board met monthly and Board members were vocal and independent, often raising community-based questions and concerns to both other Board members and to Erie's management. (SR 138). All Board members were required to sign conflict of interest statements and to act in Erie's fiduciary interests. (SR 139).

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[3] The depositions included in the supporting record were taken in 2012. Since that time, Erie has expanded its network to include 13 community-based charity clinics serving approximately 70,000 medical patients and 12,000 dental patients. <https://www.eriefamilyhealth.org/about-erie/> (visited Feb. 28, 2017).

Erie has collaborative community service relationships with many area hospitals, healthcare providers, and area organizations, including, among others, NMH, the University of Illinois, the Scholl College of Podiatric Medicine, Norwegian American Hospital, Stroger Hospital, the University of Chicago Pritzker School of Medicine, the Albany Health Coalition, the Greater Humboldt Park Community of Wellness, Chicago Public Schools, and Lurie Children's Hospital. (SR 139-40, 149, 153, 172). Erie patients requiring services not available at Erie are eligible to receive care through various community hospitals. (SR 149). These area organizations support Erie "in the spirit of being good citizens." (SR 153).

NMH is a Chicago-based hospital and a subsidiary of Northwestern Memorial HealthCare (now known as Northwestern Medicine). (SR 171). It is active in community service and works with many different organizations to help coordinate access to health care for disadvantaged members of the community. (SR 145, 172). To that end, NMH works with numerous community organizations and federally funded clinics, including Near North Health Services Corporation - like Erie, a federally qualified health clinic with which NMH has a long-standing relationship - and the James and Catherine Denny Primary Care and Preventative Medicine Center at the Lawson House YMCA. (SR 147, 153, 172). NMH also works with the Northwestern Medical Faculty Foundation (NMFF) which, among other things, runs a charity obstetrical clinic at NMH. (SR 92, 196). NMH makes charitable contributions to many community

organizations, Erie included. (SR 153). As NMH's director of community service, Dr. Daniel Derman, noted, "we're just good community members and we try to support other people that are doing good in the community." (SR 153).

In the spirit of that commitment to community service, on April 15, 1998, Erie and NMH's parent company signed an "Affiliation Agreement." (SR 175-76). The agreement "provide[d] clarity and continuity to the historical relationship" between Erie and NMH, and stated that NMH would accept Erie referrals and would provide Erie patients with care, regardless of the patient's ability to pay. (SR 175-76). Erie-employed physicians seeking privileges to practice at NMH would be required to apply for them, as would any other non-Erie-affiliated physician. (SR 176-77). An NMH representative would serve on Erie's Board "as requested by the [Erie] Board Chair." (SR 176). The agreement also provided that the entities could engage in joint marketing efforts and could publicize the existence of the agreement "with the prior consent of the other Party." (SR 177-78). NMH and Erie emphasized that the agreement did not create any agency relationship between them:

> The parties expressly acknowledge that nothing in this Affiliation Agreement is intended nor shall be construed to create an employee/employer, a joint venture or partnership relationship between NMC and [Erie]. The parties shall be entities entering into this Affiliation Agreement with each other hereunder solely for effecting the provisions of this Affiliation Agreement.

(SR 178).

During the time at issue, NMH did not employ Erie's staff, physicians, or midwives. (SR 154, 197). Relatedly, physicians at Erie did not advise patients that they worked for NMH (they did not) and did not suggest to patients that NMH and Erie were the same entity (they were not). (SR 197-98). Erie has never been owned or operated by NMH. (SR 155). There is no legal partnership between NMH and Erie. (SR 134). There have been no joint marketing efforts between NMH and Erie. (SR 127-28, 172). NMH does not represent to the public that Erie is NMH's actual agent, and does not represent to patients that Erie is an NMH facility. (SR 154). Erie does not, and is not allowed to, represent to patients that it is an agent of NMH or that Erie is NMH's "outlying clinic." (SR 154). If NMH learned that Erie was making those representations, NMH would intervene; if Erie sought permission to make those representations, NMH would deny that permission. (SR 154).

Some physicians at Erie had - and continue to have - medical privileges at NMH. (SR 148, 197). Those staff privileges are the same as the privileges extended to any independent, non-employed physician of NMH. (SR 148). For any physician to obtain medical staff membership and privileges at NMH, that physician must seek privileges at Northwestern University's Feinberg School of Medicine. (SR 151). Once those privileges are allowed, a physician must apply for staff privileges at NMH, a process which includes vetting by the medical staff office and the credentials committee, and a vote by the medical executive committee. (SR 151).

NMH's parent company compiles an annual community service report highlighting its community activities and advancements. (SR 171). In 2005, that community service report referred to a "partnership" with Erie and their "collaborative relationship to provide medical services." (SR 206). In 2006, the community service report noted that 11.2 percent of all babies delivered at NMH received prenatal care at Erie. (SR 168). During late 2011, NMH's website referenced its relationships with many different community organizations, including Erie. (SR 207; *see* SR 154). Similarly, Erie's website referred to its relationships with many different area health providers and hospitals, including NMH. (SR 207; *see* SR 154).

B. Facts Related to This Incident.

On November 15, 2005, Ms. Yarbrough presented to the Erie facility closest to her home: 1701 West Superior Avenue. (SR 44). She confirmed that she was approximately five weeks' pregnant and spoke with an Erie staff member – Ms. Yarbrough does not recall who – about her prenatal plans. (SR 44-45). The unidentified Erie staff member helped Ms. Yarbrough begin the Medicaid enrollment process and scheduled a follow-up appointment. (SR 45).

Ms. Yarbrough asked where she would deliver; the unidentified Erie staff member advised Ms. Yarbrough that she would have ultrasounds and would "most likely deliver" at NMH. (SR 45). According to Ms. Yarbrough, that statement – and that statement, alone – led her to conclude that Erie and NMH

were the same entity. (SR 46). She would have drawn the same inference of affiliation based on the delivery privileges held by any obstetrician:

> Q: So that if you had gone to Dr. Smith whose office was on Michigan Avenue and you were told you would most likely deliver at Northwestern, would you have drawn the inference that Dr. Smith's practice and Northwestern were actually the same entity?
>
> A: Yes.

(SR 46). No one affiliated with Erie said or suggested that Erie and NMH were the same entity; rather, Ms. Yarbrough was "under the impression" that they were. (SR 46). Before leaving, Ms. Yarbrough received written materials about Erie and its capabilities, and about birthing and delivery classes and hospital tours at NMH. (SR 45, 420, 480).

Ms. Yarbrough did not treat at Erie because of any desire to deliver exclusively at NMH. (*See* SR 71). She had no specific preference for any particular hospital - any "good" hospital would have been acceptable to her. (SR 71). Ms. Yarbrough explained:

> Q: Did you have any particular knowledge of Northwestern Memorial Hospital?
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> A: I was under the impression that they were a very good hospital, very big, very well-known in the city.
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> Q: And I assume that if you had been living on the south side and you had gone to a physician's office and they said, you know, we are likely to deliver you at Christ Hospital, you would have been happy about that as well?
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> A: Yes.

Q: Okay. So, you know, any good hospital would sound good to you?

A: Yes.

(SR 71).

On November 30, 2005, Ms. Yarbrough experienced vaginal bleeding and presented to the emergency room of what is now Advocate Illinois Masonic Medical Center. (SR 47). After an abdominal ultrasound, the emergency room physician advised Ms. Yarbrough that she had a bicornuate uterus. (SR 48). She returned to Erie on December 2, 2005, where she met with two Erie employees, Certified Nurse Midwife Elizabeth McKelvey and Dr. Raymond Suarez, M.D. (SR 50). Ms. Yarbrough underwent another abdominal ultrasound and was told that she did not have a bicornuate uterus. (SR 50).

Several months later, Erie referred Ms. Yarbrough to NMH for a 20-week ultrasound on February 21, 2006. (SR 53-55). That ultrasound was subsequently interpreted by William Grobman, M.D., a perinatologist employed by Defendant Northwestern Medical Faculty Foundation (NMFF). (SR 92-93). On April 8, 2006, Ms. Yarbrough prematurely delivered her daughter, Hayley Joe Goodpaster, at NMH, via emergency cesarean section. (SR 336). Ms. Yarbrough's labor and delivery admission is not at issue in this litigation.

II. This Litigation.

A. The Plaintiffs' Initial Complaint and Related Motion Practice.

On December 28, 2009, the Plaintiffs filed a two-count medical negligence complaint against NMH and NMFF. (SR 1-15). Count I of the complaint was directed at NMFF and is not at issue here. (*See* SR 5-7). Only those allegations in Count II which are relevant to the Plaintiffs' claims against NMH are discussed below.[4]

Neither Erie nor any of the individual Erie-employed treaters involved in Ms. Yarbrough's care were named as defendants. (SR 2-7). Rather, the Plaintiffs identified Erie as NMH's "outlying prenatal clinic" and alleged that Erie's employees were the actual or apparent agents of NMH. (SR 2, 3, 7). The Plaintiffs maintained that Ms. Yarbrough's Erie treaters negligently failed to identify and address issues related to Ms. Yarbrough's shortened cervix and bicornuate uterus, causing Ms. Yarbrough to deliver Hayley at twenty-six weeks gestation. (SR 4). The Plaintiffs maintain that Hayley suffered a number of medical complications related to her prematurity. (SR 8-9).

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[4] Count I of the Plaintiffs' First Amended Complaint sounds in negligence against NMFF and concerns Dr. Grobman's interpretation of Ms. Yarbrough's February 21, 2006 ultrasound. (SR 431-33). In Count II of Plaintiffs' First Amended Complaint, the Plaintiffs allege medical negligence against NMH based on the apparent agency of Ms. Yarbrough's Erie-based treaters and Dr. Grobman. (SR 433-36). All of the claims related to Dr. Grobman remain pending in the circuit court. They are not at issue, and are not discussed, in this appeal.

NMH moved for summary judgment on all agency claims arising out of Erie-based care, explaining that there existed no actual or apparent agency relationship between Erie and NMH. (SR 29-202). After briefing and argument, the circuit court agreed with NMH and granted it summary judgment related to all Erie-based care. (SR 324). The circuit court observed that Ms. Yarbrough "just says she relied upon the Erie clinic and the nurse midwife in the representations that she would be delivering at Northwestern as evidence of the agency. And the question that I had and I continue to have on some of these issues is this, is that how would a hospital ever protect itself from an apparent agency claim when in fact the person doesn't seek treatment from the hospital or is getting treatment from the clinic?" (SR 455). Allowing the Plaintiffs to proceed to trial, the circuit court noted, would impermissibly expand the scope of agency law in Illinois, and could create an impossible burden on all hospitals. (SR 456, 459). The circuit court explained:

> I have to say, this is an unduly burdensome provision to have every place that you treat, wherever your treating physicians are then employed – not employed but have staff privileges at hospitals, then to say, by the way, our doctors are not employed but have staff privileges at hospitals, then to say, by the way, our doctors are not actual or apparent agents or employees of Northwestern, of Loyola, of Rush, of whatever the hospital is? . . . And you would have to sign them off. Because otherwise, under *Gilbert*, absent that disclaimer, they're all these apparent agents no matter what, even though they're separate entities and corporations.

(SR 460-61).

However, the circuit court allowed the Plaintiffs to file an amended complaint to attempt to address the deficiencies in the complaint. (SR 462).

B. The Amended Complaint and Related Motion Practice.

The Plaintiffs proceeded to file their amended two-count complaint. (SR 326-41). Count II, against NMH, alleged medical negligence based on apparent (but not actual) agency. The Plaintiffs identified four specific Erie employees - Raymond Suarez, M.D.; Virgil Reid, M.D.; Janet Ferguson, CNM; and Elizabeth McKelvey, CNM - whose care is at issue. (SR 328). The Plaintiffs added: "Based on the representations of the Defendant, Plaintiffs reasonably concluded that an agency relationship existed between the Defendant . . . and the apparent agents, employees, or servants of Erie including Suarez, Reid, Ferguson, and McKelvey." (SR 328, 339-40). The Plaintiffs also alleged that the Affiliation Agreement, NMH's parent company's annual community service reports, and NMH's website established a "relationship" between Erie and NMH. (SR 329-34).

