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23-P-771

Appeals Court

DOLORES M. BROWN, individually and as personal representative,<sup>1</sup>  
vs. SAINT VINCENT RADIOLOGICAL ASSOCIATES, INC.

No. 23-P-771.

Worcester. April 8, 2024. – October 24, 2024.

Present: Massing, Shin, & D'Angelo, JJ.

Negligence, Hospital, Standard of care. Contract, Physician,  
With hospital. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on  
October 18, 2013.

The case was heard by J. Gavin Reardon, Jr., J., on a  
motion for summary judgment, and a motion for reconsideration  
was considered by him.

Kerry Paul Choi for the plaintiff.  
Megan Grew Pimentel for the defendant.

MASSING, J. The defendant, Saint Vincent Radiological  
Associates, Inc. (SVRA), an incorporated group of radiologists,  
entered into a contract to be the exclusive provider of

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<sup>1</sup> Of the estate of Duane C. Brown.

radiology services for Saint Vincent Hospital in Worcester (Saint Vincent). In this appeal, we consider whether SVRA owed a duty of care in tort to the plaintiff's deceased husband, Duane C. Brown (Brown),<sup>2</sup> who was admitted to Saint Vincent in urgent need of SVRA's services and allegedly died because those services were not provided. Concluding that the summary judgment materials were sufficient to establish that SVRA did owe Brown a duty of reasonable care, we reverse the summary judgment entered against the plaintiff on her negligence-based claims against SVRA.

Background. 1. SVRA's contract with Saint Vincent. "We summarize the material facts in the light most favorable to the plaintiff, the nonmoving party." Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 235 (2010). Saint Vincent is an acute-care hospital that maintains a radiology department on its premises. SVRA contracted with Saint Vincent in 2010 to become "the exclusive provider of radiology services of the Department." The contract required SVRA to provide full-time services "on a [twenty-four]-hour per day basis every day of the calendar year," with "a sufficient number, as determined by [Saint Vincent] in consultation with [SVRA], of Physicians physically

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<sup>2</sup> We refer to the plaintiff's decedent as Brown, and to Brown's widow, Dolores M. Brown, as the plaintiff.

present in the Department to provide full coverage" Monday through Friday during customary business hours; at least one full-time equivalent physician present on Saturdays, Sundays, and holidays; and at least one physician on call "[seven] nights per week" for telephone consultations. One SVRA physician, selected by SVRA and approved by Saint Vincent's chief executive officer, would be designated the hospital's "Chief of Medical Imaging" for the duration of the contract.<sup>3</sup>

Among the physicians SVRA agreed to make available were interventional radiologists. Whereas traditional radiologists interpret medical imaging and report their findings to other physicians, interventional radiologists perform procedures on patients themselves using minimally invasive, image-guided techniques. The contract held SVRA responsible for staffing Saint Vincent's radiology department with qualified interventional radiologists, including "an additional physician on-call for interventional radiology procedures and vascular interventional radiology procedures [seven] nights per week."

The contract included a provision stating that Saint Vincent had separately contracted with "non-radiologist physicians" to perform and interpret a specific set of "imaging

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<sup>3</sup> The SVRA physician designated for this position signed his correspondence as chief of Saint Vincent's radiology department, even when negotiating with Saint Vincent on behalf of SVRA.

procedures" for which SVRA was not responsible. Because some lucrative procedures that could be performed by SVRA's interventional radiologists were diverted to other physicians, and the demand for SVRA's interventional radiology coverage overnight was unexpectedly low, SVRA sought to modify its contract with Saint Vincent. It proposed reducing off-hour coverage, with weekend and holiday interventional radiology coverage "for emergencies only," acknowledging that "there may be occasional gaps in coverage as [it] currently exists." Saint Vincent did not agree to the proposed modification.

2. Treatment of plaintiff's decedent. On December 21, 2011, Brown, age sixty-one, went to Saint Vincent's emergency department complaining of neck pain. He was discharged, received pain medication, and visited his primary care provider for a cortisol injection. His neck pain persisted, and he became confused and delusional. At approximately 5:30 A.M. on December 24, an ambulance transported Brown to Saint Vincent's emergency department. In addition to his ongoing neck pain, he complained of difficulty breathing and severe abdominal pain. Supervised by SVRA's attending radiologists, radiology department residents<sup>4</sup> performed a chest X-ray and a series of computed tomography scans on Brown's abdomen, pelvis, and brain.

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<sup>4</sup> The residents were not members of SVRA. The SVRA attending radiologists supervised and worked with the residents.

He was diagnosed with acute cholecystitis -- an inflamed and infected gallbladder.

Dr. Catherine Martone, the attending general surgeon on duty, in consultation with Dr. Ryan Friedberg, the attending emergency department physician, evaluated Brown. By then, because Brown's condition precluded surgery to remove his gallbladder, Martone recommended a percutaneous cholecystostomy, whereby the infection would be drained through a tube inserted into the gallbladder through the skin. A percutaneous cholecystostomy is "a temporizing measure" intended to stabilize patients until they can withstand surgery. The tube is typically inserted by an interventional radiologist in a short, image-guided procedure performed under local anesthesia.

