MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jody Smedley,
Appellant-Plaintiff,

v.

Indiana Spine Group, P.C.,
and
Rick C. Sasso, M.D. and John W. Arbuckle, M.D.,
Appellees-Plaintiffs.

April 28, 2021

Court of Appeals Case No. 20A-CT-2320

Appeal from the Hamilton Circuit Court

The Honorable Paul Felix, Judge

Trial Court Cause No. 29C01-2003-CT-2539

Tavitas, Judge.

Case Summary

[1] Jody Smedley appeals the trial court's grant of summary judgment to the Indiana Spine Group, P.C. ("ISG"). Smedley claimed that he was injured as a result of medical malpractice by Dr. Rick Sasso, Dr. John Arbuckle, and ISG (collectively, "Defendants"). The Defendants filed a motion for summary judgment based upon the medical review panel's opinion. The trial court granted the motion for summary judgment regarding Dr. Sasso and ISG, but denied the motion regarding Dr. Arbuckle. Smedley appeals the trial court's grant of summary judgment to ISG, claiming that summary judgment was improper on his vicarious liability claim against ISG. We agree. Accordingly, we affirm the trial court's grant of summary judgment to ISG related to the conduct of its employee nurse practitioner. We reverse, however, the trial court's grant of summary judgment to ISG on Smedley's vicarious liability claim related to Dr. Arbuckle's actions. We remand for further proceedings consistent with this opinion.

Issue

[2] Smedley raises one issue, which we restate as whether the trial court properly granted summary judgment to ISG on Smedley's medical malpractice claim.

Facts

[3] Dr. Sasso is a spine surgeon, and Dr. Arbuckle is an anesthesiologist and pain medicine specialist. On May 10, 2017, Smedley underwent a surgery with Dr. Sasso. Following the surgery, Smedley experienced complications, and a nurse

practitioner, who was employed by ISG, prescribed medication. On May 31, 2017, Dr. Sasso ordered an epidural steroid injection, which Dr. Arbuckle performed on June 5, 2017. On July 20, 2017, Smedley was diagnosed with a subdural abscess, and Dr. Sasso performed additional surgery.

[4] In April 2018, Smedley filed a proposed complaint with the Indiana Department of Insurance and alleged medical malpractice by Defendants. A medical review panel unanimously determined that the evidence did not support the conclusion that Defendants failed to meet the standard of care as charged in the complaint and that Defendants' conduct was not a factor in the alleged injury.

[5] In May 2020, Smedley filed a complaint alleging medical malpractice against Defendants in the Hamilton Circuit Court. Smedley alleged in part:

> 5. The medical care and treatment provided to [Smedley] by Defendants and their agents and/or employees, including independent contractors not properly so identified to Plaintiff by Defendants as required by Indiana law, on or around May 10, 2017, and thereafter was careless, negligent and failed to comply with appropriate standards of medical care and treatment required and/or expected of physicians and healthcare providers in the State of Indiana.
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> 6. As a result of the careless and negligent acts and/or omissions of Defendants and their agents and/or employees, including independent contractors not properly so identified to Plaintiff by Defendants as required by Indiana law, [Smedley] incurred bodily injury, some of which is permanent in nature, additional medical expenses, pain and suffering, scarring, deformity, mental

> anguish, bodily impairment and other losses, expenses, costs and damages recoverable under Indiana law.

Appellant's App. Vol. II p. 13. In their answer, Defendants denied the allegations contained in paragraphs five and six of the complaint.

[6] Defendants filed a motion for summary judgment and argued that they were entitled to summary judgment as a matter of law because Smedley failed to "come forth with an expert opinion contradicting the opinions rendered by the Medical Review Panel." *Id.* at 23. The motion for summary judgment focused solely on Smedley's lack of expert testimony to prove that Defendants "breached the standard of care or that their conduct was a factor in the resultant damages." *Id.* at 30. In support of their motion for summary judgment, Defendants designated evidence consisting of only: (1) Smedley's proposed complaint to the Indiana Department of Insurance; (2) the medical review panel's opinion; and (3) Smedley's state court complaint.