Plaintiffs did not point to any action taken by NMH which led Ms. Yarbrough to conclude that Erie's employees were NMH's agents. Rather, they maintained the following:

> Upon learning that she was pregnant, healthcare workers at Erie inquired as to where Ms. Yarbrough would be receiving pre-natal care. She was advised that if she obtained her pre-natal care from healthcare workers at Erie, Ms. Yarbrough was advised that she would deliver her child at NMH and would receive additional testing and care at NMH, including but not limited to ultra sounds. In addition, Ms. Yarbrough was given pamphlet, flyers and information regarding scheduling tours of the NMH birthing/delivery section, having the car seat checked at NMH and attending birthing/Lamaze classes at NMH.

> Based upon Ms. Yarbrough's knowledge of the reputation of NMH and the information she was provided by healthcare workers at Erie, Ms. Yarbrough believed that if she received her pre-natal care at Erie, she would be receiving treatment from NMH healthcare workers. Ms. Yarbrough was never told that the healthcare workers at Erie were not the agents or employees of NMH.

(SR 334).

NMH moved for partial summary judgment on all claims related to care and treatment provided by Erie and Erie employees. (SR 368-471). NMH explained that the Plaintiffs' claims did not meet any of the apparent agency requirements articulated in *Gilbert*, 156 Ill. 2d 511. (SR 375). NMH added that the Plaintiffs failed to identify any holding out by either NMH or Erie; and could not identify any justifiable reliance by Ms. Yarbrough. (SR 374-77).

The circuit court, after further briefing and argument, denied NMH's motion for summary judgment. (SR 494). The circuit court expressed concern that, based on the First District's opinion in *Spiegelman v. Victory Mem. Hosp.*, 392 Ill. App. 3d 826 (1st Dist. 2009), the pamphlets about delivering at NMH (which Ms. Yarborough was given on her first visit to Erie); and the community service, annual reports, and the Affiliation Agreement (which Ms. Yarbrough never saw), may have been enough to create a question of fact as to whether a reasonable person would have concluded that there existed an agency relationship between the two entities. (SR 516). The circuit court also expressed concerns about the ramifications of its ruling, recognizing that it could potentially create an apparent agency claim against any hospital for actions taken by any physician with staff

privileges. (*See* SR 520). As the circuit court rhetorically asked, "So how [does NMH] defend that when it's - your sole case is this apparent authority based upon these employees of a different corporation?" (SR 604).

C. Proceedings Before the Appellate Court.

Because of the novelty of the issue, the circuit court *sua sponte* issued its own certified question for immediate review. (SR 536). Initially, the First District denied NMH's application for leave to appeal. This Court directed the First District to accept the application, and briefing followed.

On August 19, 2016, the First District answered the certified question in the affirmative. (A. 1-16). The First District acknowledged that Erie and NMH are separate, independently owned- and -operated facilities. (A. 4). The First District also discussed the public policy this Court addressed in *Gilbert*: that hospitals holding themselves out as full-care facilities cannot shield themselves from liability by hiring independent contractor physicians. (A. 8-9).

NMH had reasoned that, in this case, the public policy concerns discussed in *Gilbert* were not applicable, because the treatment at issue occurred not at the hospital or a hospital-owned facility, but at a separate, independently-owned and -operated clinic, through treaters employed by that separate, independently-owned and -operated clinic. (A. 9-11). The First District, citing *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720 (1997), rejected NMH's argument, finding it irrelevant whether the negligent conduct occurred "in the emergency room or some other area within the four walls of the hospital." (A. 10). The First District

emphasized that the "key determinant for recovery under *Gilbert* is whether the plaintiff can show that the hospital's conduct led [the plaintiff] to rely upon [the hospital] for treatment, rather than on any particular physician." (A. 10) (internal quotations omitted, brackets as in original).

The First District also found that, based on the facts of this case, there exist questions of fact as to whether NMH held Erie out as NMH's agent, whether Erie held itself out as an agent of NMH, and whether Ms. Yarbrough reasonably relied on any holding out. (A. 13-16). The First District found that NMH holds itself out as a full service hospital, and promotes itself "as a community-oriented hospital that collaborates with neighborhood centers, including Erie, to make quality health care available to those in need." (A. 13). The First District added: "[I]n holding itself out as a close partner with Erie to provide specialized and acute care to a targeted population, NMH attempted not only to be a good citizen of the community but also to attract patients." (A. 14). Because NMH has that relationship with Erie and has publicized that relationship with Erie, the First District found, NMH led individuals to conclude that Erie's employees were NMH's agents. (A. 13-14).

As for reasonable reliance, the First District found that "[Ms.] Yarbrough indicated that her decision to utilize Erie for prenatal treatment was not based on her desire to receive treatment from a particular doctor at Erie or Erie itself, but was instead based on her expressed preference for a particular hospital, *i.e.*, NMH, which she deemed to be a 'very good' hospital." (A. 15). That, the First

District concluded, was analogous to this Court's decision in *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147 (2006): "[Ms.] Yarbrough did not have a preexisting relationship with Erie or any physician at Erie. She decided to receive prenatal treatment at Erie only after she was informed of its relationship with NMH, which she believed to be a very good hospital, similar to the plaintiff in *York*." (A. 15-16).

NMH appeals.

ARGUMENT

Christina Yarbrough sought pre-natal care at Erie's facility, with Erie-employed doctors, Erie-employed midwives, and Erie-employed staff. She now alleges that those Erie-employed treaters were negligent. But, she has not sued Erie or its employees. Instead, the Plaintiffs allege that under the doctrine of apparent agency, NMH - and NMH, alone - should be vicariously liable for treatment given by Erie employees at Erie's facility. Those facts gave rise to the certified question which asks whether, based on *Gilbert*, 156 Ill. 2d 511, a hospital can be liable under the doctrine of apparent agency "for the acts of the employees of an unrelated, independent clinic[.]" The answer must be no. The scope of apparent agency under Illinois law is not so expansive.

I. Standard of Review

The narrow issue before this Court concerns a question of law certified by the circuit court. *See Thompson v. Gordon*, 221 Ill. 2d 414, 426 1238 (2006). As such, this Court's review is *de novo*. *Id.*; *see also Wilson v. Edward Hosp.*, 2012 IL 112898, ¶8; *In re M.D.D.*, 213 Ill. 2d 105, 113 (2004). This Court need not evaluate the propriety of the underlying order in answering the certified question at issue. *United General Title Ins. Co. v. AmeriTitle, Inc.*, 365 Ill. App. 3d 142, 147 (1st Dist. 2006).

II. A Hospital Cannot Be Liable Under the Doctrine of Apparent Agency For the Acts of the Employees of an Unrelated, Independent Clinic.

A. In *Gilbert*, 156 Ill. 2d 511, This Court Determined That, For Policy Reasons, Apparent Agency Applies In Medical Negligence Cases.

As a general rule, a principal is not vicariously liable for the actions of an independent contractor. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). However, Illinois courts have long recognized the doctrine of apparent authority as an exception to that general rule, one through which "a principal will be bound not only by the authority that it *actually* gives to another, but also by the authority that it *appears* to give." *Id.* (emphasis added). The policy is "rooted in the doctrine of equitable estoppel and is based upon the idea that 'if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party reasonably relies on the apparent agency and is harmed as a result.'" *Oliveria-Brooks v. Re/Max Int'l*, 372 Ill. App. 3d 127, 137 (1st Dist. 2007) (internal citation omitted); *see also* 2A C.J.S. Agency §8 (explaining that apparent agency is premised on estoppel, "that is, a representation by the principal causing justifiable reliance and resulting harm").

Before *Gilbert*, Illinois courts were divided as to whether the doctrine of apparent agency applied in medical negligence cases - specifically, whether hospitals could be vicariously liable for the alleged negligence of independent contractor physicians. *Gilbert*, 156 Ill. 2d at 519; *see also Lamb-Rosenfeldt v. Burke Med. Group, Ltd.*, 2012 IL App (1st) 101558, ¶24. By 1993, both that split, and the idea that the doctrine did not apply, became untenable. "Modern hospitals," this

Court observed, spent "billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities." *Gilbert*, 156 Ill. 2d at 520. In the meantime, this Court noted, most people were unaware of the private contractual agreements which existed between physicians and hospitals. *Id.* at 521. It would be reasonable for members of the public to assume that physicians working at those modern hospitals were, in fact, employees of those hospitals. *Id.* at 521.

With those competing interests between the hospital care industry and expectations of the public in mind, this Court determined that, as a policy matter, apparent agency applied in certain medical negligence cases. *Id.* at 524; *see York*, 222 Ill. 2d at 207 (observing that "*Gilbert* represents a divergence from the general rule that no vicarious liability exists for the actions of independent contractors"). This Court explained:

> The realities of modern hospital care raise a serious question regarding the responsibility of a hospital when a physician who is an independent contractor renders negligent health care. Can a hospital always escape liability for the rendering of negligent health care because the person rendering the care was an independent contractor, regardless of how the hospital holds itself out to the public, regardless of how the treating physician held himself out to the public with the knowledge of the hospital, and regardless of the perception created in the mind of the public? We agree . . . that a hospital cannot always escape liability in such a case.
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> * * *
>
> Consistent with this concept of the modern-day hospital facilities, a patient who is unaware that the person providing treatment is not the employee or agent of the hospital should have a right to look to

> the hospital in seeking compensation for any negligence in providing emergency room care. The fact that, unbeknownst to the patient, the physician was an independent contractor should not prohibit a patient from seeking compensation from the hospital which offers emergency room care. We join the many courts that have reached this conclusion. We stress that liability attaches to the hospital only where the treating physician is the apparent or ostensible agent of the hospital. If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable.

Gilbert, 156 Ill. 2d at 521-22 (internal quotations and citations omitted).

The policy is not without limits. On the contrary, this Court carefully delineated the circumstances in which apparent agency could be considered in medical negligence cases: "under the doctrine of apparent authority, a hospital can be held vicariously liable for the negligent acts of a physician *providing care at the hospital*, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician is an independent contractor." *Gilbert*, 156 Ill. 2d at 524 (emphasis added). This Court reiterated both that policy and the reasoning behind it a decade ago, in *York*, 222 Ill. 2d 147:

> Generally, it is the hospital, and not the patient, which exercises control not only over the provision of necessary support services, but also over the personnel assigned to provide those services to the patient during the patient's hospital stay. To the extent the patient reasonably relies upon the hospital to provide such services, a patient may seek to hold the hospital vicariously liable under the apparent agency doctrine for the negligence of personnel performing such services even if they are not employed by the hospital.

222 Ill. 2d at 194-95. It is through that policy lens that the facts in this case must be viewed.

B. The Policy Identified In *Gilbert* Is Limited to Cases In Which the Treatment At Issue Occurred At the Hospital Or a Hospital-Owned Facility.

