**IS SEXUAL ASSAULT BY A HEALTH CARE PROVIDER MEDICAL MALPRACTICE IN INDIANA?**

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1. **Introduction**

Recent Indiana case law has changed the landscape for litigating sexual abuse cases against healthcare providers and/or health care facilities. Traditionally in Indiana, a claim arising out of a sexual assault by a healthcare provider was litigated as a civil suit for damages under ordinary tort law. Oftentimes, sexual assault cases involve claims of vicarious liability against a perpetrator’s employer under theories of *respondeat superior* when a perpetrator commits an act under the scope of employment.

However, in 2018, the Indiana Supreme Court broadened the definition of what acts may occur within the scope of one’s employment. Based on this broadened scope of employment, Indiana law now suggests that even a tortious or abusive act, including sexual assault, may constitute conduct that falls within the scope of one’s employment.

This summer, the Indiana Court of Appeals took the new broadened scope of employment definition and applied it to the negligent act of a healthcare provider. In doing so, the court determined the provider’s negligent act fell under the purview of the Indiana Medical Malpractice Act, establishing a new rule that has the potential to largely alter the way sexual assault cases must be litigated in Indiana.

1. **Common Law: *Respondeat Superior***

Indiana recognizes the doctrine of *respondeat superior,* which is Latin for “let the superior make answer.” *Cox v. Evansville Police Department,* 107 N.E.3d 453, 460 (Ind. 2018). Under this doctrine, an employer is liable for employees’ tortious acts only if those acts occurred within the scope of employment. *Id.*

The scope-of-employment rule is the “general rule” of vicarious liability for both government and private employers.  *Cox,* 107 N.E.3d at 460. Whether an act falls within the scope of employment is generally a question of fact. *Id.*

* 1. ***Stropes v. Heritage House Childrens Center of Shelbyville, Inc.***

In *Stropes*, the Indiana Supreme Court held that a children’s center which cared for intellectually disabled children could be liable under the theory of *respondeat superior* when one of its nurse aids raped a patient.

Stropes was a 14-year old boy that suffered from cerebral palsy and severe intellectual disability. *Stropes by Taylor v. Heritage House Childrens Center of Shelbyville, Inc*., 547 N.E.2d 244, 245 (Ind. 1989). He was placed at the Heritage House Children’s Center of Shelbyville (“Heritage”) as a ward of the state.  *Id.* One morning, a nurse’s aide charged with feeding, bathing, and changing Stropes’ bedding and clothing performed oral and anal sex on Stropes. *Id.* Another Heritage employee saw the incident and reported the aide.  *Id.*

Stropes sued Heritage claiming, in part, that Heritage was responsible for the acts committed by the aide. *Id*. at 246. The trial court granted summary judgment in favor of Heritage on the issue of respondeat superior. *Id.* Stropes appealed.

The Indiana Supreme Court held that the act of sexual assault could not be *per se* outside the scope of employment as a matter of law.  *Stropes,* 547 N.E.2d at 249.The court reasoned in part:

A blanket rule holding all sexual attacks outside the scope of employment as a matter of law because they satisfy the perpetrators' personal desires would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other personal motivations, such as anger or financial pressures. Rather, the nature of the wrongful act should be a consideration in the assessment of whether and to what extent Griffin's acts fell within the scope of his employment such that Heritage should be held accountable.

*Id.* The Court noted that although “[r]ape and sexual abuse constitute arguably the most egregious instances of wrongful acts which an employee could commit on the job and lend themselves to arguably the most instinctive conclusion that such acts could never be within the scope of one's employment,” other courts had recognized that the resolution of the question “does not turn on the type of act committed or on the perpetrator's emotional baggage accompanying the attack*.” Id.* Rather, the Court reasoned, “these courts indicate that the focus must be on how the employment relates to the context in which the commission of the wrongful act arose*.” Id.*

The Court then went on to reason that “[a] jury presented with the facts of [that] case might find that [the nurse aide] acted to an appreciable extent to further his master's business, and “that his actions were, at least for a time, authorized by his employer, related to the service for which he was employed, and motivated to an extent by [his employer's] interests.” *Id.* at 250. Therefore, the Court reasoned, a jury might conclude “his wrongful acts fell within the scope of his employment and Heritage should be accountable*.” Id.* “Conversely,” the Court reasoned, “a jury might find that [the aide’s] acts were so divorced in time, place and purpose from his employment duties as to preclude the imposition of liability on his employer.” *Id.* The Court concluded “the nature of the acts were, at the very least, sufficiently associated with [the nurse aide’s] authorized duties to escape dismissal on summary judgment.” *Id.*

