MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Anonymous Hospital,
Appellant,

v.

Amer Newlin,
Appellee.

September 15, 2021

Court of Appeals Case No. 21A-CT-111

Appeal from the Vanderburgh Circuit Court

The Honorable David D. Kiely, Judge

Trial Court Cause No. 82C01-1801-CT-388

Weissmann, Judge.

[1] Amer Newlin underwent gall bladder surgery at Anonymous Hospital (Hospital). Unhappy with the results, Newlin initiated a medical malpractice action against Hospital, claiming it was vicariously liable for the negligence of the surgeon who performed the procedure. Hospital responded with a motion for summary judgment, claiming it could not be liable for the surgeon's actions because the surgeon was not Hospital's employee or agent. However, because disputed material issues of fact remain concerning whether the surgeon was Hospital's apparent agent, we affirm the trial court's denial of Hospital's motion for summary judgment.

Facts

[2] A gastroenterologist referred Newlin to a surgeon for possible removal of Newlin's gall bladder. Based on the surgeon's recommendation, Newlin agreed to the surgery. The surgeon's office scheduled Newlin's surgery at Hospital's facility. Newlin did not care where the surgery occurred as long as his gall bladder was removed.

[3] The surgery proceeded in August 2015, but complications arose. In his proposed medical malpractice complaint filed with the Indiana Department of Insurance, Newlin named Hospital and the referring doctor, rather than the surgeon who performed the procedure. Newlin withdrew his claim and at that point, the statute of limitations may have expired because Newlin never attempted to amend his proposed complaint to name the surgeon as a defendant. Instead, Newlin proceeded solely against the Hospital under a

theory of vicarious liability based on Newlin's claim that the surgeon was an apparent agent of Hospital and Hospital was liable for the surgeon's negligence. Newlin did not allege any direct wrongdoing by Hospital or its employees.

[4] Hospital moved for summary judgment, which was denied. At Hospital's request, the trial court certified the ruling for interlocutory appeal, and this Court accepted Hospital's interlocutory appeal under Indiana Appellate Rule 14(B).

Discussion and Decision

[5] The gist of Hospital's argument is that because Newlin personally selected his physician prior to surgery as opposed to allowing the Hospital to choose, Newlin reasonably should have known that the surgeon was not Hospital's employee or agent. But because the reasonableness of Newlin's belief is in dispute, the trial court properly denied summary judgment.

I. Standard of Review

[6] We review the trial court's denial of summary judgment *de novo*. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). Summary judgment is proper if the designated evidence establishes that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; Ind. Trial Rule 56. The party moving for summary judgment has the burden of meeting these two requirements. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Once met, the burden shifts to the non-moving party to establish facts demonstrating a genuine issue. *Id.* Where

facts or inferences are in doubt, they must be construed in favor of Newlin, the non-moving party. *See id.*

II. Apparent Agency Applies to Hospitals

[7] The doctrine of apparent agency allows a hospital to be held liable for a non-employee's actions if the patient reasonably believed, based on a hospital's actions or inactions, that the physician treating the patient is acting on behalf of the hospital. *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 148 (Ind. 1999). In *Sword*, the Indiana Supreme Court adopted Restatement (Second) of Torts § 429, which specifies:

> 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.

By adopting § 429, the *Sword* Court authorized application of apparent agency to render a hospital vicariously liable under the Medical Malpractice Act for the acts of a non-employee physician. *Id.*

[8] When applying § 429, the focus is "on the reasonableness of the patient's belief that the hospital or its employees were rendering health care." *Id.* Whether an independent contractor physician is an apparent agent of the hospital is a question of fact concentrating on the hospital's manifestations and the patient's reliance. *Id.* This determination requires "consideration of 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." *Id.*

[9] The *Sword* Court ruled that "[a] hospital will be deemed to have held itself out as the provider of care unless it "[notifies]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." *Id.* Absent such notice, special knowledge, or other reasons to know of the actual relationship between the physician and hospital, a patient will be presumed to have relied on the hospital as the provider of care. *Id.*

III. Material Issues of Fact

[10] Hospital claims no genuine question of material fact as to apparent agency exists because: 1) Newlin chose his own surgeon prior to the surgery; and 2) Hospital's involvement was limited to providing a location for the surgery. Claiming this evidence showed Newlin could not reasonably believe his surgeon was a Hospital employee, Hospital asks us to reverse the trial court's denial of its motion for summary judgment. We decline because the designated evidence suggests Hospital failed to inform Newlin of the surgeon's status. Also, Hospital ignores other designated evidence which could lead to a finding that Newlin's belief that the surgeon was Hospital's agent was reasonable.