In the 24 years since this Court announced its public policy decision in *Gilbert*, apparent agency claims in medical negligence cases have typically followed a straightforward formula: a plaintiff sues a hospital for the acts of an independent contractor physician treating a patient at that hospital. *See, e.g., York*, 222 Ill. 2d 147 (concerning the actions of an independent contractor anesthesiologist treating a patient at Rush-Presbyterian-St. Luke's Medical Center); *Mizyed v. Palos Comm. Hosp.*, 2016 IL App (1st) 142790 (concerning care rendered by an independent contractor cardiologist treating a patient at Palos Community Hospital); *Gore v. Provena Hosp.*, 2015 IL App (3d) 130446 (concerning the actions of an independent contractor emergency room physician treating a patient at Provena Hospital) *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558 (concerning the actions of an independent contractor primary care physician treating a patient at St. James Hospital); *Churkey v. Rustia*, 329 Ill. App. 3d 239 (1st Dist. 2002) (concerning an independent contractor anesthesiologist treating a patient at Sherman Hospital); *Butkiewicz v. Loyola Univ. Med. Ctr.*, 311 Ill. App. 3d 508 (1st Dist. 2000) (concerning the actions of an independent contractor radiologist treating a patient at Christ Hospital).

The issue before this Court is both different and novel. The treatment in this case did not occur "at the hospital." *See Gilbert*, 156 Ill. 2d at 524. Rather, the certified question here concerns whether *Gilbert* can be read so broadly as to include care given, not just at a hospital facility located outside the four walls of the hospital, but to care given at an unrelated, independently owned- and -operated clinic. Research shows only two published opinions discussing an apparent agency claim involving the acts of an independent contractor physician which occurred outside the four walls of a hospital. In one, *Malanowski*, the First District allowed a plaintiff to proceed on a claim against an apparent agent of a hospital for treatment which occurred in a hospital-owned clinic. In the other, *Robers v. Condell Med. Ctr.*, 344 Ill. App. 3d 1095 (2nd Dist. 2003), the Second District affirmed summary judgment against a plaintiff who sued an independent physician for treatment which occurred in that physician's private office space - space leased by the physician from a subsidiary of an area hospital. The facts and circumstances in those cases effectively demonstrate why *Gilbert* should not apply in this case.

In *Malanowski*, the First District clarified that a plaintiff could, if she satisfied the other *Gilbert* elements, potentially seek damages for treatment given by an independent contractor *outside* the four walls of a hospital. 293 Ill. App. 3d at 727. The plaintiff's decedent treated annually with Dr. Reena Jabamoni at the Loyola University Mulcahy Outpatient Center. *Id.* at 722. The plaintiff alleged

that the decedent's physician, Dr. Jabamoni, failed to diagnose the plaintiff's decedent's breast cancer; she ultimately succumbed to the disease. *Id.* at 722.

Loyola owned and operated the outpatient center, which was part of Loyola's medical campus in Maywood, Illinois; and Loyola provided administrative management for the facility. *Id.* at 726, 729-30. The plaintiff's decedent alleged, among other things, that "the outpatient center bore the 'Loyola' name, that the outpatient center held itself out as a direct provider of health care services, that the outpatient center introduced Malanowski to Dr. Jabamoni, that Malanowski was treated by other physicians at the outpatient center, and that payment for services provided by Dr. Jabamoni was made directly to the outpatient center." *Id.* at 728.

Loyola moved to dismiss the plaintiff's claims arguing, among other things, that *Gilbert* was "confined solely to situations involving negligent treatment rendered in a hospital emergency room." *Id.* at 727. The First District found that Loyola was not entitled to dismissal and specifically ruled that *Gilbert* applied to the facts of the case, explaining:

> [W]e briefly comment on Loyola's contention that the applicability of the *Gilbert* case is confined solely to situations involving negligent treatment rendered in a hospital emergency room. While the particular facts and circumstances present in *Gilbert* necessarily limited the court's analysis to medical negligence arising in an emergency room setting, we discern nothing in the *Gilbert* opinion which would bar a plaintiff, who could otherwise satisfy the elements for a claim based on apparent agency, from recovering against a hospital merely because the negligent conduct of the physician did not occur in the emergency room or some other area within the four walls of the hospital. If, as plaintiff maintains,

> Loyola's conduct reasonably led Malanowski to rely upon "Loyola" for treatment, rather than on any particular physician, then plaintiff should be allowed recovery for damages caused thereby.

Id. at 727.

That ruling is consistent with this Court's logic in *Gilbert*. In *Gilbert*, this Court declared that, as a public policy matter, "where the principal creates the appearance of authority, the principal will not be heard to deny the agency to the prejudice of an innocent party, who has been led to rely upon the appearance of authority in the agent." *Gilbert*, 156 Ill. 2d at 523 (internal quotations omitted). In *Malanowski*, even though the plaintiff's decedent did not treat inside the four walls of Loyola University Hospital, it was reasonable for the plaintiff's decedent to conclude that she was treating *at* Loyola. *See Malanowski*, 293 Ill. App. 3d at 728. Loyola owned and operated the outpatient center on its medical campus, put Loyola's name on the door, held itself out as a provider of medical services, and required patients to pay it, directly. *Malanowski*, 293 Ill. App. 3d at 727. Therefore, Loyola gave the appearance that the facility at which plaintiff's decedent treated was, in fact, a Loyola facility, regardless of whether it was located inside the hospital. *Id.* at 727. In short, Loyola was not allowed to deny agency, simply because the treatment occurred outside of the four walls of its hospital. Although the location of the treatment (outside the hospital) differed from other cases applying *Gilbert*, the context remained consistent: a patent seeking treatment from a specific hospital, who reasonably relied on the hospital

to provide those services, could proceed against the hospital under the apparent agency doctrine. *See Malanowski*, 293 Ill. App. 3d at 728.

This case is not *Malanowski*. Ms. Yarbrough did not seek treatment at NMH or at an NMH-owned clinic or outpatient facility. She did not visit Northwestern Memorial Hospital or an urgent care center owned by Northwestern Medicine. There was not a sign on the door at Erie identifying it as "Northwestern" or NMH, or using the same logo, or the same color scheme, or the same signage. No one from NMH referred Ms. Yarbrough to Erie. Rather, Ms. Yarbrough looked for a free charity clinic on the internet, found Erie, and decided to treat there. (SR 44, 381). That distinction – between *Malanowski*, where the plaintiff's decedent treated at a facility owned by, operated by, and branded as the hospital; and this case, which involves treatment occurring at an unrelated medical practitioner's clinic – is critical to understanding the inapplicability of apparent agency in this case.

Rather, this case is akin to *Robers*, 344 Ill. App. 3d 1095. There, the plaintiff filed a medical negligence complaint against his podiatrist, Donald Burdick, and Condell Medical Center, a hospital located in Libertyville, Illinois. *Id.* at 1096. The treatment at issue occurred in Dr. Burdick's private office, located in the Condell Medical Building in Round Lake, Illinois. *Id.* The Condell Medical Building housed both a Condell-owned acute care center and separate, unrelated professional offices. *Id.* Condell Hospital and Condell Medical Building were

each owned by different subsidiaries of the Condell Health Network. *Id.* Dr. Burdick was not a staff physician or employee of Condell Hospital. *Id.*

According to the plaintiff, he elected to treat with Dr. Burdick because the plaintiff saw a "flyer advertising Condell Acute Care Centers." *Id.* The flyer did not mention Dr. Burdick, but noted that "X rays taken at Condell Acute Care Centers would be read by radiologists at Condell Hospital." *Id.* at 1096-97. The plaintiff understood that Dr. Burdick's offices were in the Condell Medical Building and near his chiropractor's office. *Id.* at 1096.

Plaintiff argued that, because Dr. Burdick's office was located in a building with the name "Condell" on it, there existed an issue of fact as to whether Dr. Burdick was Condell's apparent agent. *Id.* at 1098. The Second District disagreed. *Id.* at 1097. The court concluded that no genuine issues of material fact existed "as to whether Dr. Burdick was an apparent agent of Condell" where 'Plaintiff did not see Dr. Burdick at Condell Hospital and Dr. Burdick was not on staff there." *Id.* Indeed, the Second District noted, Dr. Burdick's office "was located miles away from Condell Hospital." *Id.* "The professional office part of the Condell Medical Building was held out as a separate entity from the Acute Care Center. We do not believe that a reasonable person would have believed that Dr. Burdick was an employee or agent of Condell Hospital simply because he leased space in a building that bore the name 'Condell.'" *Id.* at 1098.

The same is true here. Like the plaintiff in *Robers*, Ms. Yarbrough did not seek treatment at NMH or an NMH facility. She sought treatment at an unrelated, independent medical clinic - essentially, as did the plaintiff in *Robers*, at a private physician's office. Yet, the First District here ignored that fundamental distinction, emphasizing instead that nothing in *Gilbert* requires that the allegedly negligent conduct occur "within the four walls of the hospital." *Yarbrough*, 2016 IL App (1st) 141585, ¶40. NMH does not disagree. Depending on the facts, a patient could conceivably articulate an apparent agency claim against a hospital for treatment given at a hospital-owned facility, such as an urgent care center or clinic, provided that the patient *had reason to think she was treating at the hospital or a hospital-owned facility*. That result would be consistent with the public policy underpinning *Gilbert*.

However, is *not* consistent with *Gilbert* to suggest, as did the First District here, that a hospital could be responsible for care given to a plaintiff, where that plaintiff did not even seek treatment at a *hospital facility*. In *Gilbert*, this Court emphasized the unique relationships between patients, physicians, and hospitals, especially in emergency situations, and that it would be unfair to prejudice an innocent party who sought treatment at a specific hospital and reasonably concluded that her independent contractor treater was actually a hospital employee. *Gilbert*, 156 Ill. 2d at 520-21. But, this Court did *not* go so far as to find that *any* relationship between a hospital and a physician (including the conferring of staff privileges) would create the same potential inequity. Nothing

in *Gilbert* suggests that something as basic as granting a private physician staff privileges would create an apparent agency relationship. Nothing in *Gilbert* indicates that a hospital may be liable in apparent agency for supporting independent community healthcare initiatives.

Yet, the First District's opinion would potentially have precisely that effect. It would expand *Gilbert* so far as to potentially create liability in a hospital for *all* acts of *any* physician, simply because that physician enjoys privileges at the hospital. Here, the First District concluded that a hospital can potentially be liable in apparent agency because a prenatal patient is told that she will likely deliver at that hospital. *Yarbrough*, 2016 IL App (1st) 141585, ¶¶61-62. Taken to its logical conclusion, any plaintiff could plausibly argue that she assumed her private physician's office was, in fact, an extension of a hospital at which that physician had privileges to practice. It would not matter that there were no signs or signifiers suggesting that the private office was, somehow, affiliated with that hospital. It would be irrelevant that the private physician's office was neither owned nor operated by the hospital.

Gilbert cannot be interpreted so broadly. The narrow public policy identified by this Court in *Gilbert* would not be served by such a sweeping holding. The First District's opinion should be reversed, and the certified question in this case must be answered no. A hospital cannot be vicariously liable the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation. On that basis, alone, this Court should reverse the

First District's opinion and remand this case to the circuit court with directions to enter judgment for NMH on the claims at issue in this appeal.

III. The First District Improperly Analyzed *Gilbert's* Holding Out and Reasonable Reliance Elements.

Gilbert did more than announce a public policy exception. It provided the framework Illinois courts use in applying that policy exception. Here, in addition to misunderstanding the scope of the public policy exception announced in *Gilbert*, the First District also fundamentally misapplied the facts of this case to that legal framework. In so doing, the First District created a precedent which penalizes hospitals for supporting independent community health initiatives and providers, creates potential liability for something as straightforward as conferring staff privileges, and deliberately ignores the specific language this Court (and others) have used to define the proper analysis to be used in apparent agency cases. The opinion should be reversed both because it is legally incorrect and because of its potentially profound practical ramifications the opinion may have on the public.

Under *Gilbert*, to articulate an apparent agency claim, a plaintiff must show: (1) the principal 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 principal; (2) the principal had knowledge of and acquiesced in the acts of the agent; and (3) the plaintiff acted in reliance upon the conduct of the principal or its agent, consistent with

ordinary care and prudence. *Gilbert*, 156 Ill. 2d at 525. The first two elements are often grouped together and are referred to as "the holding out factor." *Mizyed*, 2016 IL App (1st) 142790, ¶39 (internal quotations omitted). The third factor, reliance, "is satisfied if the plaintiff relies upon the *hospital* to provide medical care, rather than upon a specific physician." *York*, 222 Ill. 2d at 185 (emphasis in original).

