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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1987

Alla K. Popovich, as wife and Guardian Ad Litem for Aleksandr M. Popovich, et al.,
Appellants,

vs.

Allina Health System,
Respondent,

Emergency Physicians Professional Association, et al.,
Defendants.

Filed July 8, 2019
Affirmed
Stauber, Judge*
Dissenting, Ross, Judge

Hennepin County District Court
File No. 27-CV-18-10905

Brandon Thompson, Colin F. Peterson, Robins Kaplan LLP, Minneapolis, Minnesota (for appellants)

Charles F. Webber, Nicholas J. Nelson, Elie C. Biel, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for respondent, Allina Health System)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Stauber, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

In this interlocutory appeal from partial judgment, appellant Alla K. Popovich, as wife and Guardian Ad Litem for Aleksandr M. Popovich, challenges the district court's order partially granting dismissal of her vicarious-liability claim against respondent Allina Health System (Allina). Because the district court did not err, we affirm.

FACTS

In February 2016, Aleksandr Popovich visited the emergency room at Unity Hospital complaining of dizziness, loss of balance, blurred vision, headache, and shortness of breath. Dr. Aileen Haung, an emergency-room physician, treated Mr. Popovich in the emergency room and discharged him. Later that morning, Mr. Popovich was transported to the Mercy Hospital emergency room. Dr. Taj Melson, another emergency-room physician, evaluated Mr. Popovich and transferred him to Abbott Northwestern Hospital for further care. Mr. Popovich remained hospitalized for more than two weeks and spent a month in inpatient rehabilitation.

In June 2018, appellant Alla Popovich, Mr. Popovich's wife, initiated a civil action asserting that Mr. Popovich suffered severe and permanent damage requiring extensive ongoing therapy and medical care for the rest of his life. The complaint alleges that the emergency-room physicians were negligent, and that respondent Allina Health Services was legally culpable for the physicians' negligent acts and omissions through the doctrine of apparent authority. Allina owns Unity Hospital and Mercy Hospital. However, it is

undisputed that the emergency-room physicians who treated Mr. Popovich are employees of Emergency Physicians Professional Association, and are not employed by Allina.

In November 2018, the district court granted Allina's motion to dismiss as a matter of law on the ground that a hospital is not vicariously liable for the acts of non-employees. The district court granted appellant's request to enter final partial judgment under Minnesota Rule of Civil Procedure 54.02, and this appeal follows.

DECISION

The district court may grant a motion to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e). On appeal, we review a district court's decision to dismiss a cause of action de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). In this review, we consider only the facts alleged in the complaint, accept those facts as true, and construe all reasonable inferences in favor of the nonmoving party. *Bahr v. Capella Univ*., 788 N.W.2d 76, 80 (Minn. 2010). A claim survives dismissal if it is "possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A*., 851 N.W.2d 598, 603 (Minn. 2014).

Appellant argues that Allina is vicariously liable for the acts of the emergency-room physicians under a principal-agent relationship. The doctrine of vicarious liability makes "a principal . . . liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." *Semrad v. Edina Realty, Inc*., 493 N.W.2d 528, 535 (Minn. 1992). An agent can bind a principal if the agent has actual or apparent authority. *Duluth Herald & News Tribune v. Plymouth Optical Co*., 176

N.W.2d 552, 555 (Minn. 1970). Whether actual or apparent authority exists is a legal question reviewed de novo. *State v. Dotson*, 900 N.W.2d 445, 450 (Minn. App. 2017). Here, it is undisputed that the emergency-room physicians did not have actual authority to act on Allina's behalf. We therefore consider whether Allina is liable under the doctrine of apparent authority. "Apparent authority is that authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988).

Our decision in *McElwain v. Van Beek* is controlling. 447 N.W.2d 442 (Minn. App. 1989), *review denied* (Minn. Dec. 20, 1989).[1] The *McElwain* court considered whether a hospital could be held vicariously liable for the alleged negligence of an emergency-room physician. *Id.* at 446-47. We rejected appellant's vicarious-liability claim and affirmed summary judgment in favor of the hospital, stating:

> In Minnesota, a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital. *See Moeller v. Hauser*, 237 Minn. 368, 378-79, 54 N.W.2d 639, 645-46 (1952). The evidence here shows that [respondent doctor] was an independent contractor who has staff privileges at many Twin City hospitals and is not an employee of [respondent hospital]. Thus, the respondent medical center is relieved of liability.

