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IN THE COURT OF APPEALS OF INDIANA

Harold Arrendale,
Appellant-Plaintiff,

v.

American Imaging & MRI, LLC a/k/a Marion Open MRI,
Appellee-Defendant,

May 14, 2021

Court of Appeals Case No. 20A-CT-2184

Appeal from the Allen Superior Court

The Honorable Craig J. Bobay, Judge

Trial Court Cause No. 02D02-1712-CT-657

Isa Canavati, M.D.,
Amy Sutton, N.P.,
Allied Physicians, Inc., a/k/a
Fort Wayne Neurological
Center,
Alexander Boutselis, M.D.,
John Dean, M.D.,
Donald Bruns, M.D.,
Marion General Radiology, Inc.,
Jon Karl, M.D., and
Orthopaedics Northeast, P.C.,
Defendants

Vaidik, Judge.

Case Summary

[1] Our Supreme Court held in *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999), that a hospital could be held vicariously liable for the negligence of an independent-contractor physician under Restatement (Second) of Torts § 429 (1965). The issue in this case is whether that holding applies to a non-hospital facility—specifically, a diagnostic imaging center. We hold it does.

Facts and Procedural History

[2] In January 2016, Harold Arrendale was diagnosed with an arteriovenous fistula of his spine. The next year, he sued Marion Open MRI, Dr. Alexander Boutselis, and several other healthcare providers, alleging he had sought care

from them between April 2013 and December 2015 and they had failed to diagnose and treat the fistula.

[3] This appeal concerns only two of the defendants—Marion Open MRI and Dr. Boutselis. As the name suggests, Marion Open MRI is an MRI provider in Marion. Arrendale's primary-care physician sent him there to get MRIs of his spine in April 2013. The MRIs were reviewed by Dr. Boutselis, an independent radiologist with whom Marion Open MRI had contracted for that purpose. Arrendale does not accuse Marion Open MRI of any direct negligence. Rather, he alleges Dr. Boutselis "was an employee and/or agent" of Marion Open MRI, Appellant's App. Vol. II p. 184, and Marion Open MRI is therefore vicariously liable for Dr. Boutselis's alleged negligence.

[4] Marion Open MRI moved for summary judgment, arguing it cannot be held vicariously liable for Dr. Boutselis's alleged negligence because he was an independent contractor. It acknowledged our Supreme Court's holding in *Sword*—that hospitals can be held vicariously liable for the negligence of independent-contractor physicians under certain circumstances—but asserted the holding should be limited to hospitals and not applied to non-hospital entities like Marion Open MRI. Arrendale argued the opposite, asking the trial court to apply *Sword*. After a hearing, the court issued an order granting summary judgment to Marion Open MRI. The court indicated it was inclined to agree with Arrendale that *Sword* should be applied to non-hospital entities but explained:

> However, the Court also recognizes that the Indiana appellate courts have not applied apparent agency liability outside of the hospital setting. It is not the task of the Indiana trial courts to expand the law as it is presently stated. If the theory of apparent agency in medical negligence cases should be applicable to other "professional medical corporations" or "medical centers", the Indiana appellate courts should clarify and expressly so state. The consideration of expanding present law beyond the confines of a hospital is left to the wisdom of the Indiana appellate courts.

Id. at 42-43.

[5] Arrendale now appeals.[1]

Discussion and Decision

[6] Arrendale contends the trial court erred by granting summary judgment to Marion Open MRI. We review motions for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith 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." Ind. Trial Rule 56(C).

[1] While we appreciate the court's careful explanation of its ruling, we respectfully disagree with its belief that our trial courts have no role to play in the expansion of Indiana law. As demonstrated by the court's thorough twenty-five-page order, trial courts are fully capable of contributing to the development of the law.

[7] Because the parties' arguments revolve around our Supreme Court's decision in *Sword*, we begin with a brief overview of that decision. The plaintiff sought to hold a hospital vicariously liable for the negligence of an independent-contractor anesthesiologist who practiced at the hospital. Up to that time, Indiana had "long followed the general rule that hospitals could not be held liable for the negligent actions of independent contractor physicians." *Sword*, 714 N.E.2d at 149. The Court rejected that rule, noting there had been an "ongoing movement" in other jurisdictions "to use apparent or ostensible agency as a means by which to hold hospitals vicariously liable for the negligence of some independent contractor physicians." *Id.* at 150. The Court adopted—"in the specific context of a hospital setting," *id.* at 152—Restatement (Second) of Torts § 429, which provides:

> 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.