A. A Hospital's "Holding Out" Must Concern Conduct Occurring At a Hospital's Facility. To Find Otherwise Would Harm the Community and Broaden *Gilbert* Beyond Recognition.

In evaluating the scope of the holding out factor, it is useful to again recall the legal concept which underpins the doctrine of apparent agency: estoppel. *See York*, 222 Ill. 2d at 207 (noting that "where a principal creates the appearance of authority, a court will not hear the principal's denial of agency to the prejudice of an innocent third party who has been led to reasonably rely upon the agency and is harmed as a result"). Thus, it is not necessary that a hospital *expressly represent* that "the person alleged to be negligent is an employee. Rather, this element is satisfied if the hospital holds itself out as a provider of care without informing the patient that the care is provided by independent contractors." *York*, 222 Ill. 2d at 185.

Implicit in this Court's description of a holding out, *see York*, 222 Ill. 2d at 185, is the idea that the care provided by independent contractors is, in fact, provided *at a hospital facility*. As Illinois courts have repeatedly observed, a hospital may be found vicariously liable for the negligent acts of a physician

"providing care *at a hospital*, regardless of whether the physician is an independent contractor," unless the patient knows or should know of the physician's employment status. *Mizyed*, 2016 IL App (1st) 142790, ¶38 (emphasis added); *see also Scardina v. Alexian Bros. Med. Ctr.*, 308 Ill. App. 3d 359, 363 (1st Dist. 1999) (stating same); *Golden v. Kishwaukee Comm. Health Servs. Ctr., Inc.*, 269 Ill. App. 3d 37, 45 (1st Dist. 1994) (stating same). Indeed, in *Gilbert*, this Court specifically discussed its concerns that hospitals spent "billions of dollars marketing themselves . . . to persuade those in need of medical services to *obtain those services at a specific hospital.*" 156 Ill. 2d at 520 (emphasis added).

In this case, the First District ignored that implicit requirement and, instead, incorrectly focused on a single piece of the larger puzzle: advertising. *Yarbrough*, 2016 IL App (1st) 141585, ¶53. NMH, the First District noted, held itself out to the public as a full service hospital. *Yarbrough*, 2016 IL App (1st) 141585, ¶53. "More relevant to this case, however, are the facts showing that NMH also promotes itself as a community-oriented hospital that collaborates with neighborhood centers, including Erie, to make quality health care available to those in need." *Yarbrough*, 2016 IL App (1st) 141585, ¶53. NMH, the First District observed, promoted its work in community service reports and on its website, and contributed financially to Erie (and other providers of charity care). *Yarbrough*, 2016 IL App (1st) 141585, ¶53. By engaging in and publicizing that work, the First District found, NMH was *holding out those community health providers as a part of NMH*. *Yarbrough*, 2016 IL App (1st) 141585, ¶53. The First

District stated: "[I]n holding itself out as a close partner with Erie to provide specialized and acute care to a targeted population, NMH attempted not only to be a good citizen of the community but also to attract patients." *Yarbrough*, 2016 IL App (1st) 141585, ¶58.

The First District misunderstands the purpose of *Gilbert's* holding out requirement. It is not merely an evaluation of whether a hospital advertises its services, or supports its community. No. This Court evaluates whether a hospital holds itself out as a full service provider of care *to a person seeking care at that hospital*. Without that second piece of the puzzle, the holding out picture remains incomplete. And, in this case, that second piece of the puzzle does not even exist. Ms. Yarbrough *did not seek care at any NMH facility*. She sought care at a free charity clinic. NMH did not hold out the Erie treaters as if they were employees of NMH. Those Erie treaters were not working at an NMH facility, and NMH had no involvement in Ms. Yarbrough's care and treatment at that independent medical clinic.

Importantly, the First District's incorrect interpretation of the *Gilbert's* holding out requirement has practical ramifications well beyond the courtroom. If a hospital can be potentially responsible for care given at an independent charity clinic, simply by publicly supporting that clinic or by allowing clinic staff to seek hospital privileges, there exists a straightforward way to avoid that potential liability: stop that support. Stop accepting a public charity's patients

for treatment. Stop donating money to help fund a public charity's projects. Stop engaging in community service or socially-mindful activity.

Many hospitals, including NMH, actively support Erie and other community health care initiatives in Chicago. (SR 139-40, 149, 153, 172). With the support of those hospitals, Erie provides much needed quality medical care to tens of thousands of residents of traditionally underserved communities. (SR 130, 148). The First District's opinion would inevitably have a chilling effect on those activities. The ramifications would have the opposite effect of that intended in *Gilbert*: rather than protecting innocent members of the community, those individuals would be penalized by the public policy this Court adopted.

The First District's analysis also does not make sense in the context of this case. As noted, this Court has stated that a hospital should not profit by advertising its services to the public, but then deny any agency to the detriment of an innocent third party. *See York*, 222 Ill. 2d at 207; *see also Gilbert*, 156 Ill. 2d at 520-22. Here, the First District determined, "in holding itself out as a close partner with Erie to provide specialized and acute care to a targeted population, NMH attempted not only to be a good citizen of the community but also to attract patients." *Yarbrough*, 2016 IL App (1st) 141585, ¶58. NMH does not benefit from the patients it attracts through this community-based work. As even the First District observed, NMH "does not charge Erie patients for care given at NMH." *Yarbrough*, 2016 IL App (1st) 141585, ¶53.

To be sure, whether and how a hospital advertises its services *can* be relevant to a court's holding out analysis. For example, in *Spiegelman*, 392 Ill. App. 3d 826 (1st Dist. 2009), the plaintiff sought emergency care at the defendant hospital's emergency department and subsequently brought a malpractice claim against the hospital for the alleged negligent actions of her independent contractor emergency room physician. 392 Ill. App. 3d at 828. The First District found that the defendant hospital's advertisements were relevant to the jury's analysis of apparent agency because those advertisements were evidence of "whether the hospital held itself out as a provider of complete medical care." 392 Ill. App. 3d at 841.

Here, NMH does not dispute that it is a provider of complete medical care. That analysis is beside the point, though, where Ms. Yarbrough *did not seek treatment at NMH*. Ms. Yarbrough did not seek out NMH for treatment. She did not go to an NMH facility for a pregnancy test and she did not go to NMH for treatment after learning that she was pregnant. No one from Erie advised Ms. Yarbrough that they were NMH's staff. And Ms. Yarbrough did not seek care specifically from NMH. She sought free charity care and agreed to continue to treat at Erie because she was told she would deliver at a large hospital with a strong reputation. Whether NMH held itself out as a full-service provider of medical care or a supporter of community care is, therefore, irrelevant - NMH's ability to serve its community, and its advertisements related to that mission, have nothing to do with whether patients seek health care services from *Erie*.

The First District also found that Erie held itself out as NMH because its employees advised Ms. Yarbrough that she would likely receive prenatal testing and deliver at NMH. *Yarbrough*, 2016 IL App (1st) 141585, ¶55. The First District acknowledged: "although no one told her that the doctors and staff at Erie were NMH employees, no one informed her that her treating doctors and staff at Erie were not a part of NMH." *Yarbrough*, 2016 IL App (1st) 141585, ¶55. That is all. According to the First District, NMH is potentially liable for Ms. Yarbrough's Erie-based treaters because they told her she would receive some prenatal testing and most likely deliver at NMH, and they did not specifically advise her that they were *not* part of NMH. The First District is incorrect. That is not a holding out. Informing a patient of her physician's staff privileges is not a holding out. Advising a pregnant woman about the hospital at which she would likely deliver cannot suffice as a "holding out." Any private obstetrician with privileges at NMH would have given any prenatal patient the same instructions: that, when the time came, the patient would likely receive ultrasounds at NMH, and would ultimately deliver at NMH.

To make a hospital responsible for prenatal care in a *private physician's offices* based on such basic patient education is an untenable burden for any hospital. It would no longer matter whether the hospital had *any* role in the patient's care and treatment. It would only matter whether a physician mentioned a specific hospital at some point during that care and treatment. That finding - that a statement about where a physician has staff privilege constitutes

a holding out - would broaden *Gilbert* beyond recognition. Under *Gilbert*, a hospital is not liable for the acts of a physician which occur in that physician's private office facility. Yet, that is what the First District decided here. This case does not involve patient care given in a hospital or a hospital-owned or - operated facility. Rather, the care at issue was given at an Erie-owned and - operated facility, by Erie-employed treaters. The doctrine of apparent agency articulated by this Court is not so broad as to create liability in a *hospital* for *all* acts of *any* physician, merely because that physician has hospital privileges.

Because Ms. Yarbrough did not seek treatment from NMH, NMH could not have done anything to cause Ms. Yarbrough to conclude that the treaters at Erie were actually NMH's agents. To find a holding out through a hospital's simple engagement with its community does nothing to address the policy concerns raised in *Gilbert*. On the contrary, that determination creates the potential for liability where there should be none – potential which can be stunted only by disengaging from that activity. The First District's fundamental misunderstanding of "holding out" requirements must be correct.

B. The Fact That a Physician Has Hospital Staff Privileges Cannot Satisfy the Requirement of Justifiable Reliance.

The First District's analysis of the "justifiable reliance" requirement is similarly flawed: that requirement is premised on the idea that the patient's care and treatment occurred *at a hospital facility*. The First District ignored that fundamental requirement and, instead, concluded that there exists a question of

fact as to whether Ms. Yarbrough's "decision to utilize Erie for prenatal treatment was not based on her desire to receive treatment from a particular doctor at Erie or Erie itself, but was instead based on her expressed preference for a particular hospital[.]" *Yarbrough*, 2016 IL App (1st) 141585, ¶62.

As noted above, reliance "is satisfied if the plaintiff relies upon the *hospital* to provide medical care, rather than upon a specific physician." *York*, 222 Ill. 2d at 185 (emphasis in original). "The critical distinction," this Court explained, "is whether the plaintiff seeks care from the hospital itself or merely looks to the hospital as a place for a personal physician to provide care." *Id.* at 207.

The facts of *York* illustrate this point. There, the plaintiff, a retired orthopedic surgeon from New Jersey, had undergone multiple knee surgeries over the course of 20 years. *York*, 222 Ill. 2d at 153, 157-58. Eventually, the plaintiff required a knee replacement surgery. *Id.* at 157. At the time, the plaintiff's son was an anesthesiology resident at defendant Rush. *Id.* at 158. According to the plaintiff, based on his professional experience, he understood there to be several "good" orthopedic surgeons at Rush, so he asked his son for a recommendation. *Id.* His son provided one, and the plaintiff proceeded with surgery. *Id.* The plaintiff signed a consent form, which authorizing the orthopedic surgeon "and such assistants and associates as may be selected by him/her" to proceed. *Id.* at 153. According to the plaintiff, during the procedure, the attending anesthesiologist improperly administered a spinal epidural, causing the plaintiff injury. *Id.* at 153-54.

The plaintiff filed a medical negligence case against Rush, alleging that he relied on Rush to select and provide an anesthesiologist. *Id.* at 160-61. Rush claimed that, in fact, the plaintiff's son requested that a specific anesthesiologist be assigned to his father's care. *Id.* at 161-69. At trial, the plaintiff testified that he relied on the hospital, not on his son, to provide an anesthesiologist; and that the plaintiff assumed that anesthesiologist, who wore scrubs and a lab coat with the Rush insignia, was a Rush employee. *Id.*

This Court concluded that, based on those facts, Rush could be held liable in apparent agency, because the plaintiff relied "on the *hospital* to provide medical care, rather than on a specific physician." *Id.* at 185. Citing *Gilbert*, this Court noted that the "critical distinction" is whether the plaintiff sought care from the hospital itself or looked to the hospital merely as a place for his or her personal physician to provide medical care." *Id.* This Court explained:

> Except for one who seeks care from a specific physician, *if a person voluntarily enters a hospital without objecting to his or her admission to the hospital*, that person is seeking care from the hospital itself. An individual who seeks care from the hospital itself, as opposed to care from his or her personal physician, accepts care from the hospital in reliance upon the fact that complete emergency room care – from blood testing to radiological readings to the endless medical support services – will be provided by the hospital through its staff.

