IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CT-371

Darci Wilson,
Appellant/Plaintiff,

–v–

Anonymous Defendant 1,
Appellee/Defendant.

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

Appeal from the St. Joseph Circuit Court 1
No. 71C01-1812-CT-565
The Honorable John E. Broden, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CT-923

Opinion by Justice David

Chief Justice Rush and Justices Massa and Goff concur.
Justice Slaughter concurs in the judgment with separate opinion.

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).

Here, Anonymous Defendant 1—a physician group—argues that *Sword* does not extend its vicarious liability to a physical therapist with whom it had no contractual relationship. And we agree the rule articulated in *Sword* appears inapplicable on these facts.[1] However, today we also consider the Restatement (Second) of Agency section 267 and hold as a matter of first impression that under Section 267, a medical provider may be held liable for the acts of an apparent agent based on the provider's manifestations of an agency relationship with the apparent agent, which causes a third party to rely on such a relationship.

Accordingly, because there exist disputed issues of fact as to whether Anonymous Defendant 1 held out Darci Wilson's physical therapist as its apparent agent, we reverse the trial court's grant of summary judgment in Anonymous Defendant 1's favor and remand for further proceedings consistent with this opinion.

Facts and Procedural History

In September 2008, Anonymous Defendant 1, an orthopedic physician group ("Anonymous"),[2] and Accelerated Rehab, a physical therapy provider, executed a "Staffing Agreement." The Staffing Agreement required Accelerated Rehab to supply licensed, qualified rehabilitation personnel, including physical therapists, to staff Anonymous. Accelerated

[1] We do find *Sword* controls in today's companion case, *Arrendale v. American Imaging & MRI, LLC*.

[2] The Indiana Medical Malpractice Act prohibits litigants from disclosing any information that would allow a third party to identify the defendant healthcare provider until a decision is rendered by a medical review panel. Ind. Code § 34-18-8-7.

Rehab had "sole responsibility" for recruiting, vetting, training, supervising, evaluating, and monitoring the rehabilitation personnel. Appellant's Conf. App. Vol. II, p. 89. The Staffing Agreement also stated that "all [ ] Rehab Personnel shall be employees or independent contractors of [Accelerated Rehab] at all times[.]" *Id.*

Accelerated Rehab was subsequently acquired by Athletico, Ltd and Athletico Management, LLC (collectively, "Athletico"), and apparently continued operating by the terms of the original Staffing Agreement executed between Anonymous and Accelerated Rehab. But while Athletico's therapy facility and Anonymous operated under very similar names, and Anonymous granted Accelerated Rehab (and, subsequently, Athletico) the use and occupancy of the second floor of its orthopedic care facility ("the Facility"), the record does not contain any contract, agreement, or other indication of a legal relationship between Anonymous and Athletico or its rehab personnel.

Anonymous provided Darci Wilson ("Wilson") with orthopedic care in 2015 and 2016. In December 2015, Wilson underwent knee surgery at Anonymous. Following surgery, Anonymous informed Wilson that she needed to undergo physical therapy and referred her to the second floor of the Facility for her therapy needs.

Wilson reported to the Facility for physical therapy on April 12, 2016. She was unaware that her physical therapist, Christopher Lingle ("Lingle") was employed by Accelerated Rehab—indeed, many signs indicated that Lingle was Anonymous's employee. Before her first appointment, Wilson signed the "Appointment Policy—PT/OT" that provided, "Thank you for choosing [Anonymous] for your therapy needs" and was signed by "[Anonymous] Physical/Occupational Therapy Department." Appellant's Conf. App. Vol. III, p. 88. The Facility featured only Anonymous's branding; there was no indication that the second floor was occupied by Accelerated Rehab or Athletico. Lingle filled out and used physical therapy forms supplied by Anonymous. And later, Anonymous's physician signed Wilson's physical therapy records, and Wilson received a bill from Anonymous for the physical therapy.