Id. at 446.

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[1]The Minnesota Supreme Court not only denied review of *McElwain*; it subsequently rejected the view that "recognition of this tort [negligent credentialing of a physician by a hospital] would effectively overrule *McElwain* . . . , where the court of appeals held that 'a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital.'" *Larson v. Wasemiller*, 738 N.W.2d 300, 304 n. 2 (Minn. 2007).

Moeller, on which *McElwain* relies, concerned a five-year-old boy who had been hospitalized with a fractured femur and put in traction in June, 1947. *Moeller,* 54 N.W.2d at 641-43. The senior attending physician of the fracture service (the staff doctor), had "assigned the care of the [boy] to himself as attending physician," which meant that he would retain the boy "in his care . . . until [the boy] was discharged." *Id.* at 642. The boy was seen by his staff doctor six or seven times between June 7 and June 30, but not between July 1 and July 10. *Id.* at 642, 646. Staff doctors "[had] the final responsibility for the care of patients." *Id.* at 645.

The boy remained in traction until July 10, when he experienced pain due to "a severe pressure sore, caused by localized and continued pressure which cut off circulation, [that] had developed on the top of his foot." *Id.* at 643. The staff doctor testified that the sore had taken between 24 and 60 hours, or one to two-and-a-half days, to develop; another doctor testified that it had taken several days. *Id.* at 647. Because of the sore, the boy required three further operations, one in 1947, and two in 1948; he was left with "a permanent partial disability of somewhere between 30 and 40 percent." *Id.* at 643.

An action was brought on the boy's behalf against the staff doctor, against the resident doctor who had provided routine care between July 1 and July 10, and against the hospital, on the ground that it was liable for the resident doctor's, but not the staff doctor's, acts. *Id.* at 641, 644. Staff doctors had their own established practices, maintained their own offices, and were appointed to the hospital staff by the county welfare board; they were not hired by the hospital. *Id.* at 642. Resident doctors were employed and paid by

the hospital, and staff doctors "supervise[d] the activities of the resident doctor[s] to some extent." *Id.* at 642, 645.

The staff doctor testified that, on June 30, he had "left word with the charge nurse . . . that the traction [should] be removed, a splint applied, and the boy be sent home," that he did not recall the name of the charge nurse, that no intern or resident doctor had accompanied him on June 30, and that he had not discussed the discharge with any other doctor. *Id.* at 646. No nurse testified that they had received the discharge instruction. *Id.* The head nurse testified that, if she had received a discharge order, it would have been carried out, and if any other nurse had received the order, it would have been written in the order book and then carried out. *Id.* at 647. There was no such order in the book. *Id*.

The supreme court noted that "the jury reasonably may have placed little credence on [the staff doctor's] explanation as to why he failed to visit [the patient] after June 30," and concluded that "the jury could have found that . . . the [staff] doctor was under a duty to see [the boy] sometime [after June 30 and] prior to July 10 and that the breach of this duty was the proximate cause of the injury." *Id.*

The resident doctor testified that "he saw the boy at least once and usually twice a day between July 1 and July 10," that he "did not see [the staff doctor] between July 1 and July 10," and that he "had no reason to call [the staff doctor]." *Id*. at 643. The supreme court noted that "[w]hether [the resident doctor] was actually as attentive as his testimony indicated was a question for the jury," and that "[its] finding of negligence against the resident doctor is amply supported by the evidence in the record." *Id.*

The supreme court also agreed with the district court that the hospital was liable for the resident doctor's negligence, rejecting the board's argument that, because the resident doctor was "under the authoritative control of the staff doctor," the hospital was not liable for his negligence. *Id.* at 644 "[We] hold that a resident doctor in a hospital who receives his compensation from the hospital while providing medical care as a part of regular hospital routine is a servant of the hospital so as to make the hospital liable for his negligence." *Id.* at 646.

Thus, the supreme court affirmed the district court's decision that the hospital was liable for the resident doctor's contributory negligence because the resident doctor was a hospital employee, and neither the district court nor the supreme court considered whether the hospital was liable for the causal negligence of the staff doctor, who was not an employee of the hospital. *McElwain's* inference that *Moeller* supports the proposition that hospitals are not liable for the negligence of doctors who are not their employees is legitimate.

