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**SUMMARY JUDGMENT IN VICARIOUS LIABILITY CASES**  
**By Ted Babbitt**

Every trial judge knows that summary judgments in personal injury actions are rarely upheld. This was underscored in the recent case of Ginsberg v. Northwest Medical Center, 34 Fla. L. Weekly D1349 (Fla. 4<sup>th</sup> DCA July 1, 2009). Ginsberg was a medical malpractice case in which the plaintiff had entered the hospital after signing a consent form that clearly alleged that the surgeons at the hospital were independent contractors. The negligence complained of was related to the surgeons and the hospital's liability was limited to vicarious responsibility. The trial court granted a summary judgment based upon the consent form and the Fourth District reversed. The basis for reversal, inter alia, was the failure of the hospital to lay the proper predicate under the business records exception for the admission of the consent form into evidence, however, the Court made clear that even if the consent form had been admitted, the summary judgment was improper.

At the hearing, the plaintiff claimed that when he had signed the consent form, he was in pain, had no glasses and had taken pain medication and was, thus, incapable of understanding the form. The Court, citing to Fieldhouse v. Tam Inv. Co., 959 So. 2d 1214, 1216 (Fla. 4<sup>th</sup> DCA) (quoting Winston Park, Ltd. v. City of Coconut Creek, 872 So. 2d 415, 418 (Fla. 4<sup>th</sup> DCA 2004), review denied 969 So. 2d 1018, stated:

“If the record reflects even the possibility of of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party.”

Villazon v. Prudential Health Care Plan, Inc., 843 So.2d 842 (Fla. 2003) is the last word from the Supreme Court on what is required to establish apparent authority. That case requires that the purported principal holds out the purported agent as its agent and that the agent claims to have authority to act on behalf of the principal. In this case the plaintiff stated both of those allegations and met the requirements for the three elements of apparent agency set forth in Guadagno v. Lifemark Hosps. of Fla., Inc., 972 So. 2d 214, 218 (Fla. 3d DCA 2007):

- “(1) a representation by the purported principal,
- (2) a reliance on that representation by a third party, and
- (3) a change in position by the third party in reliance on the representation.”

In Ginsberg the Fourth District, relying upon Villazon, reflects on the obvious motivation of parties to include within admission forms exculpatory language regarding purported independent contractors and explains why that language is not the final word.

“In *Villazon v. Prudential Health Care Plant, Inc.*, 843 So. 2d 842 (Fla. 2003) our supreme court explained that it is not uncommon for parties to include conclusory statements in documents with regard to the independence of the relationship of the parties, and this may

occur even where the totality of the circumstances reflects other. *Id.* at 853-54 (quoting *Cantor v. Cochran*, 184 So. 2d 173, 174 (Fla. 1966) (“While the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.”))”

This case makes it clear that summary judgment is rarely appropriate in an apparent agency issue unless the requisite elements are completely devoid of support in the record.

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