IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CT-370

Harold Arrendale,
Appellant/Plaintiff,

–v–

American Imaging & MRI, LLC a/k/a Marion Open MRI; 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.,
Appellees/Defendants.

Argued: September 22, 2021 | Decided: March 24, 2022

Appeal from the Allen Superior Court
No. 02D02-1712-CT-657
The Honorable Craig J. Bobay, Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 20A-CT-2184

Opinion by Justice David

Chief Justice Rush and Justices Massa, Slaughter, and Goff concur.

David, Justice.

In *Sword v. NKC Hospitals, Inc.*, our Court adopted the Restatement (Second) of Torts section 429 and held that a hospital may be held vicariously liable for the tortious conduct of an independent contractor through apparent or ostensible agency. 714 N.E.2d 142, 152–53 (Ind. 1999). Today, we consider *Sword* and Section 429's reasoning and application to a non-hospital diagnostic medical imaging center.

We hold that *Sword* and Section 429's apparent agency principles apply to non-hospital medical entities that provide patients with health care. Therefore, because plaintiff Harold Arrendale has shown there are genuine issues of material fact whether the radiologist who read and interpreted his MRIs was an apparent agent for the defendant Marion Open MRI, we reverse summary judgment in Marion Open MRI's favor and remand for further proceedings consistent with this opinion.

Facts and Procedural History

Harold Arrendale's primary care physician sent him to American Imaging & MRI, LLC a/k/a Marion Open MRI ("Marion Open MRI") to get MRIs of his spine in April 2013. Marion Open MRI is not a hospital. It is an outpatient diagnostic imaging center that is not a qualified healthcare provider under the Indiana Medical Malpractice Act ("the Act"). Marion Open MRI contracted with radiologist Dr. Alexander Boutselis to read MRIs on an independent contractor basis. Pursuant to this contract, Marion Open MRI sent Arrendale's images to Dr. Boutselis for review and interpretation. Dr. Boutselis read and interpreted these MRIs from his home office, and he was never physically present at Marion Open MRI. Dr. Boutselis's reports and conclusions from reviewing Arrendale's MRIs appeared on Marion Open MRI letterhead and gave no indication of his independent contractor status.

Arrendale filed his complaint in December 2017 against multiple defendants, alleging medical malpractice related to his MRI and imaging care. He specifically alleged that the defendant entities, including Marion

Open MRI and Dr. Boutselis, failed to diagnose and treat his spinal arteriovenous fistula, which has now resulted in permanent injuries.[1]

Marion Open MRI moved for summary judgment, arguing that it was not liable for Dr. Boutselis's actions because *Sword*'s Restatement (Second) of Torts section 429 analysis does not apply to non-hospital entities. In response, Arrendale argued there was a dispute of material fact whether Dr. Boutselis was acting as an apparent agent for Marion Open MRI under *Sword*, despite the fact that Marion Open MRI is not a hospital. To oppose summary judgment, Arrendale designated an affidavit attesting that Marion Open MRI never provided him with any notice that the radiologist reading his MRIs was not an employee, that he had no independent knowledge of the relationship between Marion Open MRI and Dr. Boutselis, and that he assumed that Dr. Boutselis was an employee of Marion Open MRI. He also designated photographs of Marion Open MRI, which show a sign outside its building advertising "Save $$ on your next MRI!" Appellant's App. Vol. II, pp. 190–91.

In its summary judgment order, the trial court noted the "evolving nature of medical care that has taken place since [*Sword*]," and found "very good logic in Arrendale's argument that apparent authority in medical malpractice cases should be applicable to claims arising outside of a hospital setting." *Id.* at 42. However, the trial court ultimately granted summary judgment in Marion Open MRI's favor, finding that Indiana's appellate courts have only applied *Sword*'s apparent agency rules to hospitals and not yet to non-hospital medical entities.

The Court of Appeals reversed the trial court, holding for the first time that *Sword* may apply to a non-hospital diagnostic imaging facility because "it is reasonable for a patient in a diagnostic imaging center to believe that the radiologists interpreting images for the center are

[1] Dr. Boutselis is a qualified health care provider under the Act, but Marion Open MRI is not. A medical review panel entered an opinion that Dr. Boutselis failed to meet the applicable standard of care and his conduct was a "factor of the resultant damages." Appellant's App. Vol. II, p. 49.

employees or agents of the center, unless the center informs the patient to the contrary." *Arrendale v. American Imaging & MRI, LLC*, 171 N.E.3d 1004, 1009 (Ind. Ct. App. 2021), *vacated*.