1. **The Indiana Medical Malpractice Act**

Under the Indiana Medical Malpractice Act (“MMA” or “Act”), a patient who has a claim for bodily injury or death due to medical malpractice may file a complaint in any court with jurisdiction*.* Ind. Code § 34-18-8-1. “However, Indiana Code section 34-1-8-4 creates a condition precedent to trying a medical malpractice case in court, namely, that “an action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel ... and (2) an opinion is given by the panel.”  *Martinez v. Oaklawn Psychiatric Ctr., Inc.,* 128 N.E.3d 549, 555 (Ind. Ct. App. 2019), *clarified on reh'g*, No. 18A-CT-2883, 2019 WL 4312956 (Ind. Ct. App. Sept. 12, 2019). “Thus, until a medical review panel has issued its opinion, the trial court has no jurisdiction to hear and adjudicate the claim.” *Martinez*, 128 N.E.3d at 555.

“Malpractice” is defined as “a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient.” I.C. § 34-18-2-18. A “patient” is “an individual who receives or should have received health care from a health care provider, under a contract, express or implied, and includes a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider.” I.C. § 34-18-2-22. And “health care” is “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.

*Id.* (quoting *B.R. ex rel Todd v. State*, 1 N.E.3d 708, 713 (Ind. Ct. App. 2013)). “The [MMA] covers curative or salutary conduct of a health care provider acting within his or her professional capacity, but not conduct unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment.” *Martinez*, 128 N.E.3d at 556. Indiana Code section 34-18-2-14 defines a “healthcare provider” as:

An individual, a partnership, a limited liability company, a corporation, a professional corporation, a facility, or an institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, health facility, emergency ambulance service [ ], dentist, registered or licensed practical nurse, physician assistant, certified nurse midwife, anesthesiologist assistant, optometrist, podiatrist, chiropractor, physical therapist, respiratory care practitioner, occupational therapist, psychologist, paramedic, advanced emergency medical technician, or emergency medical technician, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility, or institution acting in the course and scope of the person's employment.

*Martinez*, 128 N.E.3d at 556.

When deciding whether a claim falls under the MMA, courts are guided by the substance of a claim to determine applicability of the Act. *Id.* The fact that the alleged misconduct occurred in a healthcare facility, or that the injured party was a patient at the facility, is not dispositive in determining whether the claim sounds in medical malpractice. *Id.* Instead, courts consider whether the claim is based on the provider’s behavior or practices while acting in his or her professional capacity as a provider of medical services. *Id.*

* 1. ***Collins v. Thakkar,* 552 N.E.2d 507 (Ind. Ct. App. 1990)**

In *Collins v. Thakkar*, our Indiana Court of Appeals held that a claim against doctor who impregnated a patient and then aborted her fetus without her consent did not fall under the purview of the MMA.

In that case, Collins became a patient of Thakkar’s in March 1984. *Collins v. Thakkar,* 552 N.E.2d 507, 509 (Ind. Ct. App. 1990). They developed a relationship that involved periodic sexual intercourse. *Id.* In 1988, Collins consulted with Thakkar about the possibility that she was pregnant by him. *Id.*  Thakkar performed an examination of Collins after ordinary office hours. Thakkar advised Collins that she was not pregnant and then, twice, without her consent and over her protest, “did some act with a metal instrument inside her as to inflict excruciating pain upon her.” *Id.* at 509.

Collins sued, argued Thakkar intentionally aborted the birthing process of her unborn fetus, causing her to miscarry. *Id.*  The trial court dismissed Plaintiff’s complaint for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1) finding the allegations fell under the MMA. *Id.*

The Indiana Court of Appeals reversed the trial court. In part, the court reasoned that the text of the Act led the court to conclude that the General Assembly intended to exclude from the legislator’s purview conduct of a provider unrelated to the promotion of a patient’s health or the provider’s exercise of professional expertise, skill, or judgment. *Id.* at 510. The court reasoned, Thakkar’s acts were not designed to promote the patient’s health, did not call into question Thakkar’s use of the skill or expertise required of members of the medical profession, and that, “as with an ordinary negligence action, the allegations of Collin’s complaint present[ed] the kinds of factual issues capable of resolution by a jury without application of the standard of care prevalent in the local medical community.” *Id.* at 511.

