

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Darci Wilson,
Appellant-Plaintiff,

v.

Anonymous Defendant 1,
Appellee- Defendant.

March 16, 2021

Court of Appeals Case No.
20A-CT-923

Appeal from the St. Joseph Circuit
Court

The Honorable John E. Broden,
Judge

Trial Court Cause No.
71C01-1812-CT-565

Tavitas, Judge.

Case Summary

- [1] Darci Wilson allegedly suffered an injury during a rehabilitation session with a physical therapist, whose employer shared premises with Anonymous, a physician group. Wilson filed a proposed complaint, later amended, with the Indiana Department of Insurance and a subsequent complaint for damages in state court. Wilson alleged therein that the physical therapist was negligent and that various entities, including Anonymous, were liable for damages stemming from the physical therapist's alleged negligence under the theory of respondeat superior.
- [2] Anonymous and the other defendants moved for preliminary determination of law and also moved for summary judgment. Without exception, the trial court granted summary judgment for the defendants. Wilson appeals from the trial court's entry of summary judgment in favor of Anonymous. We find the trial court possessed subject matter jurisdiction to reach a preliminary determination on issues of law and fact before it, and because the designated evidence indicates no genuine issues of material fact and Anonymous is entitled to judgment as a matter of law, Anonymous is not liable under the theory of respondeat superior. We affirm.

Issue

- [3] The sole issue on appeal is whether the trial court properly found that no genuine issue of material fact exists and Anonymous is entitled to judgment as a matter of law on the theory of respondeat superior.

Facts

[4] During the relevant period, Anonymous,¹ an orthopedic physician group, operated a business from the ground floor of a facility (“Facility”) located in South Bend, Indiana. On September 1, 2008, Anonymous and physical therapy provider Accelerated Rehab executed a Staffing Agreement, wherein Accelerated Rehab: (1) agreed to supply licensed, qualified rehabilitation personnel, including physical therapists to staff the Facility; and (2) Accelerated Rehab had “sole responsibility” for recruitment, vetting, training, supervision, evaluation, and monitoring of the rehabilitation personnel.² Wilson’s App. Vol. II p. 89. The Staffing Agreement also provided, in part: “Not later than [January 1, 2008], all such Rehab Personnel shall be employees or independent contractors of [Accelerated Rehab] at all times[.]” *Id.* at 82. Anonymous also granted Accelerated Rehab use and occupancy of the second floor of the Facility.

[5] In June 2009, physical therapist Christopher Lingle was hired by Accelerated Rehab. Accelerated Rehab was subsequently acquired by Athletico, Ltd. and Athletico Management, LLC (collectively, the “Athletico entities”). The Staffing Agreement remained in force following the Athletico entities’

¹ The Indiana Medical Malpractice Act (“MMA”) contains a provision that requires litigants to maintain the anonymity of defendant healthcare providers until such time as a decision is rendered by the medical review panel. Ind. Code § 34-18-8-7.

² Under the Staffing Agreement, Accelerated Rehab was also responsible for human resource management and support, salary negotiation, benefits provision, payroll and taxes coordination, and malpractice insurance administration for the rehabilitation personnel.

acquisition of Accelerated Rehab. During Lingle's tenure with the Athletico entities, various other healthcare providers, including Anonymous, referred physical therapy patients to the Athletico entities.

[6] In December 2015, Wilson underwent knee surgery. Post-surgery, Wilson's physicians referred her to Lingle to undergo physical therapy rehabilitation. During an April 12, 2016 session, Lingle performed a maneuver that allegedly caused Wilson to suffer acute pain and reinjury that warranted revisionary surgery. Pursuant to a managed services contract that was in effect in 2016 between the Athletico entities and Anonymous, Anonymous provided billing services to the Athletico entities. Lingle's services to Wilson on April 12, 2016, were billed through Anonymous' billing service.

[7] On April 9, 2018, Wilson filed a proposed complaint for damages before the Indiana Department of Insurance ("IDOI"). On April 12, 2018, Wilson amended her proposed complaint to add more defendants. In all, Wilson alleged medical negligence by Lingle, the Athletico entities, Ascendant Orthopedic Alliance, LLC ("Ascendant"),³ and Anonymous. In her complaint, Wilson alleged that Lingle rendered physical therapy services that fell below the standard of care and that the various defendants were vicariously liable for Lingle's negligence based on the defendants' relationship(s) with Lingle.