Marion Open MRI petitioned for transfer, which we granted. *See* App. R. 58(A).

Standard of Review

When this Court reviews a grant or denial of a motion for summary judgment, 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 judgment as a matter of law." *Campbell Hausfeld/Scott Fetzer Co. v. Johnson*, 109 N.E.3d 953, 955–56 (Ind. 2018) (quoting Ind. Trial Rule 56(C)).

We will draw all reasonable inferences in favor of the non-moving party. *Ryan v. TCI Architects/Engineers/Contractors. Inc.*, 72 N.E.3d 908, 912–13 (Ind. 2017). We review summary judgment de novo. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014).

Discussion and Decision

On transfer, Marion Open MRI contends that because it is not a hospital, it cannot be held liable under *Sword* for Dr. Boutselis's alleged negligence in reviewing and interpreting Arrendale's MRIs. It argues that the Court of Appeals failed to consider the specific context in which *Sword*'s rule was applied exclusively to hospitals.

We first look at *Sword* and its apparent agency analysis for hospitals that use independent contractor physicians. Next, we consider *Sword*'s application outside the hospital context and expressly adopt its application to non-hospital medical entities that provide health care, including diagnostic imaging facilities like Marion Open MRI. Lastly, we decline to apply this rule only prospectively and apply *Sword* to this

record to conclude there is a genuine issue of material fact as to whether Dr. Boutselis was an apparent agent for Marion Open MRI.

I. *Sword*, Vicarious Liability, and the Restatement (Second) of Torts Section 429.

"[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 with the wrongdoer." *Sword*, 714 N.E.2d at 147. Respondeat superior is the doctrine most often associated with vicarious liability in the tort context. It relies on an employer-employee or principal-agent relationship and generally does not apply to independent contractors. However, even absent an actual agency relationship, a principal may sometimes be vicariously liable for the tortious conduct of another under the doctrine of apparent agency. *Id.* Apparent agency may be established when a third party reasonably believes there is a principal-agent relationship based on the principal's manifestations to the third party. *Id.*

Although this Court has previously used the terms apparent agency and apparent authority interchangeably, we pause to note these are two distinct doctrines. Apparent authority concerns only the scope of an agent's authority and requires an agency relationship. *See Pepkowski v. Life of Indiana Ins. Co.*, 535 N.E.2d 1164, 1166 (Ind. 1989) ("Apparent authority is the authority that a third person reasonably believes an agent to possess because of some manifestation from his principal."). Apparent agency, in contrast, concerns only whether a principal's manifestations induce a third party to reasonably believe there is a principal–agent relationship. *See id.* at 1166–67 ("It is essential that there be some form of communication, direct or indirect, by the principal, which instills a reasonable belief in the mind of the third party … sufficient to create an apparent agency relationship."). In certain circumstances, apparent agency can establish vicarious liability by examining the ability of an agent with "apparent authority" to bind the principal to a contract with a third party. *Sword*, 714 N.E.2d at 148–49.

In *Sword*, a patient seeking medical attention for the birth of a child alleged that an independent contractor anesthesiologist working at a hospital committed malpractice while giving the patient an epidural. *Id.* at 145–46. Prior to *Sword*, Indiana courts followed the general rule that hospitals could not be held liable for the negligent actions of independent contractor physicians. *Id.* at 149. Courts also viewed respondeat superior as inapplicable to hospitals "because the hospitals could not legally assert any control over the physicians." *Id.*; *see also Iterman v. Baker*, 214 Ind. 308, 316–18, 15 N.E.2d 365, 369–70 (Ind. 1938). However, we acknowledged the "ongoing movement by courts to use apparent or ostensible agency as a means to hold hospitals vicariously liable for the negligence of some independent contractor physicians." *Sword*, 714 N.E.2d at 150.

Following this trend, *Sword* changed Indiana's rule regarding a hospital's prospective vicarious liability. *Id.* We expressly adopted the Restatement (Second) of Torts section 429 (1965), holding that a hospital may be found vicariously liable for the negligence of an independent contractor physician under the doctrine of apparent agency.[2] *Id.* at 149. Section 429 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.

Id.