[7] In response to the motion for summary judgment, Smedley's designated evidence included the affidavit of Dr. Robert Prince. Dr. Prince opined that:

> [T]o a reasonable degree of medical certainty, that the primary breach of the appropriate standards of care in the treatment of Mr. Smedley are attributable to Dr. Arbuckle, and were the cause of Mr. Smedley's post-surgical spread of infection and the subsequent physical injuries and additional medical care which resulted from such breach of care.

Id. at 56, 71. Dr. Prince offered no expert opinion regarding a breach of the standard of care with respect to Dr. Sasso or "other staff members, including Nurse Practitioners, of the Indiana Spine Group, Inc." *Id.* at 71.

[8] Defendants thereafter filed a motion for extension of time to reply in order to depose Dr. Prince, which the trial court granted. After Dr. Prince's deposition was taken, Defendants filed a reply and a supplemental designation of evidence, which included portions of Dr. Prince's deposition. In the reply, Defendants argued that Dr. Prince's affidavit and deposition were insufficient to create a genuine issue of material fact as to the standard of care and causation with respect to Dr. Sasso and ISG. Defendants pointed out that, in Dr. Prince's affidavit and deposition, he offered no expert opinion to controvert the medical review panel's opinion with regard to the nurse practitioner, who was an ISG employee.

[9] On October 16, 2020, Smedley filed a consent to entry of summary judgment as to Dr. Sasso, and the trial court granted Defendants' motion for summary judgment as to Dr. Sasso only. Smedley then filed a motion to tender additional evidence in opposition to the motion for summary judgment.[1] Defendants objected to Smedley's motion, argued that the motion was "improper, untimely, and did not comply with Hamilton County Local Rules,"

[1] Smedley sought to designate additional portions of Dr. Prince's deposition and Dr. Arbuckle's curriculum vitae.

and requested that the additional evidence be stricken. *Id.* at 150. The trial court granted Defendants' motion to strike the additional evidence.

[10] At the summary judgment hearing, Defendants conceded that a genuine issue of material fact existed with respect to treatment Dr. Arbuckle provided to Smedley. As for ISG, Defendants argued that no genuine issue of material fact existed with respect to the ISG's nurse practitioner. Defendants also argued at the summary judgment hearing, but not in their motion for summary judgment, that no designated evidence established an "employee[-]employer relationship" between ISG and Dr. Arbuckle. Appellees' App. Vol. II p. 9. In response, Smedley argued that "Dr. Arbuckle is an employee[,] maybe an owner[,] of the Indiana Spine Group and that's why they have vicarious liability for his actions." *Id.* Smedley further argued that ISG had the burden to demonstrate that Dr. Arbuckle was not an employee of ISG.

[11] On November 18, 2020, the trial court granted summary judgment in favor of Dr. Sasso and ISG, but not Dr. Arbuckle.[2] Smedley now appeals.

Analysis

[12] Smedley appeals from the trial court's grant of summary judgment to ISG. "When this Court reviews a grant or denial of a motion for summary judgment,

[2] Pursuant to Indiana Trial Rule 54, the trial court expressly determined that there was "no just reason for delay and direct[ed] the entry of final judgment in favor of" Dr. Sasso and ISG. Appellant's App. Vol. II p. 10.

we 'stand in the shoes of the trial court.'" *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Murray*, 128 N.E.3d at 452; *see also* Ind. Trial Rule 56(C). The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue. *Id.* On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id.* We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*, 139 S. Ct. 1167 (2019).

[13] "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant to demonstrate the absence of any genuine issue of material fact on at least one element of the claim." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). The elements of a medical malpractice claim are: "'(1) that the physician owed a duty to the plaintiff; (2) that the physician breached that duty; and (3) that the breach proximately

caused the plaintiff's injuries.'" *Id.* (quoting *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1386 (Ind. 1995)). "A 'unanimous opinion of the medical review panel' in favor of the movant is 'ordinarily sufficient' to meet this initial burden, requiring the non-movant to rebut the medical panel opinion with expert medical testimony." *Id.* at 1187-88 (quoting *Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015)). Cases hinging on disputed material facts, however, are by definition inappropriate for summary judgment because weighing evidence is "a matter for trial, not summary judgment." *Id.* at 1188.