³ Ascendant resulted from a short-lived merger between Anonymous and another provider. It is undisputed that Ascendant did not exist at the time of the incident at issue.

[8] On December 13, 2018, Lingle, Ascendant, and the Athletico entities jointly filed a motion for preliminary determination of law and a contemporaneous motion for summary judgment in a trial court action. Lingle, Ascendant, and the Athletico entities argued therein that: (1) they were not qualified healthcare providers covered under the MMA; (2) Wilson failed to timely file a complaint against them in state court upon learning that they were not qualified healthcare providers covered under the MMA; and (3) Wilson's claims were, thus, time-barred by the statute of limitations.

[9] On January 11, 2019, Wilson filed a complaint in the St. Joseph County Superior Court, naming Lingle, the Athletico entities, Ascendant, and Anonymous as defendants. Wilson alleged that: (1) Lingle was negligent in rendering physical therapy services to Wilson; and (2) Anonymous, Ascendant, and/or the Athletico entities were vicariously liable for Lingle's negligence. The parties later moved to consolidate all pending claims of the parties into a single cause, and the trial court consolidated the pending causes.

[10] The trial court ultimately entered summary judgment in favor of Lingle, Ascendant, and the Athletico entities, and found Wilson's claims were time-barred by the applicable statute of limitations. On January 18, 2019, Anonymous filed a motion for preliminary determination of law and a motion for summary judgment, alleging that no genuine issues of material fact existed regarding whether Anonymous was vicariously liable for Lingle's acts or

omissions under the theory of respondeat superior.⁴ Most pertinently, Anonymous maintained that Lingle was not its employee, agent, or contractor at the time of Wilson's alleged injury.

[11] Anonymous subsequently⁵ filed a supplemental designation of evidence and brief in support of its motion for summary judgment. The supplemental designated materials included: (1) Lingle's deposition testimony that he was employed by the Athletico entities at the time of Wilson's alleged injury; and (2) the declarations page for Anonymous' medical malpractice insurance policy and an endorsement thereto, which expressly excluded Lingle from Anonymous' malpractice insurance coverage effective June 19, 2015.⁶

[12] On March 11, 2019, Wilson filed a partial response in opposition to the pending motions for summary judgment wherein she argued that genuine issues of material fact existed regarding the application of the statute of limitations and the identity of Lingle's employer which precluded entry of summary judgment for Anonymous.⁷ In support, Wilson designated: (1) Wilson's physical therapy

⁴ Ascendant joined Anonymous in filing the motion for summary judgment. The trial court subsequently entered summary judgment in Ascendant's favor on a finding that Wilson's claim was time-barred by the applicable statute of limitations.

⁵ Anonymous supplemented its motion for summary judgment filing on August 30, 2019.

⁶ Wilson suffered the alleged injury on April 12, 2016.

⁷ On April 4, 2019, Wilson moved to stay the summary judgment proceedings to, among other things, conduct and collect outstanding discovery relevant to discerning the identity of Lingle's employer(s). After a hearing, on May 13, 2019, the trial court granted Wilson 120 days of additional time to conduct discovery, limited in scope to determining the nature of Lingle's and Anonymous' relationship.

records; (2) patient forms and documents issued to or relating to Wilson’s care that bore business names similar to those used by the Athletico entities and/or Anonymous; (3) Indiana Secretary of State corporate documents pertaining to Anonymous; (4) Wilson’s initial proposed complaint and amended proposed complaint; (5) the correspondence from the IDOI to Wilson and her counsel; and (6) Wilson’s affidavit. In her affidavit, Wilson averred that, post-surgery, she was issued a leg brace and underwent both MRI testing and physical therapy in the Facility; and that she was never advised that the service providers in the Facility “w[ere] not employed or supervised by or affiliated with Anonymous []” Wilson’s App. Vol. II p. 156.

[13] On February 7, 2020, the trial court conducted a hearing on Anonymous’ motion for summary judgment. At the hearing, Anonymous argued that it was entitled to judgment as a matter of law on the theory of respondeat superior because Lingle was not Anonymous’ employee, agent, or contractor at the time of Wilson’s alleged injury. *See* Tr. Vol. II p. 29 (counsel for Anonymous arguing: “Judge, . . . even looking at [the designated materials in] the light most favorable to [Wilson], there is not going to be any evidence that establishes that [Wilson] has any evidence to tie [] Lingle, or the care that was provided to [Wilson,] to [Anonymous]”). Wilson countered and cited: (1) *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999), and (2) *Columbus Reg’l Hosp. v. Amburgey*, 976 N.E.2d 709 (Ind. Ct. App. 2012), as support that the trial court lacked subject matter jurisdiction over the matter because a medical review panel had yet to issue an expert opinion regarding Wilson’s complaint. Wilson

also argued that Lingle and Anonymous failed to inform Wilson that they were separate entities.