Under *Sword*'s Section 429 apparent agency analysis, courts look at two main factors: (1) the principal's manifestations that an agency relationship exists and (2) the patient's resulting reliance. *Id.* at 151. For the

[2] *Sword* also discussed the apparent agency principles in the Restatement (Second) of Agency section 267 (1958), but did not expressly adopt its application to other types of medical entities. *Sword*, 714 N.E.2d at 149. We do so in today's companion case, *Wilson v. Anonymous Defendant 1*.

manifestations prong, courts see whether the hospital "acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital." *Id.* (citing *Kashishian v. Port*, 481 N.W.2d 277, 284–85 (Wis. 1992)). For the reliance prong, courts see whether "the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence." *Id.* (citing *Kashishian*, 481 N.W.2d at 285). Crucial to each prong is whether the hospital notified the patient that the treating physician was an independent contractor and not a hospital employee. *Id.*

Sword explained 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. at 152.

Reliance by the patient is presumed if the hospital failed to give meaningful notice of the independent contractor status of its physician, if the patient had no special knowledge of the arrangement between the hospital and physician, and there was no reason the patient should have known of the arrangement. *Id.*

Sword changed the framework of hospital liability through apparent agency. It prevents hospitals from insulating themselves from potential liability by using independent contractor physicians while suggesting to the public that their physicians are employed by the hospital.

II. *Sword*'s apparent agency principles apply to non-hospital medical entities like Marion Open MRI.

Marion Open MRI argues that *Sword* should be expressly limited to hospitals, noting that hospitals are unique because they provide a broad range of medical services and hold themselves out as such to the public. It claims that a hospital's array of services are often imposed on patients without providing them the opportunity to consider alternative providers, while smaller facilities like Marion Open MRI provide a singular service that doesn't induce the same reliance. It urges that the *Sword* Court was highly aware of these differences and tailored its opinion specifically to narrow *Sword*'s principles **only** to hospitals that hold themselves out as "full service medical providers."

In response, Arrendale argues that there is no meaningful difference between a patient in a hospital or a patient of a diagnostic imaging center regarding the provider's manifestations and the patient's reliance. Arrendale also argues that "the law should meet reasonable people's expectations," and that reasonable people expect that the physicians providing them with health care services are employed by the facility that the patient attends, unless the patient is provided with notice to the contrary. Resp. Br. at p. 7.

We agree with Arrendale. We begin our analysis by acknowledging the ongoing changes in the way patients consume heath care, prompting us to apply *Sword* and its apparent agency rules to non-hospital medical providers. We then find the policy reasons underlying *Sword* apply equally to Marion Open MRI and non-hospital medical entities providing patients with health care,[3] and apply *Sword*'s apparent agency principles accordingly.

[3] The Medical Malpractice Act defines "health care" as "an act or treatment performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." I.C. § 34-18-2-13. We acknowledge that today's *Sword* expansion is not limited to Act-qualified health care providers. However, we look to many of the Act's definitions to guide our decision today. *See* I.C. chapter 34-18-2.

A. There is increased reliance on non-hospital medical entities to meet society's health care needs.

We first note that the way patients consume health care services is changing. Patients now have increasingly more choices than before for where and how they choose to access health care services. For example, the CDC has observed that patients are reducing their reliance on hospitals for their health care needs. CENTERS FOR DISEASE CONTROL, *Health Care in America: Trends in Utilization* (2003), pp. 12–13 https://www.cdc.gov/nchs/data/misc/healthcare.pdf [https://perma.cc/EB28-AR3P]. Management consulting firm McKinsey & Company has also observed the rising shift in medical care from hospitals to outpatient ambulatory service sites. It projects non-hospital providers will soon account for nearly 65 percent of healthcare profit pools, while more than half of the estimated 3.4 million new healthcare and social assistance jobs generated through 2028 will be in ambulatory care services. MCKINSEY & COMPANY, *Walking Out of the Hospital: The Continued Rise of Ambulatory Care and How to Take Advantage of It* (Sept. 18, 2020), https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/walking-out-of-the-hospital-the-continued-rise-of-ambulatory-care-and-how-to-take-advantage-of-it [https://perma.cc/696P-W226] (citations omitted).

Deloitte, another professional service firm, has observed that "[m]any surgeries and medical and diagnostic procedures that once required inpatient stay can now be performed safely in an outpatient setting[,]" and that "[p]atients have embraced these changes as outpatient services tend to cost less – and be more convenient – than impatient services." DELOITTE, *Growth in Outpatient Care: The Role of Quality and Value Incentives*, https://www2.deloitte.com/content/dam/insights/us/articles/4170_Outpatient-growth-patterns/DI_Patterns-of-outpatient-growth.pdf [https://perma.cc/RDR2-VT5X].