At Wilson's April 12 physical therapy appointment, Lingle performed a procedure that caused her "excruciating pain." Appellant's Conf. App. Vol. II, p. 18. When this pain did not subside, Wilson followed up with her orthopedist, who informed her that she had been reinjured and would need to undergo another surgery.

Wilson later filed a proposed complaint with the Indiana Department of Insurance alleging that Anonymous and its employee or agent, Lingle, were negligent while providing her with medical care. Wilson later amended her proposed complaint to add Athletico as a defendant, alleging that Lingle "provided the physical therapy services through Athletico … under the assumed name of [Anonymous]." *Id*. at 20–21.

In December 2018, Athletico and Lingle initiated a cause of action against Wilson and sought summary judgment, arguing that because Athletico was not a qualified healthcare provider under the Medical Malpractice Act, any potential negligence claims by Wilson against Athletico and Lingle were barred by the two-year statute of limitations. In January 2019, while the motion for summary judgment was pending, Wilson filed a complaint against Anonymous, Athletico, and Lingle in the trial court, and Athletico and Lingle moved to dismiss. The parties eventually agreed to consolidate the two proceedings, and in October 2019, the trial court entered summary judgment in favor of Athletico and Lingle, finding that Wilson's complaint was time-barred. In March 2020, the trial court determined that *Sword* did not apply on these facts and entered summary judgment in favor of Anonymous, finding that it could not be held liable for Lingle's actions without evidence of an employment or contractual relationship between the two.

The Court of Appeals affirmed in a memorandum decision, finding no genuine issue of material fact as to whether Anonymous could be liable for Lingle's acts as an apparent agent for Anonymous under *Sword*, 714 N.E.2d at 152–53. *Wilson v. Anonymous Defendant 1,* 167 N.E.3d 720 (mem.), 2021 WL 969218 at *6 (Ind. Ct. App. 2021), *vacated.*

Wilson petitioned this Court for transfer, which we granted, vacating the Court of Appeals opinion. *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, 956 (Ind. 2018) (quoting Ind. Trial Rule 56(C)).

The party moving for summary judgment bears the burden of making a prima facie showing that there is no issue of material fact and that it is entitled to judgment. *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.* 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).

Discussion and Decision

At issue is whether Lingle was acting as an apparent or ostensible agent of Anonymous when he treated Wilson. Specifically, the parties dispute whether the rule articulated in *Sword*—that a hospital may be vicariously liable, as a principal, for its contractor's tortious conduct—applies when there is no record evidence of a legal relationship between Lingle and Anonymous. 714 N.E.2d at 152–53.

We first consider the scope of *Sword* and its requirement that a legal relationship exist between the principal and the alleged apparent agent. Next, we consider the Restatement (Second) of Agency section 267 and adopt its application specifically in the context of both hospitals and non-hospital medical facilities. Finally, we apply Section 267 to the facts before us and conclude that summary judgment in Anonymous's favor is unsupported.

I. *Sword* and the Restatement (Second) of Torts section 429 require a legal relationship between the alleged principal and the alleged apparent agent.

For many years, Indiana law held that because hospitals are corporations—and therefore cannot practice medicine—the doctrine of respondeat superior cannot apply to hold a hospital liable for the negligent acts of a physician contractor. *See, e.g., Iterman v. Baker*, 214 Ind. 308, 316–18, 15 N.E.2d 365, 369–70 (Ind. 1938).

In *Sword*, a hospital patient alleged that an independent contractor anesthesiologist committed malpractice while giving the patient an epidural. 714 N.E.2d at 145–46. We expressly adopted the Restatement (Second) of Torts section 429, finding that a hospital may be vicariously liable for the negligence of an independent contractor physician under the doctrine of apparent agency. *Id.* at 149. Section 429 provides that

> 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 Section 429, the trier of fact must consider both the hospital's manifestations to a patient and the patient's reliance on these manifestations when deciding whether to hold a hospital liable for its contractor's acts. *Id.* Central to both factors is "whether the hospital provided notice to the patient that the treating physician was an independent contractor and not an employee of the hospital." *Id.* at 152.