[14] On March 9, 2020, the trial court entered summary judgment in favor of Anonymous. The court’s order provided, in part, that: (1) the trial court possessed jurisdiction to decide whether a legal relationship existed between Lingle and Anonymous during the relevant period; and (2) the designated evidence included “no evidence whatsoever that create[d] a question of fact as to whether [Anonymous] [wa]s liable for the actions of Lingle under [] respondeat superior.” Wilson’s App. Vol. III pp. 156-57. Wilson now appeals.

Analysis

I. Motion to Strike

[15] As an initial matter, we address Anonymous’ October 16, 2020, motion to strike portions of Wilson’s appellant’s brief and appendix. Anonymous claims the submitted materials are not properly part of the summary judgment record; because the challenged materials have no bearing on the dispositive issues herein, we deny Anonymous’ motion to strike by separate order issued contemporaneously with this decision.

II. Preliminary Determination of Law

[16] Next, Wilson argues that, because her claim against Anonymous was not first adjudicated by a medical review panel, the trial court lacked subject matter jurisdiction to reach a preliminary determination of law granting summary judgment to Anonymous. “Subject matter jurisdiction is the constitutional or

statutory power of a court to hear and determine cases of the general class to which any particular proceeding belongs.” *State v. Reinhart*, 112 N.E.3d 705, 711-12 (Ind. 2018). “In determining whether a court has subject matter jurisdiction, the only relevant inquiry is whether the petitioner’s claim falls within the general scope of the authority conferred upon such court by the constitution or by statute.” *Id.* Subject matter jurisdiction cannot be waived and may be raised by the parties or the court at any time, including on appeal. *Indiana Dep’t of Env’tl. Mgmt. v. Raybestos Prod. Co.*, 897 N.E.2d 469, 474 (Ind. 2008), *opinion corrected on reh’g*, 903 N.E.2d 471 (Ind. 2009); *Madison Ctr., Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006), *trans. denied*.

[17] “[The MMA] is a statute that applies to claims of personal injury or death proximately caused by a ‘health care provider[,]’ as that term is defined in the MMA. . . .” *Chamberlain v. Walpole*, 822 N.E.2d 959, 961 (Ind. 2005). One of the requirements of the MMA, subject to certain limitations,⁸ is that a proposed medical malpractice complaint must first be filed with the IDOI for review by a medical review panel before the complaint is filed in an Indiana court. *Ellenwine v. Fairley*, 846 N.E.2d 657, 660 (Ind. 2006). The MMA, thus, “grants subject matter jurisdiction over medical malpractice actions first to the

⁸ Exceptions to this general rule are codified in Indiana Code Section 34-18-8-5, which allows the medical panel requirement to be bypassed by written, signed agreement of the parties or their agents and upon provision of said agreement to the trial court contemporaneously with the complaint; and in Indiana Code Section 34-18-8-6, which permits the commencement of an action against a health care provider for malpractice without submitting a proposed complaint to a medical review panel if the patient declares that the amount of sought damages is under \$15,000.00.

medical review panel, and then to the trial court.” *Putnam Cnty. Hosp. v. Sells*, 619 N.E.2d 968, 970 (Ind. Ct. App. 1993).

[18] Before the medical review panel’s submission of its expert opinion, a trial court has “limited” subject matter jurisdiction as follows. *Griffith v. Jones*, 602 N.E.2d 107, 110 (Ind. 1992). Although the trial court lacks jurisdiction “to rule preliminarily upon any . . . issue of law or fact preserved for a written opinion by the medical review panel,” the trial court possesses jurisdiction to determine either affirmative defenses or issues of law or fact that may be preliminarily determined under the Indiana Trial Rules; and, secondly, it may compel discovery in accordance with the Indiana Trial Rules. *Id.*; *see* Ind. Code § 34-18-11-1. The grant of power to the trial court to preliminarily determine these matters is to be narrowly construed. *Howard Reg’l Health Sys. v. Gordon*, 952 N.E.2d 182, 191 (Ind. 2011).