The Southern District of Indiana also explored changes in the way that patients consume health care in *Webster v. CDI Indiana, LLC*, No. 1:16-cv-02677-JMS-DML, 2017 WL 3839377 (S.D. Ind. Aug. 31, 2017). Chief Judge Magnus-Stinson, writing for the Southern District, first cited a 2004

Federal Trade Commission and Department of Justice report indicating that the percentage of health care spending devoted to outpatient care is growing, while the percentage of health care spending on inpatient hospital care had "declined substantially over the past twenty years." *Id*. She then noted that the Patient Protection and Affordable Care Act further ushered in a transition from a "volume-based hospital-centric model to a value-based patient-focused model[.]" *Id.* (internal citation omitted).

These observations reflect the evolving shift in the way patients consume health care. Thus, given these continued changes, we "cannot close our eyes to the legal and social needs of our society, and this Court should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate." *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972). Today, we believe that society's needs so dictate.

B. Given this shift in the way patients consume health care, we apply *Sword* and its apparent agency rules to non-hospital medical entities.

The changing realities of the way patients consume modern medicine prompt us to evolve our agency law once again to reflect society's increased reliance on non-hospital entities for its health care needs. *See Webster*, 2017 WL 3839377 at *7 (recognizing the increased reliance on non-hospital entities for health care services). We see no meaningful difference between a hospital and a non-hospital medical entity considering *Sword*'s manifestation and reliance inquiries. Hospitals and non-hospital medical care entities alike may make representations that reasonably lead a patient to believe that the physicians providing them health care are the facility's employees or agents. Both hospitals and non-hospital entities can hold themselves out to the public as providers of health care services, and both receive profits in exchange for providing such services.

But under the current legal framework, a non-hospital facility could make the exact same representations to patients that a hospital might, yet evade potential liability for its independent contractors' acts where the hospital could not. As a growing number of patients depend on non-

hospital providers for their health care, this gap in our common law allows for non-hospital medical entities to purport to offer a unified health care operation, yet still escape potential Restatement Section 429 liability by using independent-contractor physicians.

We find it problematic that non-hospital medical entities like Marion Open MRI can purport to provide a unified operation and urge potential patients to "[s]ave $$ on your next MRI!", Appellant's App. Vol. II, pp. 190–91, while insulating themselves from prospective liability by having independent contractor radiologists read and interpret patient images. "A medical center cannot hold itself out to the public as offering health care services—and profit from providing those health care services—yet escape liability by creating a complex corporate arrangement of interrelated companies." *Webster v. CDI Indiana, LLC*, 917 F.3d 574, 577–78 (7th Cir. 2019). Accordingly, we find *Sword*'s Section 429 analysis to be applicable to non-hospital diagnostic imaging centers like Marion Open MRI.

In opposing a *Sword* expansion, Marion Open MRI contends that the expansion of *Sword* would have a "significant impact upon healthcare law" because it could potentially change the existing theories of recovery and damages in the medical malpractice context. Pet. to Trans. at p. 12. For example, Marion Open MRI explains that it is not qualified under the Medical Malpractice Act and claims it is not subject to the Act's $250,000 exposure cap. *See* I.C. § 34-18-14-3(b)(1). However, we note that being subject to the Act is voluntary, and a health care provider that fails to qualify under the Act is subject to liability without regard to the Act and its protections. *See* I.C. § 34-18-3-1. Moreover, a patient's potential remedy is not affected by the Act's applicability. *Id.*

And regardless of the application of the Act, non-hospital entities and hospitals alike may avoid liability by providing "meaningful written notice to the patient, acknowledged at the time of admission." *Sword*, 714 N.E.2d at 152. Here, for example, Marion Open MRI could have inserted a provision disclosing Dr. Boutselis's independent contractor status in one of Arrendale's admission forms.

In applying *Sword* to non-hospital medical facilities, we, like the Court of Appeals, are persuaded by many of the Southern District's observations in *Webster*. There, a plaintiff sought to hold a non-hospital diagnostic imaging center, similar to Marion Open MRI, vicariously liable for the alleged negligence of an independent contractor radiologist. 2017 WL 3839377 at *2–*3. The imaging center moved for summary judgment, arguing that *Sword* applied only to hospitals. *Id.* at *1–*2. Sitting in diversity jurisdiction and applying Indiana law, the Southern District applied *Sword*'s Section 429 analysis to the non-hospital diagnostic imaging center. *Id.* at *7–*8. It explained that "[g]iven the nature of health care services today, 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.* at *8. In response to the defendant's arguments that hospitals should be treated differently given the broad scope of medical care they offer, the court explained that "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.* On appeal following a jury trial, the Seventh Circuit affirmed the Southern District's apparent agency analysis, noting that to hold otherwise would permit a medical center to "evade liability by using independent contractor professional organizations to employ physicians." *Webster*, 917 F.3d at 577.