Id. at 185 (quoting *Gilbert*, 156 Ill. 2d at 525-26) (emphasis added).

Here, Ms. Yarbrough *did not voluntarily enter a hospital.* She *did not seek care directly from the hospital itself*, where she could logically assume that the care given was being provided directly by the hospital, as opposed to by independent

contractor physicians. Nor did she select NMH as her hospital of choice, after which she assumed that NMH would assign her with an NMH-employed obstetrician. That distinction is fundamental in this case because, in fact, Ms. Yarbrough could have done precisely that: after learning of her pregnancy, she *could have sought prenatal care at NMH's free obstetrical clinic.* NMH has one. (SR 92, 196). It was available to Ms. Yarbrough. She chose not to seek it out. Rather, Ms. Yarbrough, who had no personal physician, went to an *Erie* clinic, where she was assigned an *Erie-employed* physician.

At core, the construct of the First District's opinion collapses because it is premised on an error: Ms. Yarbrough never sought treatment at an NMH facility. Without that, none of analysis in the First District's opinion can be reconciled with *Gilbert.* The public policy identified in *Gilbert* sought to protect *hospital patients,* not patients treating with private physicians. There could be no holding out of Erie's treaters as if they were NMH employees, because Ms. Yarbrough never sought treatment at NMH. There could be no reasonable reliance on NMH's representations of its ability to provide full-service care, because Ms. Yarbrough *never voluntarily entered NMH seeking that care.*

The First District's opinion should be reversed, and the certified question in this case answered in the negative. A hospital cannot be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert* for the acts of the employees of an unrelated, independent clinic.

CONCLUSION

WHEREFORE, the Defendant-Appellant, Northwestern Memorial Hospital, hereby asks that this Court answer the certified question in the negative; that this Court find that, based on the facts of this case, NMH is entitled to summary judgment; and that this Court remand this case to the circuit court for further proceedings consistent with those findings.

SWANSON, MARTIN & BELL, LLP

By: _____
One of the attorneys for Defendant
NORTHWESTERN MEMORIAL HOSPITAL.

Dated: March 1, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 341

I, Catherine Basque Weiler, certify that this Opening Brief conforms to the requirements of Illinois Supreme Court Rule 341(a) and (b). The length of this Opening Brief is 42 pages.

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APPENDIX

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Illinois Official Reports

Appellate Court

***Yarbrough v. Northwestern Memorial Hospital*, 2016 IL App (1st) 141585**

Appellate Court Caption	CHRISTINA YARBROUGH and DAVID GOODPASTER, on Behalf of Hayley Joe Goodpaster, a Minor, Plaintiffs-Appellees, v. NORTHWESTERN MEMORIAL HOSPITAL and NORTHWESTERN MEDICAL FACULTY FOUNDATION, Defendants (Northwestern Memorial Hospital, Defendant-Appellant).
District & No.	First District, Fifth Division Docket No. 1-14-1585
Filed	August 19, 2016
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 10-L-296; the Hon. William Gomolinski, Judge, presiding.
Judgment	Certified question answered; cause remanded.
Counsel on Appeal	Swanson, Martin & Bell, LLP, of Chicago (Kay L. Schichtel and Catherine Basque Weiler, of counsel), for appellant. Janet, Jenner & Suggs, LLC, of Baltimore, Maryland (Hal J. Kleinman and Giles H. Manley, of counsel), for appellees.
Panel	JUSTICE BURKE delivered the judgment of the court, with opinion. Presiding Justice Reyes and Justice Gordon concurred in the judgment and opinion.

OPINION

¶ 1 This interlocutory appeal arises from a medical negligence action that plaintiffs Christina Yarbrough and David Goodpaster brought against Northwestern Memorial Hospital (NMH) and Northwestern Medical Faculty Foundation (NMFF), stemming from the premature birth of their daughter, Hayley Joe Goodpaster. NMH filed a partial motion for summary judgment, which the trial court denied. NMH requested that the trial court certify a question of law pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) regarding the doctrine of apparent authority in the medical negligence context. The trial court ultimately issued a certified question *sua sponte*. Following this court's denial of NMH's subsequent petition for leave to appeal, the Illinois Supreme Court directed us to consider the question certified by the trial court as follows:

> "Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (Ill. 1993), and its progeny for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation?"

¶ 2 For the reasons that follow, we answer the question in the affirmative.

¶ 3 ### I. BACKGROUND

¶ 4 We begin by setting forth the facts to the extent necessary to address the issues on appeal. In this endeavor, we rely on the pleadings, motions for summary judgment, and associated briefing, and the discovery evidence contained in the record on appeal.

¶ 5 Plaintiffs alleged that Yarbrough, believing she was pregnant, went to Erie Family Health Center, Inc. (Erie), a federally funded, not-for-profit clinic, on November 14, 2005, after searching the Internet for a nearby clinic offering free pregnancy testing. After receiving a positive pregnancy test, healthcare workers at Erie inquired where Yarbrough would receive prenatal care. Yarbrough was advised that if she obtained prenatal care from Erie, she would deliver at NMH and receive additional testing and care at NMH, including ultrasounds. She was given pamphlet and flyer information regarding scheduling tours and classes at NMH. Plaintiffs alleged that based on her knowledge of NMH's reputation and the information provided by Erie, Yarbrough believed that if she received prenatal care from Erie, she would be receiving treatment from NMH health care workers.

¶ 6 Plaintiffs alleged that when Yarbrough was eight weeks pregnant, she experienced vaginal bleeding and went to the Advocate Illinois Masonic Medical Center (Advocate) on November 30, 2005. An ultrasound was performed and she was diagnosed with having a bicornuate uterus. The emergency department notified Erie. Yarbrough received an ultrasound at Erie on December 2, 2005, and she was told that she had a shortened cervix but did not have a bicornuate uterus. No other follow-up regarding a uterine abnormality was performed. She continued receiving prenatal care at Erie. She also received a 20-week ultrasound on February 21, 2006, at NMH, which was interpreted by Dr. William Grobman. Plaintiffs alleged that as a result of the failure to identify and address appropriately Yarbrough's bicornuate uterus and shortened cervix, she delivered Haley Goodpaster prematurely at 26 weeks' gestation on April 8, 2006, via emergency cesarean section. As a result of the premature delivery, Hayley Goodpaster suffered numerous medical complications.

¶ 7 Plaintiffs filed their initial complaint on December 28, 2009. Count I alleged medical negligence by Dr. Grobman, as an actual or apparent agent of NMFF, in performing and interpreting Yarbrough's 20-week ultrasound. Count II alleged medical negligence against NMH based on the prenatal care Yarbrough was provided at Erie, asserting that Erie was NMH's actual or apparent agent. NMH moved for summary judgment. The trial court granted the motion as to all claims related to Erie as NMH's agent. The trial court granted plaintiffs leave to file an amended complaint.

¶ 8 In the amended complaint filed on August 22, 2013, plaintiffs again alleged medical negligence against NMFF in count I based on Dr. Grobman's conduct.[1] In count II, plaintiffs alleged medical negligence against NMH based on the doctrine of apparent authority. Plaintiffs alleged that health care providers at Erie (Dr. Raymond Suarez, Dr. Virgil Reid, Janet Ferguson, CNM, and Elizabeth O. McKelvey, CNM) were the apparent agents of NMH and rendered negligent prenatal care in failing to properly scan, diagnose, and treat Yarbrough for a shortened cervix and bicornuate uterus, leading to preterm delivery.

¶ 9 In support of their apparent authority claim, plaintiffs set forth numerous allegations regarding the close ties between NMH and Erie in order to satisfy the elements of *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 524-25 (1993).[2] Plaintiffs alleged that Erie was founded as a project between NMH and Erie Neighborhood House in 1957, and NMH provides financial support, technological assistance, and strategic support through board membership. Plaintiffs alleged that in 1998, NMH's parent company, Northwestern Memorial Corporation (NMC) (now Northwestern Memorial HealthCare (NMHC)) and Erie entered into an "Affiliation Agreement" with the stated purpose of increasing NMC's "services to the community, building on our current substantial commitments and partnerships" and to "provide clarity and continuity to the historical relationship between the Parties." The agreement called for Erie to utilize NMH as a "primary site for acute and specialized hospital care for its patient population," and NMC would arrange to treat Erie patients in need of more comprehensive care. Further, plaintiffs alleged that the agreement provided for joint marketing efforts, a board seat designated for an NMH representative, committee participation, and consideration of Erie providers for medical staff membership at NMH.

¶ 10 Plaintiffs further alleged that NMH held out Erie as its agent in its published materials and on its website. Plaintiffs alleged that NMHC published annual reports and community service reports that discussed Erie. For example, plaintiffs alleged that the 2005 community service

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[1]Plaintiffs' claim relating to Dr. Grobman is not at issue on appeal.

[2]"[U]nder the doctrine of apparent authority, a hospital can be held vicariously liable for the negligent acts of a physician providing care at the hospital, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician is an independent contractor. The elements of the action have been set out as follows:

'For a hospital to be liable under the doctrine of apparent authority, 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.' " *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 524-25 (1993) (quoting *Pamperin v. Trinity Memorial Hospital*, 423 N.W.2d 848, 856 (Wis. 1988)).

report stated that NMHC improves access to health care "[t]hrough partnerships with community health centers"; it was committed to the community and to building "collaborative relationships with a number of neighborhood based centers"; Northwestern Memorial Foundation granted $1 million annually to the hospital's "Community Service Expansion Project," which "provides key funding for *** [Erie] sites on the West and Northwest sides"; and the project funded facility improvements and physician salaries. It stated that Erie physicians were "affiliated with Northwestern Medical Faculty Foundation, a multispecialty group practice with more than 500 physicians covering more than 40 specialties." The 2005 report included a statement from an Erie patient who was treated by an obstetrician who led "Woman's Health at Erie" and was on staff at NMH. Further, the report discussed its "longstanding affiliations with community-based health centers" in ensuring that patients "have access to quality primary and specialty care regardless of their ability to pay" and that it has "shared a relationship with Erie Family Health Center for more than 45 years." Plaintiffs alleged that the 2006 community service report stated that "Northwestern Memorial, in collaboration with [Erie] has provided the information technology infrastructure, educational tools and access to facilities with mammography equipment" and that 11.2% of the babies delivered at NMH's Prentice Women's Hospital in 2006 received prenatal care at Erie.

¶ 11 With regard to NMH's website, plaintiffs alleged that NMH listed Erie under "Our Health Partners," along with a link to Erie's website, and promoted that it has a "formal and long-standing" affiliation with Erie, including two members on Erie's board of directors. Plaintiffs alleged that Erie's website similarly promoted its relationship with NMH and stated that it "partners with Northwestern Memorial Hospital *** to increase access to specialized medical care and state-of-the-art medical technologies. Patients who are in need of services not offered at Erie are eligible to receive care at these hospitals." Further, Erie's website stated that all Erie doctors "have faculty status at Northwestern University Feinberg School of Medicine." Plaintiffs alleged that NMH was aware of Erie's website but did not monitor or review it and never instructed Erie to change it.