[19] Indiana Code Section 34-18-11-1 provides, in part, as follows:

(a) A court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the commissioner under this article may, upon the filing of a copy of the proposed complaint and a written motion under this chapter, do one (1) or both of the following:

(1) preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure; or

(2) compel discovery in accordance with the Indiana Rules of Procedure.

(b) The court has no jurisdiction to rule preliminarily upon any affirmative defense or issue of law or fact reserved for written opinion by the medical review panel under IC 34-18-10-22(b)(1), IC 34-18-10-22(b)(2), and IC 34-18-10-22(b)(4).

(c) The court has jurisdiction to entertain a motion filed under this chapter only during that time after a proposed complaint is filed with the commissioner under this article but before the medical review panel gives the panel's written opinion under IC 34-18-10-22

[20] In *Castillo v. Ruggiero*, 562 N.E.2d 446, 455 (Ind. Ct. App. 1990), *trans. denied*, this Court upheld the trial court's preliminary determination of an issue of fact related to a party's employment. In that case, Castillo contemporaneously filed complaints against defendant-physicians before the IDOI and a trial court. The trial court subsequently granted the defendant-physicians' motion to compel and their subsequent motion for summary judgment. On appeal, Castillo argued, in part, that the trial court lacked jurisdiction to enter summary judgment for the defendant-physicians because no medical review panel had yet decided the factual dispute of the parties.

[21] This Court rejected Castillo's argument and opined: "We do not believe that the determination of one's employment status is reserved for the medical review panel" *Castillo*, 562 N.E.2d at 455. This Court analogized *Johnson v. Padilla*, 433 N.E.2d 393 (Ind. Ct. App. 1982), as follows:

The dispute in issue in *Johnson* was whether the physician actually performed the medical procedure which allegedly injured the plaintiff. The court in *Johnson* held that resolution of this factual dispute did not require the expert opinion of a

medical review panel. So it is in the present case. *A trial court may properly determine if a factual issue exists as to whether a particular physician is the employee of an organization, or an independent contractor, for the purposes of ruling on a motion for summary judgment.*

Id. at 455-56 (emphasis added) (internal citations omitted).

[22] Here, as in *Castillo*, we find that a factual issue existed regarding the identity of Lingle’s employer. Additionally, an issue of law existed regarding whether Anonymous was vicariously liable for Lingle’s negligent acts in the scope of Lingle’s employment. Because, neither the issue of fact, regarding the identity of Lingle’s employer, nor the issue of law, regarding whether Anonymous was vicariously liable on a theory of respondeat superior, required the expert opinion of a medical review panel, we conclude that the trial court was not precluded from preliminarily ruling thereon. *See id.* at 455.

[23] Based on the foregoing, we conclude that Anonymous’ motion for summary judgment, pursuant to Trial Rule 56, and its contemporaneously-filed motion to dismiss Wilson’s claim, pursuant to Indiana Trial Rule 12(B)(6), are expressly authorized for preliminary determination by Indiana Code Section 34-18-11-1. Accordingly, Wilson’s claim that the trial court here lacked subject matter jurisdiction to reach a preliminary determination of law granting summary judgment to Anonymous must fail.

III. Vicarious Liability

[24] Lastly, Wilson argues that the trial court erred in entering summary judgment in Anonymous’ favor. Wilson maintains that genuine issues of material fact

exist regarding whether Anonymous could be found vicariously liable, under the theory of respondeat superior, for Lingle's negligent acts or omissions in the scope of Lingle's employment.

[25] The grant or denial of summary judgment on a motion for preliminary determination is subject to the same standard of review as any other summary judgment ruling. *Dermatology Assocs., P.C. v. White*, 67 N.E.3d 1173, 1176 (Ind. Ct. App. 2017). When a trial court's ruling granting or denying summary judgment is challenged on appeal, the procedure and standard under Indiana law is clear. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Our standard of review is the same as it is for the trial court. *Id.* The moving party "bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 (Ind. 2012).

[26] Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the non-moving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Manley*, 992 N.E.2d at 673. We construe all factual inferences in favor of the non-moving party and resolve all doubts as to the existence of a material issue against the moving party. *Id.* An appellate court reviewing a challenged trial court summary judgment ruling is limited to the designated evidence before the trial court, *see* Ind. Trial Rule 56(H), but is constrained to neither the claims and arguments presented at trial nor the rationale of the trial court ruling. *see Woodruff v. Ind. Family & Soc. Servs. Admin.*, 964 N.E.2d 784, 790 (Ind.