The Court explained:

> Under Section 429, as we read and construe it, a trier of fact must focus on the reasonableness of the patient's belief that the hospital or its employees were rendering health care. This ultimate determination is made by considering the totality of the circumstances, including the actions or inactions of the hospital, as well as any special knowledge the patient may have about the hospital's arrangements with its physicians. We conclude 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.

Id.

I. Does *Sword* apply to diagnostic imaging centers?

[8] Arrendale contends *Sword* should apply to non-hospital entities, asserting: "When a patient receives health care in a facility, whether that facility is a hospital, nursing home, or center for radiologic studies, a patient reasonably expects or believes that the health care workers making those facilities function are employees or agents of those facilities." Appellant's Br. p. 14.[2] In an amicus brief supporting Arrendale, the Indiana Trial Lawyers Association (ITLA) argues:

> There is no logical justification for imposing liability on hospitals for the medical malpractice of undisclosed independent contractors while allowing non-hospital health care facilities to escape liability under the same circumstances. . . . Both hospitals and non-hospital health care facilities are only capable of acting

[2] Arrendale argues we have already "applied *Sword* outside the hospital setting," Appellant's Br. p. 14, citing *Helms v. Rudicel*, 986 N.E.2d 302 (Ind. Ct. App. 2013), *trans. denied*. It is true the care at issue in *Helms* was provided at a clinic, not a hospital, but the clinic was affiliated with a hospital, and the issue was whether the hospital could be held vicariously liable for negligence committed at the clinic. We held it could be. While that was an application of *Sword* to care provided outside of a hospital building, it was not an application of *Sword* to non-hospital defendants.

> with patients through the health care professionals it engages. Both hold themselves out to the public as providers of health care services. And both derive financial profits by holding themselves out to the public as providers of quality health care. They should both have the same responsibilities to their patients.

ITLA Br. pp. 9-10.

[9] Marion Open MRI, on the other hand, argues *Sword* should be limited to hospitals because a hospital—unlike a diagnostic imaging center—is a provider of a broad range of medical services and holds itself out as such. It adds:

> Some of that medical care may be provided by actual employees of the hospital, such as nurses or staff physicians, and some may be provided by independently contracted providers. Just as a patient may not know what range of treatment to expect when he or she presents to a hospital for emergency services, or even for scheduled services such as surgery, the patient has no reason to know whether any particular medical provider at the hospital is "on staff" or is a contract provider.

Appellee's Br. p. 17. Defense Trial Counsel of Indiana (DTCI), as amicus, similarly contends the holding in *Sword* is tied to how modern hospitals present themselves to the public as "full-service institutions":

> The concept of applying apparent agency to independent contractors in *Sword*, and specifically to a hospital setting, comports with the notion that individuals are looking to the hospital as an institution to provide health care based on the commercialization and presentation of hospitals as being full-service institutions with sophisticated and specialized services, which should not be understated as a major benefit to the communities these hospitals serve.

DTCI Br. p. 12.

[10] Then-Chief Judge Jane Magnus-Stinson of the Southern District of Indiana thoroughly considered and addressed many of these arguments in *Webster v. Center for Diagnostic Imaging, Inc.*, No. 1:16-cv-02677-JMS-DML, 2017 WL 3839377 (S.D. Ind. Aug. 31, 2017). There, as here, the plaintiff sought to hold a diagnostic imaging center vicariously liable for the negligence of an independent-contractor radiologist. In concluding *Sword* applied, the judge first noted "the evolving nature of the provision of health care, and the reduced reliance on the hospital setting as the location where health care is provided":

> In 2004, five years after *Sword*, the Federal Trade Commission and the Antitrust Division of the Department of Justice issued a report finding that "[t]he percentage of total health care spending devoted to outpatient care is growing" while the percentage of total healthcare spending by Americans on inpatient hospital care had "declined substantially over the past twenty years." Improving Health Care: A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice (2004). By 2014, this trend had continued, sparked, in part, by the passage of the Patient Protection and Affordable Care Act, with credit rating agency Fitch Ratings observing a "transition in healthcare delivery from a volume-based hospital-centric model to a value-based patient focused model" including "the outpatient/ambulatory setting." Utilization Metrics Review (Aug. 15, 2014) available at http://www.hfma.org/DownloadAsset.aspx?id=25424 (last accessed August 30, 2017). Similarly, observers predict a "significant shift" of health-system resources from inpatient to ambulatory care between 2016 and 2020. Bruce E. Beans, Experts Foresee a Major Shift From Inpatient to Ambulatory Care (Apr. 2016) available at

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4811253/# (last accessed August 30, 2017).