[11] Hospital essentially acknowledges its notice to Newlin was deficient. Appellant's Br., p. 14; see App. Vol. II, pp. 43-45. The Hospital merely

informed Newlin that "some, or all, of the physicians" providing care "are independent contractors and are not agents or employees . . ." App. Vol. II, p. 43. This language is similar to language we already deemed insufficient to place a patient on notice that a treating physician is not a hospital employee. *See Ford v. Jawaid*, 52 N.E.3d 874, 879 (Ind. Ct. App. 2014)."

[12] Additionally, the trial court's denial of summary judgment is supported by testimony from Newlin that he has only a 9th grade education and he believed the surgeon was employed by Hospital because the surgeon's office was near Hospital's facilities. Newlin was also never informed, either verbally or through Hospital's consent forms, that the surgeon was not Hospital's employee. App. Vol. II, pp. 74, 88-90.

[13] Hospital warns that an application of § 429 finding apparent agency liability in this case "will effectively make all hospitals strictly liable for all negligence within its four walls." Appellant's Br., p. 26. But Hospital is appealing the denial of summary judgment, not an ultimate judgment finding Hospital liable for the actions of an independent contractor surgeon. Moreover, Hospital could have avoided the *Sword* presumption—and perhaps even liability altogether—if it had simply notified Newlin that Hospital was not liable for the surgeon's actions because the surgeon was not its employee.

IV. We Reject Hospital's Invitation for New Standard

[14] Observing that other states have refused to find a hospital liable in circumstances where a patient engages the services of a physician prior to

admission in the hospital, Hospital invites this Court to rule similarly. *See, e.g.*, *Pamperin v. Trinity Mem'l*, 423 N.W.2d 848, 856 (Wis. 1988) (ruling that "[w]here a patient seeks care from a physician who then uses the hospital facilities, the hospital would not be liable under the doctrine of apparent authority"); *Hardy v. Brantley*, 471 So.2d 358, 371 (Miss. 1985) (noting that when "a patient engages the services of a particular physician who then admits the patient to a hospital where the physician is on staff, the hospital is not vicariously liable for the neglect or defaults of the physician"); *Weldon v. Seminal Mun. Hosp.*, 709 P.2d 1058, 1060 (Okla. 1978) (finding no issues of material fact regarding an agency relationship between hospital and physician where the patient viewed the hospital facility as mere site where the physician would treat the patient and did not look to the hospital to provide treatment).

[15] These cases all predate *Sword.* Given the national scope of *Sword's* review of precedent, the decisions cited by Hospital presumably were considered by the *Sword* court when adopting § 429 as the standard for applying apparent agency in a medical malpractice case.

[16] Hospital also requests we rely on *Hosp. Corp. of Am. Inc. v. Hiland*, 547 N.E.2d 869, 871-72 (Ind. Ct. App. 1989), *adopted on other grounds in Cacdac v. Hiland*, 561 N.E.2d 758 (Ind. 1990), another case which predates *Sword*. In support of that request, Hospital cites the following language in *Hiland*:

> It is undisputed that both Hiland and Pemberton personally selected and were treated by Cacdac as their personal physician prior to being admitted to the hospital. Further, they were each

> admitted to the hospital by Cacdac and relied solely upon his diagnosis and recommendations. They intended to receive care from him alone. There is absolutely no evidence that Hiland and Pemberton believed Cacdac was an employee of the hospital or thought the hospital was caring for them through Cacdac as its agent. Thus, the doctrine of apparent authority cannot serve as a basis for imputing to the hospital Cacdac's alleged act of misrepresentations.

Id. at 874.

[17] In *Sword*, our Supreme Court specifically treated *Hiland* as an example of the precedent it was rejecting by adopting § 429. 714 N.E.2d at 150 n.9, 152-53. Moreover, *Sword* seemingly acknowledged that a hospital may not escape liability for a non-employee surgeon's negligence simply because the patient selected the surgeon. The Court noted that even a patient who chooses a physician in advance "may not have had reason to know of the contractual arrangements between the physician and the hospital." *Id.* at 151.

[18] In any case, applying *Hiland* here would not change the result reached by the trial court. The record in this case, unlike that in *Hiland*, contains evidence that the patient believed the surgeon was an employee of Hospital. Newlin visited the surgeon in a building directly behind Hospital's facility and believed all of the physicians located there were employed by Hospital, in part because he was "never told otherwise." App. Vol. II, pp. 88-90. Therefore, even under *Hiland*, a genuine issue of material fact would exist as to whether Hospital could be vicariously liable for the surgeon's actions.

[19] Regardless, we are bound to follow *Sword*. *Meeks v. State,* 759 N.E.2d 1126, 1128 (Ind. Ct. App. 2001) ("[W]e are without authority to overrule the decisions of our Supreme Court . . ."), *trans. denied*.

V. Conclusion

[20] Because genuine issues of material fact exist as to whether Hospital could be vicariously liable for the surgeon's actions under an apparent agency theory, the judgment of the trial court is affirmed.

Kirsch, J., and Altice, J., concur.