[14] We begin by noting that Defendants' motion for summary judgment requested judgment based solely on the unanimous opinion of the medical review panel. By designating the medical review panel's opinion, Defendants met their initial burden of showing that ISG, Dr. Sasso, and Dr. Arbuckle did not breach their duties to Smedley or that their alleged breaches did not cause Smedley's injuries. In response, Smedley designated expert evidence that Dr. Arbuckle's actions breached the appropriate standard of care and caused Smedley's injuries. Smedley, however, offered no expert opinion regarding a breach of the standard of care with respect to Dr. Sasso and "other staff members, including Nurse Practitioners, of the Indiana Spine Group, Inc." Appellant's App. Vol. II p. 71. In fact, Smedley conceded that summary judgment was proper with respect to Dr. Sasso and with respect to ISG for claims related to the nurse practitioner's actions. Accordingly, the trial court properly granted summary judgment to Dr. Sasso and ISG related to the allegations against ISG's nurse practitioner.

[15] Smedley, however, argues that the trial court erred by granting summary judgment to ISG on its potential vicarious liability based on Dr. Arbuckle's conduct.[3] "[Vicarious liability] is a legal fiction by which a court can hold a party legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party's relationship to the wrongdoer." *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 147 (Ind. 1999) (citing KEETON, TORTS § 69). "Courts employ various legal doctrines to hold people vicariously liable, including respondeat superior. . . ." *Id.* Under respondeat superior, an employer, who is not liable because of his own acts, can be held liable "for the wrongful acts of his employee which are committed within the scope of employment." *Id.* "Apparent or ostensible agency also can be a means by which to establish vicarious liability." *Id.* at 148-49. Under apparent or ostensible agency:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Id. at 149.

[3] The trial court entered final judgment in favor of ISG, leaving no claims pending against ISG.

[16] In *Sword*, our Supreme Court held that:

> [A] hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital. A hospital generally will be able to avoid liability by providing meaningful written notice to the patient, acknowledged at the time of admission.
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> [I]f the hospital has failed to give meaningful notice, if the patient has no special knowledge regarding the arrangement the hospital has made with its physicians, and if there is no reason that the patient should have known of these employment relationships, then reliance is presumed.

Id. at 152.

[17] In his complaint, Smedley raised a vicarious liability claim. Defendants' motion for summary judgment, however, did not request summary judgment for any potential vicarious liability of ISG based on the conduct of Dr. Arbuckle. In fact, vicarious liability was not even mentioned by Defendants until the summary judgment hearing. Defendants, who had the initial burden

of showing they were entitled to summary judgment, failed to designate any evidence related to the relationship between ISG and Dr. Arbuckle.[4]

[18] On appeal, ISG argues that Smedley had the burden of designating evidence regarding ISG's relationship, if any, with Dr. Arbuckle. Our Supreme Court has repeatedly held that the party moving for summary judgment—here Defendants—bears the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party—here Smedley—to show the existence of a genuine issue of material fact. *Id.* Accordingly, Defendants, not Smedley, had the initial burden of making a showing that ISG was entitled to summary judgment on Smedley's vicarious liability claim. Specifically, ISG had the burden to designate evidence showing Dr. Arbuckle was an independent contractor and such notice was provided to Smedley.

[19] We conclude that the trial court erred by granting summary judgment on an issue not raised by ISG in its motion for summary judgment and without any designated evidence regarding vicarious liability. ISG has failed to demonstrate that no genuine issue of material fact exists or that ISG was entitled to judgment as a matter of law on the issue.

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[4] At the summary judgment hearing, Defendants' counsel stated: Dr. Arbuckle is "a shareholder in that group [ISG.] [T]hat group is like every group [sic] is designed to do different things including pay the physicians who are the owners or are the shareholders in the group . . . ." Appellees' App. Vol. II p. 16.

Conclusion

[20] We affirm the trial court's grant of summary judgment to ISG related to the conduct of its nurse practitioner. We reverse, however, the trial court's grant of summary judgment to ISG on Smedley's vicarious liability claim related to Dr. Arbuckle's actions. We remand for further proceedings consistent with this opinion.

[21] Affirmed in part, reversed in part, and remanded.

Najam, J., and Pyle, J., concur.