Applying *McElwain* here, we determine that Allina is not vicariously liable for the acts of the emergency-room physicians as a matter of law. *See* 447 N.W.2d at 446 (holding independent contractor-physician with staffing privileges at hospital is not an employee of hospital). The record establishes that Drs. Haung and Melson were not Allina employees, but were instead employed by the Emergency Physicians Professional Association. Because the uncontested evidence demonstrates that the physicians were not employed by the hospitals or by Allina, Allina is "relieved of liability." *Id.*

We are also persuaded by relevant unpublished caselaw and federal caselaw. In *Kramer v. St. Cloud Hosp*., 2012 WL 360415, at *9 (Minn. App. Feb. 6, 2012), *review denied* (Minn. Apr. 25, 2012), we upheld dismissal of a medical-malpractice claim in favor of a hospital, noting that "Minnesota does not recognize a medical-malpractice claim against a hospital based on the doctrine of apparent authority." *See also Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (holding that, while not binding, unpublished opinions may be persuasive). Courts applying Minnesota law have likewise held that a hospital is not vicariously liable for the actions of its independent contractors. *See Damgaard v. Avera Health*, 108 F. Supp. 3d 689, 696 (D. Minn. 2015) (citing *McElwain,* 447 N.W.2d at 446, as a supporting example after observing that, "As [d]efendants [providers of healthcare] correctly note, and [plaintiff, a patient] appears to concede, in Minnesota a healthcare provider can be vicariously liable for a physician's negligence only if the physician is an employee of the provider."); s*ee also TCI Bus. Capital, Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 431 (Minn. App. 2017) ("A federal court's interpretation of Minnesota law is not binding on this court, though it may have persuasive value.").

Appellant urges this court to overturn *McElwain*. We decline to do so. As an error-correcting court, we are bound by our published decisions. *See State v. M.L.A*., 785 N.W.2d 763, 767 (Minn. App. 2010) ("The district court, like this court, is bound by supreme court precedent"), *review denied* (Minn. Sept. 21, 2010).

> The doctrine of stare decisis . . . directs that we adhere to former decisions in order that there might be stability in the law. . . . We will only overrule our precedent if provided with

> a compelling reason to do so. The reasons for departing from former decisions must greatly outweigh reasons for adhering to them.

Ariola v. City of Stillwater, 889 N.W.2d 340, 356 (Minn. App. 2017) (quotations and citation omitted), *review denied* (Minn. Apr. 18, 2017).

Ariola concerned whether active knowledge or constructive knowledge was required for the adult-trespasser exception to recreational-use immunity. This court had released six published decisions stating that actual knowledge was required in 2009, 2008, 1998, 1989, 1988, and 1987, and one published decision stating that only constructive knowledge was required in 1991. *Id.* at 355. We concluded that three reasons supported overruling the 1991 decision. *Id.* at 356.

First, the six published decisions that conflicted with the 1991 decision, particularly the three that followed it and therefore could have distinguished it, but did not, supported overruling. *Id.* Here, no case from either this court or the supreme court supports overruling *McElwain.* Second, the 1991 decision, conflicting as it did with six others, created "confusion for district courts, counsel, and parties" and caused unnecessary litigation. *Id.* Again, no published decision case conflicts with *McElwain.* Finally, the 1991 decision conflicted with the Restatement (Second) of Torts, which was consistent with the other six decisions. *Id.* No such conflict with a secondary source exists here. Appellant has not shown any compelling reason to overrule *McElwain*.

The *McElwain* decision has stood as the law in Minnesota for thirty years. The Minnesota Supreme Court had the opportunity to review the case further on appeal, and declined to do so. Moreover, as an error-correcting court, this court is "without authority

to change the law." *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

In sum, limiting our consideration to the facts alleged in the complaint, accepting those facts as true, and construing all reasonable inferences in favor of appellant, *Bahr*, 788 N.W.2d at 80, we determine that appellant's cause of action against Allina fails to state a claim upon which relief can be granted as a matter of law. Because appellant's vicarious-liability claims against the hospital are foreclosed by our decision in *McElwain*, we affirm the district court's order granting partial dismissal in Allina's favor.

Affirmed.