Id. at *7.

[11] She then acknowledged there are "numerous differences" between a hospital and a diagnostic imaging center but found "no meaningful difference between the institutions in light of the *Sword* factors—a medical center's manifestations and a patient's reliance." *Id.* at *8. "Given the nature of health care services today," she continued, "it is entirely possible for a reasonable, prudent patient to conclude from representations made by a medical center that the doctors and health care professionals that service patients within the center's facilities are agents or servants of the center." *Id.* The judge also rejected the argument that *Sword* was inapplicable because the plaintiff was not seeking a "broad scope of medical treatment," explaining that "even treatment that falls within a narrow scope can have catastrophic, life altering consequences to a patient. Moreover, a reasonably prudent patient may arguably rely upon a center's representation that a doctor is the center's agent, regardless of the breadth of treatment the patient received." *Id.*[3]

[12] While not binding on us, we find Judge Magnus-Stinson's analysis to be highly persuasive, and Marion Open MRI has not given us a convincing reason to

[3] Judge Magnus-Stinson's analysis was set forth in her order denying the parties' cross-motions for summary judgment. The case proceeded to a jury trial the next year, and she reaffirmed the analysis in an order denying the defendant's post-trial motions. *Webster v. CDI Ind., LLC*, 337 F. Supp. 3d 818 (S.D. Ind. 2018). The Seventh Circuit later affirmed that order. *Webster v. CDI Ind., LLC*, 917 F.3d 574 (7th Cir. 2019).

depart from it. In short, just as it is reasonable for a hospital patient to believe that the doctors providing care in a hospital are employees or agents of the hospital, it is reasonable for a patient of a diagnostic imaging center to believe that the radiologists interpreting images for the center are employees or agents of the center, unless the center informs the patient to the contrary.[4] We therefore hold *Sword* applies to diagnostic imaging centers.

II. Should our holding be applied prospectively only?

[13] Marion Open MRI argues that even if we hold *Sword* applies to diagnostic imaging centers, our holding "should be applied prospectively only," i.e., should not be applied in this case. Appellee's Br. p. 33. For three reasons, we disagree. First, "Appellate court decisions routinely apply to the parties involved, and everyone else, even when addressing an unresolved point of law." *Ray-Hayes v. Heinamann*, 768 N.E.2d 899, 900 (Ind. 2002). Second, our Supreme Court did not restrict its holding in *Sword* to future cases, even though it was a much greater departure from established law than our holding today. And third, an appellate decision will be limited to prospective application only if, among other things, it establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly

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[4] There is no evidence Marion Open MRI informed Arrendale his MRIs would be or had been interpreted by an independent-contractor radiologist. To the contrary, Dr. Boutselis's reports regarding Arrendale's MRIs were printed on Marion Open MRI letterhead, with no indication he was acting as an independent contractor. *See* Appellant's App. Vol. II pp. 193-98.

foreshadowed." *Id.* Marion Open MRI identifies no precedent we are purportedly "overruling," and we obviously could not overrule our Supreme Court's holding in *Sword* even if we believed that was necessary. Moreover, our decision was clearly foreshadowed by *Sword* itself. To be sure, the *Sword* Court limited its holding to the hospital context, but we see that as a simple matter of judicial restraint, as the defendant in that case was a hospital. Nothing in the opinion indicates to us that our Supreme Court believed its holding should never be applied outside the hospital context. Our holding today is a natural progression of *Sword* and should be applied in this case.

III. Is there a genuine issue of material fact under *Sword*?

[14] Arrendale also asks us to hold that, under the framework adopted in *Sword*, there is a genuine issue of material fact as to whether Dr. Boutselis was an apparent or ostensible agent of Marion Open MRI. But as Arrendale himself notes, the trial court did not rule on this issue, having declined to apply *Sword*. To the extent there is a dispute about Marion Open MRI's liability under the *Sword* framework, the trial court should resolve that dispute in the first instance. *See Merrillville 2548, Inc. v. BMO Harris Bank N.A.*, 39 N.E.3d 382, 390 (Ind. Ct. App. 2015) (noting "an intermediate court of appeals, for the most part, is not the forum for the initial decisions in a case"), *reh'g denied*, *trans. denied*.

[15] Reversed and remanded.

Bradford, C.J., and Brown, J., concur.