

IN THE
INDIANA SUPREME COURT

Cause No. 67A01-0603-CV-122

CHI YUN HO, M.D.,)	
)	
Appellant-Defendant,)	
)	Appeal from the Putnam Circuit Court
v.)	
)	Trial Court Case No. 67C01-0210-PL-349
LORETTA M. FRYE and THOMAS)	
HOFFMAN, Personal Representative)	The Honorable Matthew L. Headley, Judge
of the Estate of Charles Frye,)	
)	
Appellees-Plaintiffs.)	

REPLY BRIEF OF *AMICI CURIAE* THE INDIANA STATE MEDICAL
ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION
IN SUPPORT OF PETITION TO TRANSFER

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ARGUMENT

I. Funk Is 75 Years Old And Should Be Abandoned.

The Court of Appeals' Opinion has the practical effect of imposing on Dr. Ho – and surgeons in operating rooms across Indiana – “captain of the ship” liability for the negligence of hospital employees. “[G]ood law is stable but does not stand still, [and] it is always incumbent on a court when the question is properly raised . . . to investigate the wisdom of precedents established many years ago.” McLochlin v. Miller, 139 Ind. App. 443, 217 N.E.2d 50, 52 (1966). This judicial obligation is of critical importance here, where the standards of care in medical malpractice cases can shift over time. See Blevins v. Clark, 740 N.E.2d 1235, 1241 (Ind. Ct. App. 2000); Continental Cas. Co. v. Novy, 437 N.E.2d 1338, 1349 (Ind. Ct. App. 1982).

Indiana's pronouncement of the “captain of the ship” doctrine in Funk v. Bonham, 204 Ind. 170, 183 N.E. 312 (1932),¹ is 75 years old and was issued during a period when charitable immunity of hospitals still prevailed. When an old decision is based on an analytical framework that is no longer valid, the decision is implicitly overruled. Indiana-Kentucky Elec. Corp. v. Indiana Dep't of State Revenue, 598 N.E.2d 647, 654 (Ind. Tax Ct. 1992). Given the dramatic changes in the delivery of healthcare in the United States (none of which Appellees or ITLA dispute), Funk should be revisited. See Marsico v. Marsico, 154 Ind. App. 436, 290 N.E.2d 99, 101 (1972) (noting that old cases decided in 1920 and 1954 were “suspect as primary authority in many areas of divorce law because of the steady progression of change”).

II. The Medical Review Panel's Opinion, The Record, And Prevailing Authority Do Not Support The Continued Viability Of The “Captain Of The Ship” Doctrine.

ITLA argues that the Medical Review Panel's Opinion and the testimony at trial “contradict[] any conclusion that the ‘Captain of the Ship’ Doctrine is no longer viable.” (ITLA

¹ Caselaw clearly recognizes Funk as the origin of Indiana's “captain of the ship” doctrine. See

Brief, p. 9). ITLA is wrong.² Dr. Gabrielson, who was both a member of the Medical Review Panel and Appellees' own expert witness at trial, testified:

The standard of who is in control in the operating room has changed over a period of years. . . . [I]n years past there was a captain of the ship theory. But because of divided responsibilities in the operating room the captain of the ship theory does not necessarily hold up because you have people assuming their roles of full responsibility of anesthesia . . . and you have people assuming the roles for what's being done at the operating table and then you have people assuming the roles of what's being done in the rest of the room. So, whereas fifty years ago you might say one person was totally in charge and the captain of the ship theory was [sic] played into the story. In this situation in today's surgery there is a divided responsibility that we have come to work with.

(Appellant's App., p. 73). Thus, Dr. Gabrielson opined that the standard of who is in control in the operating room has shifted, and because a surgeon now bears only "some . . . responsibility" for what occurs in the operating room, the "captain of the ship" theory no longer holds up. (*Id.*, pp. 73-74). ITLA's reliance on selective portions of the record is not well taken.

In contrast to the numerous cases demonstrating broad abandonment of the "captain of the ship" rule, ITLA relies on a single opinion from a California appellate court. (ITLA Brief, p. 12) (citing Fields v. Yusuf, 144 Cal.App.4th 1381 (2006)). Fields is not compelling authority for ITLA's position. In reality, the appellate courts in California are split on whether the "captain of the ship" doctrine remains a viable basis upon which to impose liability on a surgeon for the negligence of hospital employees. See Tappe v. Iowa Methodist Med. Ctr., 477 N.W.2d 396, 403 (Iowa 1991) ("[A]lthough some states still apply the doctrine . . . and California courts are split on the issue . . . , the majority of courts shun this rigid doctrine . . ."). Indeed, the dissent

Miller v. Ryan, 706 N.E.2d 244, 251 (Ind. Ct. App. 1999). This is hardly "rhetoric." (ITLA Brief, p. 10).

² ITLA maintains that application of the "captain of the ship" doctrine was never raised in the proceedings below and, as such, the issue is waived. (ITLA Brief, p. 8). However, it was *Appellees* who argued in their Motion for Partial Summary Judgment that the "Indiana Supreme Court in Funk v. Bonham established that the doctor, not the nurse, is responsible for removal of the sponge" and "[t]his principle represents the *captain of the ship* doctrine established by the Supreme Court in Funk["] (Appellees' App., pp. 77-78). Additionally, Appellees' own witness, Dr. Gabrielson, testified at trial

in Fields questioned the “viability of the aged doctrine” and referenced Lewis v. Physicians Ins. Co. of Wis., 627 N.W.2d 484 (Wis. 2001), in which the Wisconsin Supreme Court declared that with the development of modern full-care hospitals and the corresponding diminishing role of an individual doctor’s control over the operating room, the doctrine across the country has “lost its vitality.” Fields, 144 Cal.App.4th at 1404 n.1 (Chavez, J., dissenting). Moreover, the court in Fields was “compelled [by *stare decisis*] to adhere to the doctrine” approved by the California Supreme Court in Ales v. Ryan, 64 P.2d 409 (Cal. 1936), a decision just as outdated and inconsistent with the practice of modern medicine as Funk. Fields, 144 Cal.App.4th at 1398.

III. Patients Have Recourse Against Hospitals For Injuries Sustained During Surgery.

Any suggestion that Indiana patients are without recourse absent “captain of the ship” liability is without merit. Not only has Indiana abandoned charitable immunity, but it has struck down prior holdings that would have prohibited imposing liability against hospitals for injuries sustained during surgical procedures. In Sloan v. Metro. Health Council, 516 N.E.2d 1104 (Ind. Ct. App. 1987), the Court of Appeals held that “a public policy no longer exists in Indiana shielding medical corporations from malpractice liability of their employee physicians.” Id. at 1109. The Indiana Legislature specifically amended the Medical Malpractice Act to include hospitals and hospital employees as “health care providers” who can be held liable for malpractice. See Ind. Code § 34-18-2-14. Therefore, injured patients in Indiana have available remedies against hospitals and hospital employees for injuries sustained in the operating room.³

CONCLUSION

This Court should grant transfer and vacate the Court of Appeals’ decision below.

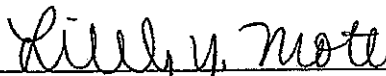
concerning the decline of the “captain of the ship” doctrine. The issue, then, is hardly waived.

³ Indeed, Appellees settled with Putnam County Hospital before trial. (Appellant’s App., p. 226).

Respectfully submitted,



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