Wilson argues that the Section 429 apparent agency rule articulated in *Sword* applies here, and thus, Anonymous may be held liable for Lingle's

alleged negligence.[3] Anonymous responds that *Sword* is inapplicable because it requires a legal relationship between the alleged principal and the alleged apparent agent. That is, because the record does not reflect an employment, contractual, or any other defined legal relationship between Anonymous and Lingle, Anonymous argues it cannot be held vicariously liable under *Sword* and Section 429 of the Restatement. We agree with Anonymous.

"[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. In certain circumstances, apparent agency can be a means to establish vicarious liability. *Id.* at 148–49. Apparent agency refers to the ability of an agent with "apparent authority" to bind the principal to a contract with a third party. *Id.* at 148. Apparent authority is the "authority that a third person reasonably believes an agent to possess because of some manifestation from his principal"; these manifestations can originate from direct or indirect communication or advertisements to the community. *Id.*

But while Wilson argues that Anonymous held Lingle out as its apparent agent—by allowing Athletico (and Lingle) to share space in its Facility and use its physical therapy forms, and by requiring Wilson to sign an "Appointment Policy" that thanked her for "choosing [Anonymous] for your therapy needs"—Section 429 still requires evidence of some form of legal relationship between the hospital and the practitioner. No such legal relationship exists on this record. Though Anonymous and Accelerated Rehab executed a Staffing Agreement requiring Accelerated Rehab to supply Anonymous with physical therapists, the record does not include any contract between Athletico and Anonymous. And both Anonymous and Athletico denied that Lingle was their employee or agent when Wilson's injury occurred.

[3] Today's companion case, *Arrendale v. American Imaging & MRI, LLC*, expands *Sword* and its Section 429 apparent agency principles to non-hospital medical entities.

On this sparse record, given the lack of evidence of any legal relationship between Anonymous and Lingle, *Sword*'s rule governing vicarious liability does not apply here.

II. The Restatement (Second) of Agency section 267 applies to medical care facilities.

Though we do not find *Sword*'s Section 429 analysis applicable here, we consider the Restatement (Second) of Agency section 267 and its application to both hospitals and non-hospital medical entities.

Section 267 provides that:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Restatement (Second) of Agency § 267 (1958).

Sword notes that, under a Section 267 analysis, a principal may be held liable for an apparent agent's negligent conduct if, "because of the principal's manifestations, a third party reasonably believes that in dealing with the apparent agent he is dealing with the principal's servant or agent and exposes himself to the negligent conduct because of the principal's manifestations."[4] 714 N.E.2d at 149.

Our rationale in *Sword* did not turn on any qualities unique to hospitals, nor on the specific employment or contractual arrangements between hospitals and their physicians. Instead, our concern was with what a patient reasonably believes because of specific representations that

[4] *Sword* discussed Section 267's apparent agency principles in conjunction with Section 429, but it only adopted Section 429 at that time because a legal relationship **did** exist between the principal and alleged apparent agent there. *See* 714 N.E.2d at 149–52.

a provider has made—an issue that is just as relevant in the context of non-hospital medical providers. Nearly 30 years ago, the Ohio Supreme Court observed that "often the very nature of a medical emergency precludes choice. Public policy dictates that the public has every right to assume and expect that the hospital is the medical provider it purports to be." *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 53 (Ohio 1994). And as the Seventh Circuit observed more recently, "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 (7th Cir. 2019). Consumers seeking access to health care—and constrained by geography, logistics, and insurance network coverage—often lack the luxury of time to delve deeply into the legal relationships among health care providers.

