105.10 Claims Based On Apparent Agency--Both Principal And Agent Sued--Principal Sued Under Respondeat Superior Only--Medical Malpractice Actions--Reliance On Principal Alleged

Under certain circumstances, the liability of a party may arise from an act or omission of that party's apparent agent.

In the present case, [plaintiff's name] has sued [principal's name] as the principal and [apparent agent's name] as [his] [her] [its] apparent agent. [principal's name] denies that any apparent agency relationship existed.

In order for an apparent agency relationship to have existed, [plaintiff's name] must prove the following:

First, that [principal's name] held [himself] [herself] [itself] out as a provider of [type of care, *e.g.*, complete emergency room care] and that [plaintiff's/decedent's name] neither knew nor should have known that [apparent agent's name] was not an employee of [principal's name].

Second, that [plaintiff's/decedent's name] [or others] did not choose [apparent agent's name] but relied upon [principal's name] to provide [type of care, *e.g.*, complete emergency room care].

If you find that [apparent agent's name] was the apparent agent of [principal's name] at the time of the occurrence, and if you find that [apparent agent's name] is liable, then both [defendant] and [defendant] are liable.

If you find that [apparent agent's name] is not liable, then neither [defendant] nor [defendant] is liable for the acts of [apparent agent's name].

If you find that [apparent agent's name] is liable, but that [he] [she] [it] was not the apparent agent of [principal's name] at the time of the occurrence, then [principal's name] is not liable for the acts of [apparent agent's name].

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. If plaintiff alleges reliance on a “holding out” by an agent and “acquiescence” by the principal, please refer to Gilbert v. Sycamore, 156 Ill.2d 511, 622 N.E.2d 788, 190 Ill.Dec. 758 (1993), for a discussion for the necessary elements. If there is a basis for liability against the principal independent of apparent agency, this instruction should be modified accordingly or replaced by other instructions.

This instruction is intended to apply where apparent agency is alleged relative to a hospital or other such institutional provider. The instruction should not be used without modification where apparent agency is alleged relative to a health maintenance organization or health insurance provider. *See* Petrovich v. Share Health Plan of Illinois, 188 Ill.2d 17, 719 N.E.2d 756, 241 Ill.Dec. 627 (1999). Moreover, the instruction should not be used without modification where apparent agency is alleged in contexts other than medical negligence. *See* O'Banner v. McDonald's Corp., 173 Ill.2d 208, 670 N.E.2d 632, 218 Ill.Dec. 910 (1992).

The bracketed phrase “or others” in the instruction should be used where there is evidence that a person or persons other than the plaintiff or the decedent relied upon the principal

to provide the medical care under consideration. Please refer to the Comment below for a discussion of this issue.

If the issue of apparent agency is in dispute and the principal is sued alone, IPI 105.11 should be used.

Comment

This instruction reflects the opinion of the Illinois Supreme Court in Gilbert v. Sycamore, 156 Ill.2d 511, 622 N.E.2d 788, 190 Ill.Dec. 758 (1993). Gilbert set forth and explained the elements necessary to establish apparent agency, namely, a “holding out” and “justifiable reliance.” In Gilbert, the court further held that apparent agency cannot be established in situations where a patient knew or should have known that the physician providing treatment was not an agent or employee of the hospital. *Id.* at 524. In reaching its decision, the Gilbert court referred to “two realities of modern hospital care”: first, that health care providers increasingly hold themselves out to the public as providers of health care through their marketing efforts; and, secondly, that patients have come to rely upon the reputations of hospitals in seeking health care. *Id*.

The element of “holding out” is satisfied where it is proven that the principal acted in a manner which would lead a reasonable person to conclude that the physician alleged to be negligent was an agent or employee of the principal. *Id*.

The element of “justifiable reliance” is satisfied where there is reliance upon the hospital to provide care, rather than upon a specific physician. *Id*. A pre-existing physician--patient relationship will not preclude a claim by the patient of reliance upon the hospital. Malanowski v. Jabamoni, 293 Ill.App.3d 720, 727; 688 N.E.2d 732, 738; 228 Ill.Dec. 34 (1st Dist.1997).

Although Gilbert involved an emergency room setting, the Gilbert analysis is not limited to such situations. *See*, *e.g.*, Malanowski v. Jabamoni, 293 Ill.App.3d 720, 688 N.E.2d 732, 228 Ill.Dec. 34 (1st Dist.1997) (applying Gilbert to an outpatient clinic situation).

In the absence of proof of actual reliance by plaintiff, several appellate decisions hold that the element of justifiable reliance may be satisfied where there is reliance by those acting on behalf of the plaintiff. *See*, *e.g.*, Monti v. Silver Cross Hospital, 262 Ill.App.3d 503, 507-508; 637 N.E.2d 427, 201 Ill.Dec. 838 (3d Dist.1994) (emergency personnel brought patient to hospital); Golden v. Kishwaukee Community Health Services, 269 Ill.App.3d 37, 46; 206 Ill.Dec. 314, 645 N.E.2d 319 (1st Dist.1994) (plaintiff brought to hospital at direction of plaintiff's friends); Kane v. Doctors Hospital, 302 Ill.App.3d 755, 706 N.E.2d 71, 235 Ill.Dec. 811 (4th Dist.1999) (plaintiff's personal physician arranged for treatment at hospital); Scardina v. Alexian Brothers Medical Center, 308 Ill.App.3d 359, 719 N.E.2d 1150, 241 Ill.Dec. 747 (1st Dist.1999) (plaintiff's physician referred him to a hospital where he was seen by a radiologist). But see*,* Butkiewicz v. Loyola University Medical Center, slip op. No. 1-98-2899 (1st Dist. Feb. 7, 2000) (disagreeing with Kane, distinguishing Monti, and finding that plaintiff's reliance on his “trusted” physician did not constitute “justifiable reliance” as to the defendant hospital).