¶ 12 NMH moved for partial summary judgment as to all apparent authority claims related to the alleged negligence of employees or agents of Erie. NMH argued that NMH did not hold out Erie as its agent and Erie and its employees did not hold themselves out as agents of NMH. NMH asserted that Erie was an independent, federally funded community health center comprised of 10 clinics in the Chicago area, it was not named as a defendant, and Erie's employees were working onsite at Erie within the scope of their employment with Erie. NMH argued that neither it nor Erie represented that Erie was an outpatient facility of NMH and there was no legal partnership or joint marketing efforts. NMH asserted that Erie has its own management structure, budget, board of directors, employees, and facility. NMH asserted that although it provides some charitable funding to Erie and has a small presence on its board, NMH has no control over Erie.

¶ 13 In support of its argument that there was no evidence of an apparent agency relationship between NMH and Erie, NMH relied on the deposition testimony of Holli Salls, vice president of public relations for NMH; Doctor Daniel Derman, vice president of operations at NMH; William Kistner, vice president of internal audit for NMHC; and Yarbrough. Salls testified that NMH does not bring pamphlets about NMH to independent medical groups to distribute to their patients, NMH did not do any joint marketing with other entities between 2004 and 2006, and Erie has never sought to do any joint promotional marketing. Salls testified that she was

aware that Erie discussed its affiliation with NMH on its website. Salls testified that Erie did not get her permission to do so, but NMH has never told Erie not to promote the affiliation between them. Salls testified that use of the word "partner" in promotional materials was not meant in the legal sense, but merely described collaborative activities.

¶ 14 Dr. Derman acknowledged in his deposition that NMH's website stated that NMH had "formal and long-standing affiliations with two federally qualified health center partners, Near North Health Services Corporation and Erie Family Health Center" and that it had two representatives on Erie's board of directors. Further, NMH's website listed Erie under "Our Health Partners" and stated that Erie "was founded in 1956 as a project of volunteer physicians from Northwestern Memorial and Erie Neighborhood." Dr. Derman also acknowledged NMH's press releases discussing NMH's partnership initiatives with Erie in treating diabetes and women's health, promoting the fact that NMH and Erie "worked together to provide information about transportation, navigating and processes for accessing additional diagnostic services if needed," and developing educations programs together. Dr. Derman acknowledged that Erie's website listed NMH under "Our Partners" and "Hospital Affiliations" and it stated that "Erie partners with" NMH, among other hospitals, "to increase access to specialized medical care and state-of-the-art medical technologies. Patients who are in need of services not offered at Erie are eligible to receive care at these hospitals." Further, Derman acknowledged that Erie's website stated, "All Erie pediatricians, internists, OB/GYN physicians and family physicians have faculty status at Northwestern University Feinberg School of Medicine," and that medical students and residents from Northwestern train at Erie. Dr. Derman testified that he was aware that Erie has a website, but his office does not review the information on Erie's website.

¶ 15 Dr. Derman reviewed the affiliation agreement during his deposition and acknowledged that, in it, NMC agreed to cause NMH to consider Erie staff for hospital privileges. Further, the parties agreed to "jointly participate in collective marketing efforts as they relate to the affiliation of the parties" and that the other party "may publicize and refer to this affiliation agreement and their affiliation with each other with the prior consent of the other party." The agreement also contained an "independent contractor" provision indicating that the parties did not have a joint venture, partnership, or employer/employee relationship.

¶ 16 Dr. Derman testified that NMH does not employ Erie staff and does not provide Erie with any equipment or supplies, lab coats, or promotional material. Dr. Derman testified that NMH makes charitable contributions to Erie of approximately $333,000 and $600,000 per year, passes along grant money, and does not charge Erie patients for care given at NMH. Derman testified that NMH makes charitable contributions to Erie and other organizations because "we're just good community members and we try to support other people that are doing good in the community." NMH has also provided Erie with free informational technology support services.

¶ 17 Kistner testified in his deposition that he has served on Erie's board of directors since 2002, and he was the chairman for two years. At one point, there was a second NMHC representative on the board. Kistner explained that as indicated in the affiliation agreement, Erie must follow specific guidelines to satisfy Federally Qualified Health Center (FQHC) governance requirements, which requires 51% or more of the board to be composed of patients and community members, while the remaining 49% may be nonpatients, but "no more than 50 percent of the 49 percent can derive more than 10 percent of their income from the healthcare

field." He signed a conflict of interest statement indicating that his fiduciary responsibility was to Erie when acting as a board member. He testified that Erie operates as an independent entity and its community board members are "very vocal." Kistner testified that he could not recall any collective marketing efforts in the 10 years of his board membership. Kistner testified that in 2006, Erie's revenue was approximately $25 million; approximately 60% came from patient revenue and 40% came from grants from various organizations, including NMH or NMC.

¶ 18 Yarbrough testified in her deposition that she found Erie by searching the Internet for a clinic where she could obtain a pregnancy test without having health insurance. When the test was positive, someone at Erie asked what her plans were for prenatal care. Yarbrough testified that she "asked questions about the doctors there, what hospital I would be going to, things like that. That's when I chose Erie Family Clinic." The Erie clinic was approximately five blocks from where she lived at the time. She filled out paperwork for Medicaid and scheduled her first appointment. She was also given written materials or a pamphlet about Erie. She testified that she was informed that she "would have ultrasounds done at Women's Prentice Hospital, which is part of Northwestern, and that's where I would most likely deliver the baby."

"Q. Did anybody at Erie say anything to suggest to you that Erie Family Health Center and Northwestern Memorial Hospital were the same entity?

A. I was under the impression that they were.

Q. And what would give you that impression?

A. Most likely because of the delivery at Northwestern, the delivery privileges.

Q. So that if you had gone to Dr. Smith whose office was on Michigan Avenue and you were told you would most likely deliver at Northwestern, would you have drawn the inference that Dr. Smith's practice and Northwestern were actually the same entity?

A. Yes.

Q. But in terms of whether anybody at Erie said, hey, we are Northwestern and Northwestern is part of us, fair to say nobody said anything like that?

A. No one said that, but they also never said that they weren't."

¶ 19 Yarbrough testified that after being treated for vaginal bleeding at Advocate on November 30, 2005, and being diagnosed with a bicornuate uterus, she went to Erie on December 2, 2005, where she saw Dr. Suarez and midwife McKelvey. Dr. Suarez performed an ultrasound and informed her that she did not have a bicornuate uterus. She was told that she had a shortened cervix. Yarbrough returned to Erie several times after that for routine appointments, a urinary tract infection, and a lab test. She had the routine 20-week ultrasound performed at NMH on February 21, 2006, and she continued with her regular prenatal visits at Erie after that. Yarbrough testified that on April 5, 2006, she experienced severe cramps and back pain. She called Erie and was told to go to NMH. She was admitted to the hospital and delivered her daughter three days later via a cesarean-section performed by Dr. Suarez. Yarbrough testified that either during the delivery or afterward, Dr. Suarez mentioned something about her having a bicornuate uterus and an incompetent cervix when Yarbrough asked why she had delivered prematurely.

¶ 20 Regarding her decision to go to Erie, Yarbrough further testified as follows:

"Q. Early on you talked about doing some research, and you found Erie Clinic, and when you went through the first time and confirmed your pregnancy, you asked

questions and were told about the delivery at Northwestern, and you believed that they were working—they would be working together?

A. Yes.

Q. When you had your 20-week ultrasound and they sent you—when Erie sent you on to Northwestern to Prentice to have it done, did that reconfirm your belief that the two were working together?

A. Yes.

Q. Okay, and that was because you would get your complete care was all affiliated, since the ultrasound was there, the delivery was going to be there?

A. Yes.

Q. And you did not have your own o-b-g-y-n and you just went there initially at Erie to confirm your belief that you were pregnant. Once you did find out that you were pregnant, did the fact that they said that you would have the delivery and other care at Northwestern influence your decision to stay at Erie?

A. Yes."

¶ 21 Yarbrough also testified:

"Q. Did you have any particular knowledge of [NMH]?

A. I was under the impression that they were a very good hospital, very big, very well-known in the city.

Q. And I assume that if you had been living on the south side and you had gone to a physician's office and they said, you know, we are likely to deliver you at Christ Hospital, you would have been happy about that as well?

A. Yes.

Q. Okay. So, you know, any good hospital would sound good to you?

A. Yes.

Q. Did anybody at [NMH], flipping this around, say anything to you to suggest that [NMH] and Erie Family Health Center had some special connection?

A. No."

¶ 22 Based on this testimony, NHM argued that Yarbrough was never told that NMH and Erie were the same entity and the fact that she was informed she would likely deliver at NMH was insufficient to establish apparent authority. Further, Yarbrough was not seeking treatment from NMH as she had no specific desire to deliver at NMH and "any good hospital would sound good to" her. NMH contended that plaintiffs' claim would require a massive expansion of the apparent authority doctrine under *Gilbert*, and plaintiffs could not show that NMH held Erie out as its apparent agent, that NMH acquiesced to any holding out by Erie, or any reasonable reliance by Yarbrough. NMH asserted that Yarbrough sought care from Erie and all of the treatment Erie provided was performed at Erie's facility.

¶ 23 Plaintiffs responded that Yarbrough agreed to receive prenatal treatment at Erie based on her knowledge of NMH and after being led to believe, reasonably, that the Erie health care workers were employees or agents of NMH. Plaintiffs contended that her belief was reasonable because Erie staff informed her that she would deliver and have ultrasounds performed at NMH, she was provided pamphlets with information about delivering at NMH, she knew NMH had a very good reputation, and she was never told that the doctors and nurses

at Erie were not employees or agents of NMH. Plaintiffs asserted that NMH promoted itself as a provider in partnership with Erie under the affiliation agreement, in its press releases, and on its website, and it did not prevent Erie from discussing its affiliation with NMH on Erie's website.

¶ 24 At a hearing on the motion for summary judgment on February 21, 2014, NMH orally moved to certify a question under Rule 308. The circuit court stated that the case was "the first of its kind" and it entered an order denying NMH's partial summary judgment motion and ordering the parties to submit proposed certified questions.

¶ 25 Following their respective submissions, the circuit court took the matter under advisement. According to NMH, the circuit court decided not to certify a question but did not enter an order to that effect. On May 16, 2014, the circuit court *sua sponte* entered an order certifying the question set forth *supra*, pursuant to Rule 308, and holding that its February 21, 2014, order "involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." At our supreme court's direction, we allowed NMH's petition for leave to appeal on January 14, 2015.

¶ 26 II. ANALYSIS

¶ 27 A. The Certified Question

¶ 28 As set forth above, the certified question is as follows:

> "Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (Ill. 1993), and its progeny for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation?"

¶ 29 B. Standard of Review

¶ 30 "The scope of review in an interlocutory appeal under Rule 308 is ordinarily limited to the question certified by the trial court, which is reviewed *de novo*." *Kennedy v. Grimsley*, 361 Ill. App. 3d 511, 513 (2005) (citing *Thompson v. Gordon*, 356 Ill. App. 3d 447 (2005)). Rule 308(a) provides in relevant part that the trial court may certify a question to this court when, "in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010).

¶ 31 C. *Gilbert v. Sycamore Municipal Hospital*

¶ 32 The parties agree that under *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 525 (1993), a hospital may be vicariously liable for negligent medical treatment rendered in the hospital by an independent-contractor physician under the doctrine of apparent authority. *Id.* at 524. Before our supreme court decided *Gilbert*, "hospitals in Illinois could be subject to vicarious liability for a physician's negligent acts only if the physician was an actual agent of the hospital." *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 24. The court cited the "realities of modern hospital care" as its impetus for allowing hospitals to be vicariously liable under the doctrine of apparent authority. The court observed that hospitals

"increasingly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health services," and spend "billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities" in order to attract patients and compete for health care dollars. (Internal quotation marks omitted.) *Gilbert*, 156 Ill. 2d at 520. Further, the public is generally unaware of whether the staff in an emergency room is comprised of independent contractors or employees of the hospital, and absent a situation where a patient is somehow put on notice of a doctor's independent status, a patient generally relies on the reputation of the hospital and reasonably assumes that the staff is comprised of hospital employees. *Id.* at 521.