ROSS, Judge (dissenting)

I respectfully dissent from the majority's holding that hospitals in Minnesota are categorically immune from vicarious liability in negligence suits that rest on the apparent-authority doctrine. I agree that the district court was bound to grant the hospital's motion to dismiss because we said in *McElwain v. Van Beek* that, "[i]n Minnesota, a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital." 447 N.W.2d 442, 446 (Minn. App. 1989), *review denied* (Minn. Dec. 20, 1989), *partly overruled by Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019). And I agree with the majority that we must affirm if we follow that declaration in *McElwain*. But a two-tier problem prevents me from joining the majority's reliance on *McElwain*.

First, *McElwain* did not purport to establish a new rule of law limiting vicarious liability but merely to restate what it thought was an old rule of law already established or declared in *Moeller v. Hauser*, 54 N.W.2d 639, 645-46 (1952). Second, *McElwain*'s understanding that it was merely restating an old rule of law already established or declared in *Moeller* is, in a word, wrong. This is not open to serious debate. *Moeller* never actually established nor declared the rule of law that *McElwain* says it did, and no reading of *Moeller* supports the idea that its conclusion was premised implicitly on the supposed rule of law. In other words, when we implied in *McElwain* that a rule of law exists in Minnesota categorically immunizing hospitals from vicarious liability in every malpractice case in which the allegedly negligent physician has any other arrangement than an employment relationship with the hospital, we were plainly incorrect.

I need not labor to make the point that *Moeller* does not stand for the proposition *McElwain* ascribed to it; not even the respondent hospital, well represented by highly-skilled appellate counsel, attempts to defend *McElwain*'s reliance on *Moeller* for the stated rule. It is enough to point out the two clearest reasons that *Moeller* certainly does not hold that "a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital." First, again, nothing stated in *Moeller* comes remotely close to expressing that holding. And second, beyond the fact *Moeller* did not so hold, it *could not* so hold. A holding of a case is only that rule of law the court necessarily relied on to decide the actual issues then being decided. *Cf. Wandersee v. Brellenthin Chevrolet Co.,* 102 N.W.2d 514, 520 (1960) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand . . . lack the force of an adjudication.") (quotation omitted). *Moeller* was answering whether, under the *employer*-liability doctrine of *respondeat superior*, a hospital could avoid liability for a hospital-employed resident physician's allegedly negligent care on the theory that the resident was really serving the hospital's staff physician rather than the hospital. 54 N.W.2d at 644. And its answer to that question has nothing to do with *nonemployer* vicarious liability: "[W]e must hold that a resident doctor in a hospital who receives his compensation from the hospital while providing medical care as a part of regular hospital routine is a servant of the hospital so as to make the hospital liable for his negligence under the doctrine of *respondeat superior*." *Id*. at 646. *Moeller* does not hold what *McElwain* declares.

I adhere strongly to the oft-stated concept that precedent ought to be followed for the sake of stability of the rule of law. *See Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) ("The doctrine of stare decisis directs that we adhere to former decisions in order that there might be stability in the law."). But that is because the rule of law is *purposefully* built, presumably, on an existing rule of law that itself deliberately extended a rule of law that grew thoughtfully from yet another rule of law, and so on. As the supreme court explained *stare decisis* long ago, "It is elementary that, when a rule has been *deliberately adopted* and declared, it ought not to be disturbed by the same court, except for very cogent reasons, and upon a clear manifestation of error." *State v. Manford*, 106 N.W. 907, 907 (Minn. 1906) (emphasis added). The heart of the doctrine of *stare decisis*, then, is that a court should not easily forsake a rule that it deliberately made, even if the court should later question the underlying reasoning. But the rule in *McElwain* was not deliberately made, so we can address it without second-guessing our prior rationale. And I think the rule in *McElwain* carries even less weight than a rule of law that is merely announced without deliberation, detached from history, and undeveloped through reasoning; in addition to having all those deficiencies, it is also a rule of law premised entirely on what we now see is a simple fallacy, which is the notion that the rule already existed.