Unlike the Restatement (Second) of Torts section 429, Section 267 does not require a legal relationship between the principal and apparent agent. And applying Section 267 here, Anonymous could be liable for Lingle's alleged negligence if its communications led Wilson to reasonably believe that Lingle was providing treatment as an agent of Anonymous. *See Pepkowski v. Life of Indiana Ins. Co.*, 535 N.E.2d 1164, 1167 (Ind. 1989) (holding that 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.")[5]

By adopting and applying the Section 267 analysis in the context of both hospitals and non-hospital medical facilities, we join other jurisdictions that have done the same. *See*, *e.g.*, *Cefaratti v. Ananow*, 141

[5] During oral argument, Wilson's counsel expressed that Wilson was not making a Section 267 argument. (Oral Argument at 13:46–15:24, https://perma.cc/8WBZ-SYX8). However, Wilson's counsel later articulated that Section 267 would provide Wilson the relief she seeks, and that Section 267 in the health care context "very much supports the reading of the ostensible agency. . ." *Id.* at 16:05–16:50. Further, Wilson also relied on and quoted Section 267 in her briefing before this Court. *See* Pet. to Trans. at 12–13. Believing that Section 267 provides an appropriate analysis for situations like these, we expressly adopt it in the medical care context and apply it to Wilson's case.

A.3d 752, 770–71 (Conn. 2016) (holding that hospital may be vicariously liable under Section 267 and apparent agency may be proven by reliance); *Boyd v. Albert Einstein Med. Ctr.*, 547 A.2d 1229, 1235 (Pa. 1988) (applying Section 267 to find genuine issue of fact as to whether participating physicians were ostensible agents of an HMO).

Other jurisdictions have applied a theory of apparent agency that also focuses on reasonable reliance, but without expressly adopting Section 267. *See, e.g., Popovich v. Allina Health Sys.*, 946 N.W.2d 885, 898 (Minn. 2020) (holding that a malpractice plaintiff may pursue a theory of apparent authority by showing both representation and reliance); *Eads v. Borman*, 277 P.3d 503, 514–15 (Or. 2012) (holding that a medical entity may be vicariously liable if (1) the principal held itself out as a direct provider of medical care; and (2) the plaintiff relied on these representations by looking to the principal, not a specific physician, as the provider); *Wilkins v. Marshalltown Medical and Surgical Center*, 758 N.W.2d 232, 237 (Iowa 2008) (finding an issue of fact as to whether the medical center was legally liable for actions of its emergency room doctors under either apparent authority or ostensible agency).

We believe our adoption of Section 267 in the medical care context is fair and consistent with a national trend seeking to limit the ability of health care providers to evade potential vicarious liability based on arrangements—whether contractual or informal—that are not readily apparent to the average health care consumer. *See Arrendale v. American Imaging & MRI, LLC*, --- N.E.3d --- (Ind. 2022); *Webster*, 917 F.3d at 577.

III. Issues of material fact exist as to whether Lingle was Anonymous's apparent agent under Section 267.

In applying Section 267 to the facts and circumstances before us, we find that genuine issues of material fact preclude summary judgment in favor of Anonymous.

Courts applying Section 267 have analyzed two elements: representation and reliance. And here, the designated evidence on both

elements is insufficient to establish that Anonymous is entitled to judgment as a matter of law. Ind. Tr. R. 56(C). Instead, it can support a conclusion that Anonymous led Wilson to reasonably believe that Lingle was providing physical therapy as its agent.

Both Anonymous and Accelerated Rehab/Athletico operated under nearly identical names and shared space in the same Facility. The outside of the Facility bears only Anonymous's name. After performing Wilson's surgery, Anonymous informed her that she needed to undergo physical therapy and referred her to the second floor of its Facility—where Athletico was housed—for her therapy needs. Before her first therapy appointment, Wilson reviewed the Appointment Policy that thanked her for "choosing [Anonymous] for your therapy needs" and was signed by "[Anonymous] Physical/Occupational Therapy Department." Appellant's Conf. App. Vol. III, p. 88. This Appointment Policy also indicated that it "is the policy of [Anonymous]," not Athletico, to require at least 24 hours' notice to cancel an appointment. *Id.* After Wilson's therapy session, Anonymous sent her a bill.

At no point during Wilson's orthopedic treatment in 2015 and 2016 did anyone indicate to her that any individual providing services to her, including Lingle, was unaffiliated with Anonymous. Indeed, Wilson did not discover there was no legal relationship between Lingle and Anonymous for more than two years after her injury; on April 19, 2018, the Department of Insurance informed her that neither Lingle nor Athletico was a qualified healthcare provider under the Medical Malpractice Act.