¶ 33 With these concerns in mind, the *Gilbert* court held that a plaintiff must establish the following three factors to hold a hospital liable under the doctrine of apparent authority for acts of independent-contractor physicians:

> " '(1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.' " *Id.* at 525 (quoting *Pamperin v. Trinity Memorial Hospital*, 423 N.W.2d at 856).

¶ 34 The first two elements are "frequently grouped together and have been referred to as the 'holding out' factor." *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 26. A plaintiff must present some evidence of all three elements in order to avoid summary judgment. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1094 (2009); *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 25. The *Gilbert* court stressed that "liability attaches to the hospital only where the treating physician is the apparent or ostensible agent of the hospital. If the patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable." *Gilbert*, 156 Ill. 2d at 522.

¶ 35 D. Application of *Gilbert* Outside the "Four Walls" of a Hospital

¶ 36 On appeal, NMH first contends that the doctrine of apparent authority is not applicable here because the conduct at issue did not occur at the hospital but instead occurred, as indicated in the certified question, at an "unrelated, independent clinic."

¶ 37 As this court in *Malanowski v. Jabamoni* observed, the negligent conduct in *Gilbert* occurred in the emergency room of a hospital. *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 727 (1997); *Gilbert*, 156 Ill. 2d at 516-17. Accordingly, the particular facts in *Gilbert* necessarily confined the court's analysis to medical negligence occurring in an emergency room. *Malanowski*, 293 Ill. App. 3d at 727; *Gilbert*, 156 Ill. 2d at 516-17. The *Malanowski* court reasoned that there was

> "nothing in the *Gilbert* opinion that would bar a plaintiff, who could otherwise satisfy the elements for a claim based on apparent agency, from recovering against a hospital merely because the negligent conduct of the physician did not occur in the emergency room or some other area within the four walls of the hospital." *Malanowski*, 293 Ill. App. 3d at 727.

¶ 38 In *Malanowski*, the allegedly negligent conduct occurred in an outpatient clinic owned and operated by Loyola University of Chicago (Loyola) called the "Loyola University Mulcahy Outpatient Center." *Id.* at 722. The plaintiff brought suit against Loyola and Dr. Reena Jabamoni, alleging that Dr. Jabamoni negligently failed to diagnose the decedent's breast cancer while treating her at the outpatient clinic. *Id.* In her apparent authority claims, the plaintiff alleged that Loyola owned and operated the outpatient center, which held itself out as a "direct provider of health care services"; that the decedent had been a regular patient of the clinic since 1982; that the decedent had been a regular patient of Dr. Jabamoni for several years; and that she reasonably believed that Dr. Jabamoni was an employee of the outpatient center, when in fact she was an independent contractor with privileges at the center. *Id.* at 726.

¶ 39 In arguing on appeal that the trial court properly dismissed the apparent authority claims, Loyola contended that *Gilbert* did not apply because the conduct occurred outside of the hospital, but the court found that "[i]f, as plaintiff maintains, Loyola's conduct reasonably led [the patient] to rely upon 'Loyola' for treatment, rather than any particular physician, then plaintiff should be allowed recovery for damages caused thereby." *Id.* at 727. The court also found that under *Gilbert*, the existence of an ongoing doctor-patient relationship did not preclude a claim of reliance on the hospital, and remained a question of fact for the jury to resolve. *Id.* at 728. The court observed that the outpatient center bore Loyola's name, it held itself out as a direct provider of health care services, it had introduced the decedent to Dr. Jabamoni, the decedent was also treated by other physicians at the center, and payment for Dr. Jabamoni's services were made to the outpatient center. *Id.* See also *Butkiewicz v. Loyola University Medical Center*, 311 Ill. App. 3d 508, 510-11 (2000) (holding that *Gilbert* was not limited to conduct in an emergency room where the independent-contractor radiologist failed to diagnose the decedent's lung cancer after his admission to the hospital for chest pains), and *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 151-52 (2006) (applying *Gilbert* to negligent medical conduct that occurred outside of the emergency room, *i.e.*, in the hospital's operating room).

¶ 40 NMH argues that *Malanowski* is distinguishable because Erie is a separate corporate entity contained in a separate facility, and not a separate corporate entity located within an outpatient facility owned and operated by NMH, as in *Malanowski*. However, plaintiffs' claim is that there were such close ties between NMH and Erie, despite being separate entities located in separate facilities, that material issues of fact exist regarding the elements of apparent authority. Based on *Malanowski*, *York*, and *Butkiewicz*, we reject NMH's argument that *Gilbert* is inapplicable here because the allegedly negligent conduct did not occur within the "four walls" of the hospital. As the court in *Malanowski* found, nothing in the *Gilbert* opinion limits a plaintiff from recovering against a hospital "merely because the negligent conduct of the physician did not occur in the emergency room or some other area within the four walls of the hospital." *Malanowski*, 293 Ill. App. 3d at 727. The key determinant for recovery under *Gilbert* is whether the plaintiff can show that the hospital's "conduct led [the plaintiff] to reply upon ['the hospital'] for treatment, rather than on any particular physician." *Id.* This is precisely what plaintiffs aim to show in this case.

¶ 41 NMH also cites *Scardina v. Alexian Brothers Medical Center*, 308 Ill. App. 3d 359, 365 (1999), in support of its argument. However, the brief passage cited by NMH from *Scardina* merely summarizes the holding in *Gilbert*: "In *Gilbert*, the court held that a hospital can be vicariously liable under the doctrine of apparent agency for the negligent acts of a physician

providing care at the hospital, irrespective of whether the physician is an independent contractor." *Id.* at 363. Notably, the *Scardina* court observed that "although *Gilbert* speaks of negligent treatment rendered in a hospital's emergency room, its decision is not limited to such factual settings, but applies to cases involving other forms of hospital care." *Id.* at 364. As in *Butkiewicz* and *York*, the alleged medical negligence in *Scardina* occurred in the hospital (an operating room), but not in the emergency room; thus, the court had no reason to consider *Gilbert*'s applicability outside the "four walls" of a hospital. Moreover, the contested issue did not involve where the conduct occurred, but whether the patient relied on the hospital to provide radiological services upon his admission to the hospital for stomach and chest pain, where the patient went there because his family physician instructed him to go to that particular hospital and had staff privileges there. *Id.*

¶ 42 E. Application of *Gilbert* Where the Apparent Agent Is Not a Defendant

¶ 43 NMH next argues that the apparent agent, an "unrelated, independent clinic," *i.e.*, Erie, was not made a party to the litigation, and therefore NMH cannot be held liable as the principal.

¶ 44 We conclude that *Gilbert* contains no such requirement. Although whether the apparent agent must be named as a party was not at issue in *Gilbert*, we note that the physician and the hospital were sued in *Gilbert* but not the independent medical group that employed the physician. *Gilbert*, 156 Ill. 2d at 515. Also by way of example, in *Mizyed v. Palos Community Hospital*, 2016 IL App (1st) 142790, ¶¶ 23-25, 36, neither the physician who rendered the treatment at issue nor the independent medical group that employed her were named in the plaintiff's medical negligence lawsuit, which alleged that the hospital was vicariously liable for the physician's negligence under the doctrine of actual and apparent agency.

¶ 45 As noted by plaintiffs, the apparent agency instruction in the Illinois Pattern Jury Instructions, Civil, supports that a principal may be sued even where the apparent agent is not. The Notes on Use for instruction 105.11, "Claims Based on Apparent Agency—Principal Sued, But Not Agent," provides that "[t]his instruction should be used where the issue of apparent agency is in dispute, *the principal alone is sued*, and plaintiff alleges reliance upon a 'holding out' on the part of the principal." (Emphasis added.) Illinois Pattern Jury Instructions, Civil, No. 105.11, Notes on Use (2006) (hereinafter, IPI Civil (2006)). See also IPI Civil (2006) No. 105.10, Notes on Use ("This instruction should be used where the issue of apparent agency is in dispute, the principal and agent are sued in the same case, and plaintiff alleges reliance on a 'holding out' by the principal."); IPI Civil (2006) No. 50.04 (general apparent agency instruction where only principal is sued). Accordingly, plaintiffs were not required to name Erie or any of the Erie treaters as defendants and their absence is not a bar to recovery against the hospital here.

¶ 46 In sum, we find that a hospital may be held liable under the doctrine of apparent agency for the acts of the employees of an independent clinic that is not a party to the litigation, assuming that the plaintiff establishes the elements of apparent authority as set forth in *Gilbert*. Courts may apply *Gilbert* outside the "four walls" of the hospital, and a plaintiff is not required to name the individual physician or his employer as a defendant in order to hold the principal/hospital vicariously liable.

¶ 47 F. Applying *Gilbert* to the Facts of This Case

¶ 48 NMH argues, in the alternative, that plaintiffs have failed to establish the *Gilbert* elements, *i.e.*, they have not shown that NMH held Erie out as its agent, that Erie held itself out as NMH's agent with NMH's acquiescence, or that Yarbrough reasonably relied on any holding out in electing treatment at Erie. NMH warns that an opposite conclusion would greatly expand apparent agency law in Illinois. NMH asserts that this case is "ripe" for ruling on summary judgment as there are no disputed issues of material fact and the only issue remaining is the question of law regarding apparent authority. NMH asserts that this court should answer the certified question in the negative and remand for a finding that it is entitled to partial summary judgment.

¶ 49 Plaintiffs assert that the certified question does not present a novel question and NMH's appeal merely involves questions of fact that should be determined by a jury. Plaintiffs argue that they have established material issues of fact under the *Gilbert* test as to the holding out and reasonable reliance requirements.

¶ 50 We note that the parties have engaged in extensive discovery with respect to the agency issue and NMH has expended considerable effort on appeal discussing why the facts do not support an apparent authority claim here. In essence, NMH is arguing that the trial court should have granted its motion for summary judgment. This case is before us on a Rule 308 certified question from the trial court, and not an appeal from the trial court's ruling on NMH's motion for partial summary judgment. A Rule 308 appeal focuses on answering a certified question of law and is "not intended to address the application of the law to the facts of a particular case." *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶¶ 7, 8 (declining to address the parties' arguments regarding the underlying motion to dismiss). See also *Spears v. Association of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15 (stating that the court should only answer a certified question if it presents a question of law and decline to answer if the resolution depends on "a host of factual predicates" (internal quotation marks omitted)). However, even considering NMH's alternative argument, given the facts adduced in this case thus far, NMH has failed to establish that no genuine issue of material fact exists such that its right to a judgment in its favor is " 'clear and free from doubt.' " *Mizyed*, 2016 IL App (1st) 142790, ¶ 35 (quoting *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 23).

¶ 51 We recognize that the present case does not involve the traditional situation of an independent-contractor physician employed by a separate, private medical group, providing negligent care inside a hospital. However, plaintiffs do not seek to hold NMH liable merely because, as NMH contends, the Erie physicians have privileges at the hospital. Rather, the issue of whether NMH and/or Erie held themselves out as having such close ties such that a reasonable person would conclude that an agency relationship existed, and whether Yarbrough relied upon NMH or Erie, raises material questions of fact for a jury to resolve. Under the unique facts of this case and in light of the evidence presented thus far, plaintiffs have, at a minimum, raised a question of fact regarding the holding out and reliance elements under *Gilbert* and their apparent authority claim contains issues of fact subject to a jury's determination. As the *Gilbert* court stated, "[w]hether an agent is authorized to act is a question of fact. [Citation.] Whether a person has notice of the lack of an agent's authority, or is put on notice by circumstances, is likewise a question of fact." *Gilbert*, 156 Ill. 2d at 524. See also *Scardina*, 308 Ill. App. 3d at 363 ("Whether an agency relationship exist[ed] in such instances is typically a question of fact to be decided by the trier of fact and may only be disposed of by

summary judgment where the parties' relationship is so clear as to be undisputed."); *McNamee v. Sandore*, 373 Ill. App. 3d 636, 651 (2007) ("While agency is a legal concept, the existence and scope of an agency relationship is a fact-intensive inquiry reserved for the finder of fact unless the parties' relationship is so clear as to be undisputed.").

