

## Insights

### Patient May Raise Vicarious Liability of Hospital for Unnamed Physicians in Medical Review Panel Submission

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Recently, in ***Anonymous Hospital v. Mason Spencer and Steve Robertson, Commissioner of The Indiana Dept. of Insurance, and Doug Hill, Medical Review Panel Chair***, 20A-CT-393, the Indiana Court of Appeals held that a patient may assert negligence on the part of nonparty physicians in his submission to the medical review panel. The opinion further complicates the issues of apparent agency and vicarious liability for institutional providers such as hospitals.

Mason Spencer spent 25-days in Anonymous Hospital for respiratory insufficiency. He was admitted to the ICU and intubated. He was treated by many individuals, including hospital employees and independent providers. The patient filed a proposed complaint with the Indiana Department of Insurance alleging that, during his admission to Anonymous Hospital, he developed bedsores, skin deterioration, a dislocated jaw, and several other ailments. Following the expiration of the statute of limitations, the patient filed his submission for the medical review panel's evaluation. Contained within the patient's submission were arguments alleging vicarious liability for the physicians, Hospital employees, and/or agents who treated Mr. Spencer during his hospitalization.

Following receipt of the patient's submission, Anonymous Hospital filed a petition for preliminary determination of law. It requested that the trial court strike the allegations of vicarious liability and exclude the conduct of any physicians from the panel's review because plaintiff failed to name any physicians in the proposed complaint or in pre-panel discovery. Since the statute of limitations had expired, the unnamed physicians could not be added as parties. The trial court concluded that current Indiana case law does not preclude a medical review panel from reviewing the vicarious liability claims asserted by plaintiff.

The Indiana Court of Appeals affirmed the trial court's ruling. The Court wrote that "Spencer's failure to name or identify any physicians individually prior to the running of the statute of limitations is not fatal to his vicarious liability claims against the Hospital. In other words, Spencer may proceed with his arguments and allegations of physician negligence/vicarious liability in his submission to the MRP even though those physicians are not named in the proposed complaint and are now individually immune from suit." The appellate court reasoned that it considered the general theory of liability in Mr. Spencer's proposed complaint, which fell "squarely within our supreme court's decision in *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999).

The Appellate Court focused on the preliminary, informal, and limited nature of the medical review panel process. The Court criticized Anonymous Hospital's "...attempt to so severely, and we think unjustifiably, limit Spencer's claims against it *before* the case has even been presented to the MRP." The Court was not convinced by the Hospital's artfully crafted prejudice arguments characterizing the proposed complaint as "threadbare" and the initial discovery responses as "bait-and-switch." By focusing on the preliminary nature of the medical review panel proceedings, the Court specifically did not rule on whether arguments asserted for the first time against independent physicians after the statute of limitations had already run will be admissible at trial.

The Court closed by reminding "the Hospital that, in the words of Karen Carpenter, 'We've only just begun.' The Hospital has yet to even craft its own submission to the MRP, and it has ample notice and opportunity to respond

to all alleged instances of negligence, physician or otherwise, presented by Spencer in his submission. Thereafter, there is still much to be sorted out if and when this case finds its way to a courtroom. Indeed, at trial, it is well settled that Spencer can proceed with 'any theories of alleged malpractice during litigation' so long as '(1) the proposed complaint encompasses the theories, and (2) the evidence relating to those theories was before the MRP." *McKeen*, 71 N.E.3d at 834 (*quoting McKeen*, 61 N.E.3d at 1262).