The majority succumbs to the temptation to give the *McElwain* declaration significance because the supreme court denied a petition to review our decision. This is a mistake because "[t]he temptation to read significance into a denial of a petition for further review is best resisted." *Murphy v. Milbank Mut. Ins. Co.*, 388 N.W.2d 732, 739

(Minn. 1986). We should instead recognize that the supreme court's choice not to review one of our decisions "does not give the [decision] any more or less precedential weight than a court of appeals decision from which no review was sought." *Id.*

I add that we have previously done precisely what the majority suggests we cannot do here. In a situation remarkably similar to this one, for example, we overturned a prior published opinion of this court that (1) had declared a rule of law that was not supported by the supreme court case cited as support, (2) had been denied review by the supreme court, and (3) had lasted as supposed precedent for nearly 20 years. This court had made the categorical declaration in *Imdieke v. Imdieke*, "To base custody or care on a parent's remaining in a certain area is a restrictive condition contrary to Minnesota law." 411 N.W.2d 241, 244 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987). We offered no explanation for the declaration other than to cite the supreme court decision of *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983). Our declaration in *Imdieke* ostensibly remained the law of the land for nearly two decades, and we relied on it in unpublished opinions. *See, e.g., Lundquist v. Lundquist*, C0-94-509, 1994 WL 510168, at *2 (Minn. App. Sept. 20, 1994) (citing *Imdieke* after observing, "We have previously held that residential restrictions on custodial parents are impermissible limitations."). But we corrected the *Imdieke* declaration of supposed law in 2006 when we finally noticed that "*Auge* did not involve an issue of conditional custody, and there is no statement in the *Auge* opinion that custody conditioned on maintaining a particular residence for a child is contrary to Minnesota law." *Dailey v. Chermak*, 709 N.W.2d 626, 630 (Minn. App. 2006) ("Thus, the pronouncement

in *Imdieke* regarding conditional custody was dictum and without basis in the law."), *review denied* (Minn. May 16, 2006).

The appellants have illuminated a path for a holding that the *McElwain* declaration was really just dictum that we can disregard since the opinion alternatively concluded that the accused tortfeasor had engaged in no negligent act, rendering unnecessary our stray statement about a hospital's vicarious liability. *See McElwain*, 447 N.W.2d at 445-46 (holding that the physician did not owe a duty of care to the injured non-patient). I would rather deal with the error directly, however, as we treat other errors, and correct it on the ground that, like the *Imdieke* declaration, the *McElwain* declaration was "without basis in the law." People are fallible, and judges are people, making courts fallible. Sometimes, despite diligent efforts, courts err. We did. We should say so.

Recognizing that *Moeller* never established the rule of law that *McElwain* said it established and that *McElwain* does not offer any rationale or explanation for the rule, I think it is accurate to say that Minnesota has never properly established any rule categorically immunizing hospitals from vicarious liability premised on the tortfeasor's apparent authority to act for the institution. The respondent hospital points to Kansas and Missouri as states that have enacted statutes to restrict hospital liability in a manner similar to the *McElwain* rule and to other states that have taken various approaches to limit hospital vicarious liability. Those other approaches might be relevant to us were we the body responsible for making unprecedented changes in the law. We are not.

The majority offers only circular support for the *McElwain* declaration. It deems "persuasive" the reasoning of an unpublished opinion of this court and also a federal district

court decision. But, neither of those cases offers any rationale why Minnesota supposedly excepts hospitals from the same standard of apparent authority that applies to every other institution. Instead, both cases followed the *McElwain* rule simply because *McElwain* announced the rule. *See Damgaard v. Avera Health*, 108 F. Supp. 3d 689, 696 (D. Minn. 2015) (citing *McElwain* for proposition that "a healthcare provider can be vicariously liable for a physician's negligence only if the physician is an employee of the provider"); *Kramer v. St. Cloud Hosp.*, No. A11-1187, 2012 WL 360415, at *9 (Minn. App. Feb. 6, 2012) (citing on *McElwain* for the same proposition). Citing the two cases that merely cited *McElwain* adds nothing to the strength of *McElwain* or to the majority's reliance on it.

The district court did not err by dutifully following the rule of law as we declared it in *McElwain*, but it is clear that we erred in declaring the rule. I would decline to follow the untethered and unexplained *McElwain* declaration based on its mistaken, misplaced reliance on the cited authority and expressly overrule the declaration as nonbinding. I would therefore reverse and, without otherwise commenting on the merit of the apparent-authority theory of liability applied to this case, instruct the district court to revisit the hospital's dispositive motion in light of our overruling of *McElwain*.