In support of summary judgment, Anonymous designated portions of the Staffing Agreement it executed with Accelerated Rehab that purported to shift all physical therapy responsibilities—including malpractice insurance management—to Accelerated Rehab. But the Agreement also states that "[Anonymous] owns and operates a medical group practice … and operates a physical therapy department as part of its medical group[.]" Appellant's Conf. App. Vol. II, p. 88. And the record is silent as to whether this agreement remained in place after Athletico acquired Accelerated Rehab; the only evidence of the Athletico acquisition itself is

Lingle's deposition testimony. For his part, Lingle didn't recall when he was hired, when Athletico "bought [Accelerated Rehab] out," or the address of the Facility—though he worked there for "seven [or] eight years." Appellant's Conf. App. Vol. III, pp. 18, 53. He also failed to bring any subpoenaed documents—including W-2s, 1099s, tax returns, pay stubs, and employment contracts—to the deposition.

In any event, the relevant question under Section 267 is not whether Anonymous employed Lingle or maintained his malpractice insurance. Instead, the court must consider whether Anonymous engaged in "some form of communication, direct or indirect," that "instill[ed] a reasonable belief" in Wilson's mind that Lingle was an agent of Anonymous—and whether this belief led Wilson to seek treatment from Lingle. *Pepkowski*, 535 N.E.2d at 1167. At the summary judgment stage, Wilson has shown disputed issues of material fact as to both the representation and reliance elements of Section 267.

Conclusion

We find genuine issues of material fact as to whether Lingle was an apparent agent of Anonymous under Section 267 of the Second Restatement of Agency. Accordingly, we reverse the trial court's grant of summary judgment in favor of Anonymous and remand for further proceedings consistent with this opinion.

Rush, C.J., and Massa and Goff, JJ., concur.
Slaughter, J., concurs in the judgment with separate opinion.

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Slaughter, J., concurring in judgment with separate opinion.

More than twenty years ago, this Court addressed which standard to adopt for applying principles of apparent agency. *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999). After considering both section 267 of the Restatement (Second) of Agency and section 429 of the Restatement (Second) of Torts, we adopted section 429. *Id.* at 148-49, 152. Yet today, in companion cases, the Court embraces both standards. In *Arrendale v. American Imaging & MRI, LLC*, ___ N.E.3d ___ , No. 21S-CT-370 (Ind. Mar. 24, 2022), we apply our existing standard under section 429. But here in *Wilson*, the Court adopts and applies a new standard under section 267. The Court notes that the difference between the two standards is that section 429 requires a legal relationship between the principal and apparent agent, while section 267 does not. *Ante*, at 9. But if this is the only difference, then it is not clear whether a case will ever present a factual scenario in which section 429 applies but section 267 does not. Thus, in adopting section 267, the Court appears to render section 429 redundant. Because we can resolve *Wilson* under section 429, I see no reason to adopt a new standard – especially one that jettisons our prevailing standard in favor of one the parties did not ask us to adopt.

Instead, I would apply section 429 here and deny Anonymous's motion for summary judgment. The Court holds that section 429 does not apply because no "legal relationship exists on this record." *Id.* at 7. I respectfully disagree. The uncontested record shows that Anonymous and Accelerated Rehab executed a staffing agreement requiring Accelerated Rehab to supply Anonymous with physical therapists. At the time of Wilson's injury, Lingle, a physical therapist, was an employee of Accelerated Rehab. Although Athletico acquired Accelerated Rehab, their staffing agreement appears to have remained in effect after the acquisition. This evidence creates a factual dispute for trial on whether a legal relationship existed between Anonymous and Lingle. Because our summary-judgment standard compels us to draw all inferences in favor of Wilson, the nonmovant, we must infer a legal relationship existed here between Anonymous and Lingle. Thus, while I agree with the Court that Anonymous is not entitled to summary judgment, I would remand for further proceedings under section 429, not section 267.