2012) (“We will reverse if the law has been incorrectly applied to the facts. Otherwise, we will affirm a grant of summary judgment upon any theory supported by evidence in the record.”); *Wagner v. Yates*, 912 N.E.2d 805, 811 (Ind. 2009) (“[W]e are not limited to reviewing the trial court’s reasons for granting or denying summary judgment but rather we may affirm a grant of summary judgment upon any theory supported by the evidence.”).

[27] Wilson claims that Anonymous is vicariously liable for Wilson’s injuries. “[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*, 714 N.E.2d at 147 (citing KEETON, TORTS § 69). “Courts employ various legal doctrines to hold people vicariously liable, including respondeat superior” *Id.* “Respondeat superior is the applicable tort theory of vicarious liability.” *Id.* at 148. 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.*

[28] In support of her claim, Wilson relies upon *Sword* and *Columbus Reg’l Hosp. v. Amburgey*, 976 N.E.2d 709 (Ind. Ct. App. 2012); however, her reliance on these cases is misplaced. *Sword* and *Columbus Regional Hospital* are readily distinguishable from the instant matter. In *Sword*, our Supreme Court analyzed whether the defendant-hospital could be held liable for the alleged negligence of an independent contractor anesthesiologist. The *Columbus Reg’l Hosp.* panel likewise considered a medical malpractice claim that was brought against a hospital for

the negligent acts of its independent contractors. Whereas *Sword* and *Columbus Reg'l Hosp.* involved independent contractors of the respective defendant-hospitals, the evidence designated here implicates no such legal relationship between Lingle and Anonymous; thus, we find these cases inapposite.

[29] The instant record reveals that Anonymous designated ample evidence to establish that it did not employ or contract with Lingle for the provision of physical therapy services at the time of Wilson's alleged injury. First, the designated Staffing Agreement provided that: (1) Accelerated bore "sole responsibility" for hiring rehabilitation personnel to work at the Facility; and (2) ". . . all [] Rehab Personnel [who worked at the Facility were] employees or independent contractors of [Accelerated Rehab] at all times" Wilson's App. Vol. II p. 82. Next, the designated endorsement to Anonymous' malpractice insurance policy specifically excluded Lingle from coverage on the date of Wilson's alleged injury. Additionally, Lingle's deposition transcript included his designated testimony that he was employed by the Athletico entities, not Anonymous, at the time of Wilson's alleged injury.

[30] In opposition to Anonymous' motion for summary judgment, Wilson designated, among other things, materials indicating that: (1) Lingle and Anonymous had offices in the same building; (2) Lingle's services to Wilson were billed through Anonymous' billing service; (3) certain similarities existed between business names used by Anonymous and the Athletico entities, and Wilson received paperwork from Lingle that bore some of those similar business names; and (4) Wilson underwent MRI testing, physical therapy, and

was issued a leg brace in the Facility, and Wilson was not advised that the service providers in the Facility “w[ere] not employed or supervised by or affiliated with Anonymous []” Wilson’s App. Vol. II p. 156.

[31] We find Wilson’s designated materials indicate mere insinuations, which we find to be wholly speculative and insufficient to create a genuine issue of material fact. *See Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079, 1089 (Ind. Ct. App. 2018), *trans. denied* (“Mere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment”); *see also Castillo*, 562 N.E.2d at 456 (holding that a nonmoving party may not rest on mere allegations, “but must set forth by affidavit or otherwise some specific facts demonstrating an issue for trial”).

[32] Absent evidence of an employer-employee or a master-servant relationship between Lingle and Anonymous, we agree with the trial court that no genuine issues of material fact existed to preclude entry of summary judgment in favor of Anonymous, and that Anonymous is entitled to judgment as a matter of law on the theory of respondeat superior. *See Wilson’s App. Vol. III pp. 156-57* (finding that the designated materials included “no evidence whatsoever that create[d] a question of fact as to whether [Anonymous] [wa]s liable for the actions of Lingle under [] respondeat superior”). The trial court did not err in granting Anonymous’ motion for summary judgment.

Conclusion

[33] By a separate order, Anonymous' motion to strike is denied. The trial court possessed jurisdiction to decide preliminary issues of fact and law pursuant to Indiana Code Section 34-18-11-1, before the medical review panel's issuance of an expert opinion. No genuine issues of material fact existed to preclude entry of summary judgment in favor of Anonymous; Anonymous is entitled to judgment as a matter of law. We affirm.

[34] Affirmed.

Riley, J., and Robb, J., concur.