* 1. ***Doe by Roe v. Madison Center Hospital*, 652 N.E.2d 101 (Ind. Ct. App. 1995)**

In *Doe v. Madison Center Hospital,* a minor child, who was a patient of a psychiatric center, was sexually assaulted, molested, and coerced into having sexual intercourse by a mental health counselor/orderly.  *Doe by Roe v. Madison Center Hospital,* 652 N.E.2d 101, 102 (Ind. Ct. App. 1995). The trial court dismissed the child's intentional tort claims for lack of subject matter jurisdiction, and the Indiana Court of Appeals reversed after concluding that the claims did not fall within the purview of the Act. *Id.* at 103. Specifically, the Indiana Court of Appeals concluded:

Doe's allegations, that [employee] King coerced Jane Doe, a minor, to engage in sexual intercourse causing her to contract a venereal disease, do not constitute a rendition of health care or professional services. The alleged acts, although occurring during Jane Doe's confinement in the Hospital for psychiatric care and treatment, were not designed to promote her health. Neither do they call into question King's use of skill or expertise as a health care provider.

*Id.* at 104 (internal citation omitted). Furthermore, the court observed that the child and the counselor did not have a therapist-patient relationship.

1. **Recent developments in Indiana**
	1. ***Cox v. Evansville Police Department,* 107 N.E.3d 453 (Ind. 2018)**

In *Cox v. Evansville,* the Indiana Supreme Court addressed, as a matter of first impression, whether sexual assault by a police officer fell within the scope of an officer’s employment. *Cox v. Evansville Police Department*, 107 N.E.3d 453, 459 (Ind. 2018). In doing so, the Court redefined *respondeat superior* law in Indiana by broadening the range of acts that may fall under the scope of employment.

*Cox* was an appeal of two different cases—one in Evansville, and one in Fort Wayne—where two different on-duty police officers raped a woman after being dispatched to a scene and taking the respective woman into his custody. *Id.* at 457.

The officers were convicted criminally. *Id.* at 457-58. Both women then brought civil actions against the respective assaulting officer’s city employer, alleging theories of respondeat superior, the common-carrier exception, and negligent hiring, training, supervision, and retention.  *Id.* at 458. After a series of appeals, the Indiana Supreme Court found as a matter of law, the city could not, under *respondeat superior,* escape liability for the officers’ sexual assault in those instances.  *Id.* at 456.

The Court began by noting,“[u]ltimately, the scope of employment encompasses the activities that the employer delegates to employees or authorizes employees to do, plus employees’ activities that naturally or predictably arise from those activities.” *Id.* at 461. The Court explained:

This means that the scope of employment –which determines whether the employer is liable – may include acts that the employer expressly forbids; that violate the employer’s rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.

*Id*.

The Court held that determining whether an act arises within the scope of employment “depends on whether acts naturally or predictably arise from the employment context.” *Id.* at 462. The Court then noted that officers are invested with “considerable and intimidating powers” that come with “an inherent risk of abuse.” *Id.* at 463. The Court further reasoned, “when that abuse is a tortious act arising naturally or predictably from the police officer’s employment activities, it falls within the scope of employment for which the city is liable.” *Id.* Thus, the Court concluded, “if an on-duty police officer commits a sexual assault by misusing official authority, the sexual assault is within the scope of employment if the employment context naturally or predictably gave rise to that abuse of official authority.” *Id*

The Court further explained:

The reasons underlying scope-of-employment liability support this conclusion. First, the city benefits from the lawful exercise of police power, so when tortious abuse of that power naturally or predictably flows from employment activities, the city equitably bears the cost of the victim's loss. And second, holding the city liable encourages it to guard against recurrent assaults. Particularly because cities vest considerable power and authority in police officers, we want cities to exercise vigilance in hiring and supervising officers.

*Id.*

* 1. ***Martinez v. Oaklawn Psychiatric Center***

This year, in *Martinez v. Oaklawn Psychiatric Center,* the Indiana Court of Appeals applied the “broadened scope of employment” set forth by *Cox* in establishing a new test for determining whether misconduct by a healthcare provider is subject to the Medical Malpractice Act, or whether the misconduct is a pure question of premises liability/standard negligence law.  *Martinez v. Oaklawn Psychiatric Ctr., Inc.,* 128 N.E.3d 549, 553 (Ind. Ct. App. 2019), c*larified on reh'g,* No. 18A-CT-2883, 2019 WL 4312956 (Ind. Ct. App. Sept. 12, 2019).

In *Martinez,* Roy Martinez suffered from mental illness, and was admitted to Oaklawn, a group home that offered supervised living for patients that do not require inpatient services.  *Id*. at 552. One night, Kafatia, an Oaklawn employee who worked as a residential assistant, became involved in a physical altercation with Martinez after Martinez refused to get ready for bed after curfew. *Id*. at 553. Martinez suffered a large laceration on his leg as a result of the altercation. *Id*.