¶ 52 As stated, the first two elements of apparent authority require a showing that "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," and if the agent's acts created "the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them." (Internal quotation marks omitted.) *Gilbert*, 156 Ill. 2d at 525. "The focus of this factor is whether or not 'the patient knows, or should have known, that the physician is an independent contractor.' " *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶ 26 (quoting *Gilbert*, 156 Ill. 2d at 524).

¶ 53 It is undisputed that NMH holds itself out as a "full service hospital." More relevant to this case, however, are the facts showing that NMH also promotes itself as a community-oriented hospital that collaborates with neighborhood centers, including Erie, to make quality health care available to those in need. NMH publicized its relationship with Erie on its website, annual reports, community service reports, and other press releases. As plaintiffs noted, NMH promoted that 11.2% of babies delivered at NMH in 2006 received prenatal care at Erie, and 100% of prenatal patients at Erie delivered at NMH. NMH's website provided a link to Erie's website and represented that Erie was one of "Our Health Partners" and promoted their "formal and long-standing affiliations" with Erie, that two NMH representatives sit on Erie's board, and that Erie was founded "as a project of volunteer physicians from Northwestern Memorial and Erie Neighborhood House." Dr. Derman testified in his deposition regarding collaborative efforts between NMH and Erie in providing care in the areas of diabetes and women's health and its promotion of these efforts. In addition, NMH has continuously contributed financially to Erie, provides information technology assistance to Erie, and does not charge Erie patients for care given at NMH.

¶ 54 Significantly, the relationship between Erie and NMH also involves the affiliation agreement, pursuant to which the parties agreed that NMH was to be the primary site for acute and specialized hospital care for Erie patients. The affiliation agreement called for a NMH representative to sit on Erie's board of directors, the creation of a community advisory committee, and appointment of Erie's executive director to the committee. Although Salls testified in her deposition that she did not know of any joint marketing efforts between NMH and Erie, the affiliation agreement provided for joint marketing efforts relating to their affiliation.

¶ 55 Regarding Erie's actions, which would constitute a "holding out" by Erie, Yarbrough testified that, upon confirming her pregnancy, Erie staff inquired where she planned to receive prenatal care and informed her that, if she were treated at Erie, she would likely deliver at NMH and receive additional testing at NMH and provided her with information about delivering at NMH. As testified to by Yarbrough, although no one told her that the doctors and staff at Erie were NMH employees, no one informed her that her treating doctors and staff at Erie were not a part of NMH.

¶ 56 In addition, Erie's website referred to NMH as an "Our Partner" and stated that "Erie partners with [NMH]," in addition to other hospitals, in order to "increase access to specialized medical care and state-of-the-art medical technologies. Patients who are in need of services not

offered at Erie are eligible to receive care at these hospitals." The website stated that all Erie physicians "have faculty status at Northwestern University Feinberg School of Medicine." Salls testified that she was aware that Erie discussed its affiliation with NMH on its website, but that NMH has never told Erie not to promote the affiliation between them. Dr. Derman testified that he was also aware of Erie's website, but his office does not review it.

¶ 57 Whether Yarbrough actually observed these indicia of "holding out" on the websites of NMH and Erie and in written materials is not determinative. Whether a patient actually observes a hospital's advertisements is not relevant to the objective inquiry into the "holding out" factor under *Gilbert*. *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826, 839 (2009). In *Spiegelman*, the hospital argued that its advertisements promoting the hospital could not show reasonable reliance as there was no evidence that the plaintiff actually viewed the advertisements. *Id.* The plaintiff argued that the advertisements demonstrated that the hospital held itself out as a complete provider of care, an objective determination which did not depend on whether the plaintiff actually viewed them. *Id.* The court agreed with the plaintiff, holding that the advertisements "were relevant to the element of holding out—whether the hospital held itself out as a provider of complete medical care." *Id.* at 841. See also *Hammer v. Barth*, 2016 IL App (1st) 143066, ¶ 26 (finding that a genuine issue of material fact existed as to the "holding out" element where the evidence showed that the hospital's website advertised that the hospital had clinical leadership in over 60 medical fields and boasted a staff of over 1000 doctors in various specialties and one of the "most experienced" emergency trauma centers in Illinois).

¶ 58 NMH argues that this case does not involve the same concern present in *Spiegelman* and *Gilbert*, *i.e.*, hospitals using advertisements to attract patients by promising complete, quality care while attempting to avoid liability by using independent contractors. *Spiegelman*, 392 Ill. App. 3d at 839-41; *Gilbert*, 156 Ill. 2d at 520-21. However, as in *Spiegelman*, in holding itself out as a close partner with Erie to provide specialized and acute care to a targeted population, NMH attempted not only to be a good citizen of the community but also to attract patients. We disagree with NMH's assertion that *Spiegelman* is distinguishable or that the concerns animating *Gilbert* are not present in this case.

¶ 59 Turning to the third element in *Gilbert*, reasonable reliance is established where "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.

> " '[T]he critical distinction is whether the plaintiff is seeking care from the hospital itself or whether the plaintiff is looking to the hospital merely as a place for his or her personal physician to provide medical care. Except for one who seeks care from a specific physician, if a person voluntarily enters a hospital without objecting to his or her admission to the hospital, then that person is seeking care from the hospital itself. An individual who seeks care from a hospital itself, as opposed to care from his or her personal physician, accepts care from the hospital in reliance upon the fact that complete emergency room care—from blood testing to radiological readings to the endless medical support services—will be provided by the hospital through its staff.' " *Gilbert*, 156 Ill. 2d at 525-26 (quoting *Pamperin*, 423 N.W.2d at 857).

¶ 60 NMH asserts that plaintiffs failed to establish any reasonable reliance by Yarbrough because she sought treatment at Erie, she understood her treaters were Erie employees, no one

represented that Erie and NMH were the same entity, and she expressed no specific preference for any particular hospital.

¶ 61 Yarbrough testified that she did not have a prior or ongoing relationship with any physicians at Erie, she had never been to Erie for any treatment before, and she did not seek out a particular physician at Erie. Her testimony indicated that she went to Erie because it was a local clinic offering free pregnancy testing. After confirming her pregnancy, Erie staff inquired about where Yarbrough planned to receive prenatal care and informed her that, if she were treated at Erie, she would likely deliver at NMH and receive additional testing, including ultrasounds, at NMH. She was given pamphlets and information about NMH by Erie. Yarbrough testified that she asked about the doctors and what hospital she would deliver at and "[t]hat's when I chose Erie Family Clinic." She testified that she was under the impression that Erie and NMH were the same entity "[m]ost likely because of the delivery at Northwestern, the delivery privileges." She confirmed that if she had gone to a different doctor's office and had been told she would most likely deliver at NMH, she would have drawn the same inference. Yarbrough testified that she believed Erie and NMH were working together. She affirmed that being sent to NMH for her 20-week ultrasound reaffirmed this belief because her complete care was "all affiliated, since the ultrasound was there, the delivery was going to be there." Yarbrough affirmed that the fact that she would deliver at NMH and receive other care there influenced her decision. Her impression of NMH was that it was "a very good hospital, very big, very well-known in the city." When asked if she "had been living on the south side and you had gone to a physician's office and they said, you know, we are likely to deliver you at Christ Hospital, you would have been happy about that as well?" Yarbrough answered, "Yes." She also responded in the affirmative when asked if "any good hospital would sound good to you?"

¶ 62 Yarbrough's testimony raises an issue of material fact regarding whether there was reasonable reliance in this case. Yarbrough indicated that her decision to utilize Erie for prenatal treatment was not based on her desire to receive treatment from a particular doctor at Erie or Erie itself, but was instead based on her expressed preference for a particular hospital, *i.e.*, NMH, which she deemed to be a "very good" hospital. Her testimony also supports that she was unaware that her Erie treaters were not part of NMH; it was her understanding or perception that Erie was the same entity as, or was related to, NMH.

¶ 63 Plaintiffs assert that this case is similar to *York*, where the plaintiff believed there were " 'good docs at Rush' " and, based upon this knowledge, he selected a particular orthopedic surgeon there to perform his knee replacement surgery. *York*, 222 Ill. 2d at 195-96. The court found sufficient evidence to support the jury's verdict in finding Rush vicariously liable for the negligent conduct of the anesthesiologist who participated in the plaintiff's surgery based on apparent authority. *Id.* at 195. The plaintiff did not select who would serve as his anesthesiologist; he relied on the hospital to select one for him. *Id.* at 195-98. Our supreme court's holding was based on evidence showing that the plaintiff selected the orthopedic surgeon only after determining that the hospital had good doctors and nothing alerted the plaintiff to the fact that the anesthesiologist was an independent contractor. *Id.* at 196. Our supreme court clarified the holding in *Gilbert* in observing that "the mere existence of a preexisting physician-patient relationship" did not "automatically preclude[ ] any claim by the patient of reliance upon the hospital or the support staff." *Id.* at 193. Accordingly, "the reliance element of a plaintiff's apparent agency claim is satisfied if the plaintiff reasonably relies upon

a hospital to provide medical care, rather than upon a specific physician." *Spiegelman*, 392 Ill. App. 3d at 840.

¶ 64 In the present case, the evidence showed that Yarbrough did not have a preexisting relationship with Erie or any physician at Erie. She decided to receive prenatal treatment at Erie only after she was informed of its relationship with NMH, which she believed to be a very good hospital, similar to the plaintiff in *York*. In contrast, where a patient goes to a hospital at the direction of and in reliance on a trusted personal physician, our court has found no reasonable reliance under *Gilbert*. For example, there was no reliance established in *Butkiewicz*, where the patient went to the defendant hospital because his long-time personal physician directed him to, even though he did not like that hospital, and the patient trusted his physician completely and would have done "whatever he told him to do." *Butkiewicz*, 311 Ill. App. 3d at 510, 512-14. See also *Lamb-Rosenfeldt*, 2012 IL App (1st) 101558, ¶¶ 33-35 (finding no evidence of reliance sufficient to avoid summary judgment where the patient went to the defendant hospital to receive treatment at the direction of her personal physician, with whom she had a preexisting relationship, and the plaintiff's negligence claim sought to hold the hospital vicariously liable for treatment protected by that physician).

¶ 65 III. CONCLUSION

¶ 66 In sum, we answer the certified question in the affirmative. A hospital may be held liable under the doctrine of apparent agency for the acts of the employees of an independent clinic that is not a party to the litigation, assuming that the plaintiff establishes the elements of apparent authority as set forth in *Gilbert*. We remand this case for further proceedings consistent with this opinion.

¶ 67 Certified question answered; cause remanded.

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

Plaintiffs-Respondents,

v.

NORTHWESTERN MEMORIAL HOSPITAL,

Defendant-Petitioner,

and

NORTHWESTERN MEDICAL FACULTY FOUNDATION,
Defendant.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

PROOF OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that three copies of the attached Opening Brief were served on the attorney listed below by mailing in United States mail located at 330 North Wabash Street, Chicago, Illinois, 60611, on March 1, 2017, by 5:00 p.m. in properly addressed envelope bearing sufficient postage prepaid.

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SUBSCRIBED and SWORN to before me this 1st day of March, 2017.

NOTARY PUBLIC

TAMMY S PHILLIPS
Official Seal
Notary Public - State of Illinois
My Commission Expires Mar 16, 2021