We are not the first jurisdiction to apply apparent agency principles outside the hospital context. *See Sword*, 714 N.E.2d at 150–51 (looking to other jurisdictions in guiding our apparent agency principles). For example, Rhode Island in *George v. Fadiana* adopted and applied apparent agency theories to a dental office and the acts of its independent contractor orthodontist. 772 A.2d 1065, 1067 (R.I. 2001). The plaintiff claimed that the dental office held itself out to the public as a provider of dental services, and she reasonably believed that the dental office was providing her dental services. *Id.* at 1068. The trial court granted summary judgment in the dental office's favor, finding it could not be held liable for the alleged torts of its independent contractor. *Id.* at 1067. The Rhode Island Supreme Court reversed, holding that apparent authority principles applied against

"professional medical corporations" in addition to hospitals. *Id.* at 1069. The *George* Court found that "[c]rucial to any such determination is the manner in which the medical professionals conduct themselves or hold themselves out[,]" not whether the medical professionals operated out of a hospital or a non-hospital facility. *Id.*

We therefore hold that a non-hospital medical entity holding itself out as a health care provider may be held vicariously liable for its independent contractor physician's tortious acts unless it gives meaningful notice to the patient, the patient has independent special knowledge of the arrangement between the non-hospital medical entity and its physicians, or the patient otherwise knows about these relationships.[4] *See Sword*, 714 N.E.2d at 152.

III. There are genuine issues of material fact whether Dr. Boutselis was an apparent agent for Marion Open MRI.

Having determined that *Sword* applies to non-hospital medical entities, and declining to apply this decision prospectively only, we now examine the facts before us. We first note that there is no dispute as to whether Dr. Boutselis qualifies as an independent contractor within the meaning of Section 429. Therefore, *Sword*'s requirement that a "legal relationship" exists between a principal and an alleged apparent agent is met.[5] We now apply *Sword* to analyze Marion Open MRI's manifestations and the

[4] Marion Open MRI also argues that if *Sword*'s apparent agency principles are expanded to non-hospital facilities, its application should be applied prospectively only. We decline to do so. We have observed that "[p]rospective application is an extraordinary measure[,]" *Lowe v. N. Ind. Comm. Transportation Dist.*, 177 N.E.3d 796, 800 (Ind. 2021), and "[a]ppellate 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). Accordingly, we decline to apply today's rule prospectively only, and apply it to Marion Open MRI.

[5] *Sword*'s "legal relationship" requirement is discussed in more detail in today's companion case, *Wilson v. Anonymous Defendant 1*.

reasonableness of Arrendale's reliance that this imaging center was rendering his health care through Dr. Boutselis.

Here, Marion Open MRI held itself out as a for-profit provider of MRI services to the public and sought to gain customers through its advertising techniques. *See* Appellant's App. Vol. II, pp. 190–191 ("Save $$ on your next MRI!"). There is no dispute that Marion Open MRI, as a non-hospital entity, provided health care services to Arrendale. There is no evidence in the record showing that Marion Open MRI directly informed or otherwise provided Arrendale with meaningful notice that an independent contractor radiologist would interpret his MRIs. Arrendale did not select his own radiologist before admission, and he testified that he thought Marion Open MRI employed the radiologist who read his MRIs. Likewise, Arrendale lacked any special knowledge regarding the contractual relationship between Marion Open MRI and Dr. Boutselis. Arrendale received Dr. Boutselis's interpretations of his MRIs on Marion Open MRI letterhead with no indication that Dr. Boutselis was an independent contractor.

Drawing reasonable inferences in favor of Arrendale as the nonmoving party, we find under the "totality of the circumstances, including the actions or inactions" of Marion Open MRI, that there is a genuine issue of material fact whether Dr. Boutselis was its apparent agent. *See Sword*, 714 N.E.2d at 152. Therefore, we hold that summary judgment in Marion Open MRI's favor is improper.

Conclusion

As a matter of first impression, we hold that a non-hospital medical entity, including a diagnostic imaging center like Marion Open MRI, may be held liable for the negligent acts of its apparent agents, and expressly apply *Sword*'s apparent agency rules to such entities. We therefore reverse summary judgment in Marion Open MRI's favor and remand for further proceedings consistent with this opinion.

Rush, C.J., and Massa, Slaughter, and Goff, JJ., concur.

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