As part of his training as a residential assistant, Kafatia had been trained annually in non-violent, verbal de-escalation strategies. *Id*. After the altercation, Martinez walked to the kitchen and called 911.  *Id*. Kafatia did not follow Martinez into the kitchen.  *Id*. Instead, he remained in the living room and waited for the police, which was consistent with Oaklawn’s protocol for handling altercations with psychiatric patients.  *Id*. Responding officers found Martinez in the kitchen surrounded by a pool of blood, and he died shortly thereafter. *Id*.

Martinez’s estate filed a complaint, alleging Kafatia, acting within the course and scope of his employment, “negligently and recklessly” injured Martinez, resulting in his death.  *Id*. Oaklawn filed a motion to dismiss under Trial Rule 12(B)(1) arguing the court lacked subject matter jurisdiction over the Complaint because the Estate failed to proceed through the medical review panel process.  *Id.* at 554. The trial court granted Oaklawn’s motion to dismiss, and Martinez appealed.

The Indiana Court of Appeals affirmed, holding Kafatia’s misconduct was subject to the medical review panel process. *Id.* at 562. The court declared that under the Indiana Supreme Court’s “broadened scope of employment” as set forth in *Cox*, the new test for determining whether the Medical Malpractice Act applies to specific misconduct is “whether that misconduct arises naturally or predictably from the relationship between the health care provider and patient or from an opportunity provided by that relationship.”  *Id.* at 558. The court also noted “under *Cox,* such conduct may include otherwise tortious or abusive conduct.”  *Id.*

In so holding, the Court reasoned, “Kafatia’s attempt to enforce Martinez’s curfew was a part of Oaklawn’s provision of healthcare to Martinez. When the altercation occurred that injured Martinez, Kafatia was naturally responding to Martinez's physically aggressive behavior by defending himself.” *Id*. at 562. “Kafatia thereafter followed Oaklawn's protocol by removing himself from Martinez's immediate physical presence and waiting for law enforcement to assist with Martinez. These facts and circumstances, together with the broadened scope of employment set forth in *Cox*, place the incident and injuries squarely within the scope of the Medical Malpractice Act.” *Id*.

1. **Sexual assault cases against healthcare providers post-*Martinez***

The *Cox* and *Martinez* decisions provide a strong indication that a health care provider’s act of sexual abuse of a patient would be subject to the MMA if the act arises naturally or predictably from the relationship between the health care provider and the patient.

Clearly, sexual abuse cannot be said to further the promotion of a patient's health. Nor does the misconduct require a panel of medical experts to determine whether the conduct fell below the standard of professional expertise, skill, or judgment required by a health care provider. However, under *Cox* and *Martinez*, Indiana courts seem to indicate that even “tortious or abusive conduct,” like the sexual abuse at issue in *Cox* may arise under the scope of a health care provider’s employment, and therefore be subject to the Act.

1. **Statutes of Limitation: Medical Malpractice v. Sexual Assault**

 The new case law in Indiana creates an inherent conflict between the statutes of limitation in Indiana that apply to sexual assault of a minor and the statutes of limitation that apply to medical malpractice.

 Under Indiana Code section 34-11-2-4(a)(1), the statute of limitation to bring a civil sexual assault claim is two (2) years for an adult. Under Indiana Code section 34-11-2-4(b)(1)-(2), the statute of limitation for an injury that results from sexual abuse of a child is seven (7) years after the cause of action accrues, or four (4) years after the person ceases to be a dependent of the person alleged to have performed the sexual abuse.

These statutes of limitation are in direct conflict with the statute of limitations to bring a claim of medical malpractice, which is two (2) years (or until a minor’s eight birthday, if the minor is less than six (6) years of age when the alleged malpractice occurs). Ind. Code § 34-18-7-1 (1998). So, for example, if a doctor commits malpractice on a 5-year-old child in Indiana, that child and his parents have until the child’s 8th birthday to bring a claim for medical malpractice.

In an abundance of caution, Cohen & Malad has started promptly double-filing cases where there are allegations of sexual assault by a health care provider under both the Indiana Department of Insurance and in state court, in the event that these allegations are deemed to fall under the scope of the Indiana Medical Malpractice Act and the shorter statute of limitation applies. This practice will avoid any potential statute of limitations issues by enabling a sexual assault case to be filed in state court and subsequently stayed while the case concurrently proceeds through the medical review panel process under the Indiana Department of Insurance.

The Appellant, Martinez has petitioned for transfer of the *Martinez* decision to the Indiana Supreme Court. We hope that the Indiana Supreme Court will accept transfer of the case, and provide further guidance on this issue, as this issue could potentially alter the way sexual abuse cases proceed against health care providers in Indiana.