At 9:23 A.M., Dr. Ashleigh Van Dijk took over as Brown's attending physician, relieving Friedberg. She agreed with Martone's assessment that Brown was not a candidate for surgery and would "need an emergent cholecystostomy tube." Van Dijk then called SVRA's scheduler, an employee of SVRA, who informed Van Dijk that on-call interventional radiology coverage was unavailable at that time and would not be available for another three days. As it happened, Dr. Douglas Burd, an attending radiologist and a partner of SVRA, who was present at the hospital reviewing images -- including Brown's chest X-ray -- was an interventional radiologist qualified to place a

cholecystostomy tube. We infer from the record that Van Dijk was not told that Burd could perform the procedure.

Brown's condition became critical, and Van Dijk spoke with Brown's family and the emergency department at nearby UMass Memorial Medical Center (UMass Memorial) about transferring him there for the cholecystostomy procedure. At 11:44 A.M., about six hours after Brown had arrived at Saint Vincent, he was transferred to UMass Memorial. After his arrival there, but before a cholecystostomy tube could be inserted, Brown died from infection of the gallbladder.

3. Procedural history. The plaintiff sued Martone, Van Dijk, and Friedberg in the Superior Court in 2013. After approximately two years of discovery, the plaintiff amended the complaint to add Saint Vincent, through two affiliated corporate entities, and SVRA. Against each party, the amended complaint asserted a set of negligence-based claims, including counts for wrongful death, conscious pain and suffering, lack of informed consent,<sup>5</sup> loss of consortium, and gross negligence (collectively, the negligence claims), brought individually and as the personal representative of Brown's estate. The plaintiff asserted an additional claim against SVRA for breach of its contract with

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<sup>5</sup> The plaintiff claimed that Brown could have been transferred sooner if the defendants had disclosed the risks and alternatives to the proposed course of diagnosis and treatment.

Saint Vincent on the theory that Brown was a third-party beneficiary of the contract. SVRA requested a medical malpractice tribunal, which ruled in the plaintiff's favor. In 2018, the plaintiff further amended the complaint to add a group of emergency department physicians at UMass Memorial as defendants.

The plaintiff's claims against the individual defendants and Saint Vincent have all been resolved.<sup>6</sup> With respect to the plaintiff's claims against SVRA, SVRA moved for summary judgment. The motion judge denied summary judgment on the contract claim, concluding that there were disputed issues of material fact concerning whether the procedure Brown needed was within the scope of services SVRA was obligated to provide, and thus whether Brown was an intended beneficiary of SVRA's contract with Saint Vincent. The judge entered summary judgment for SVRA on the plaintiff's negligence claims, concluding that SVRA had only a contractual obligation to provide services to Saint Vincent, but did not owe a legal duty to Brown to perform a cholecystostomy. The plaintiff filed a motion for reconsideration, which was denied.

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<sup>6</sup> Stipulations to dismiss the claims against Friedberg and Van Dijk were filed in October 2022. In early 2023, all claims against Martone and Saint Vincent were likewise dismissed by agreement. In March 2023, the plaintiff's claims against the UMass Memorial physicians were tried before a jury, which handed down a verdict for the defendants.

On March 15, 2023, the plaintiff and SVRA filed a stipulation of dismissal "without prejudice and without costs, and preserving all rights of appeal as to any claims on which summary judgment was granted that are covered by insurance." At oral argument before this court, both the plaintiff and SVRA represented that they had reached a settlement with respect to the contract claim and that the "without prejudice" language in the stipulation was meant to preserve the plaintiff's right to appeal from the allowance of summary judgment with respect to the negligence claims.<sup>7</sup> The stipulation with SVRA amounted to a judgment, see Mass. R. Civ. P. 58 (a), as amended, 371 Mass. 908 (1977), and the plaintiff timely filed a notice of appeal from the allowance of summary judgment for SVRA on the negligence claims and from the denial of her motion for reconsideration.

Discussion. The sole issue presented in this appeal is whether the plaintiff may proceed to trial against SVRA on tort theories of liability or whether, as a matter of law, those avenues of relief are foreclosed because SVRA owed no duty to Brown distinct from its contract with Saint Vincent. To be entitled to summary judgment, SVRA must demonstrate that,

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<sup>7</sup> Had the parties dismissed the contract claim without prejudice with the intent to revive it after having obtained appellate review of the allowance of summary judgment on the negligence claims, this appeal would not be properly before us. See Alberti v. Alberti, 104 Mass. App. Ct. 235, 240 (2024).



viewing the record in the light most favorable to the plaintiff, the plaintiff has no reasonable expectation of proving the existence of a duty, an essential element of its negligence claims. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Khalsa v. Sovereign Bank, N.A., 88 Mass. App. Ct. 824, 829-830 (2016). Our review is de novo. See Williams v. Steward Health Care Sys., LLC, 480 Mass. 286, 290 (2018).

To situate our discussion of the principal issue, we briefly set forth the nature of the plaintiff's third-party beneficiary claim and how it was resolved at the summary judgment stage. In addition to her negligence claims, the plaintiff asserted that Brown was an intended beneficiary of SVRA's contract with Saint Vincent. Massachusetts law recognizes "the right of an intended beneficiary of a contract to sue for its enforcement or breach." James Family Charitable Found. v. State St. Bank & Trust Co., 80 Mass. App. Ct. 720, 723 (2011), citing Restatement (Second) of Contracts § 304 (1981).

The motion judge concluded that Brown could be considered an intended beneficiary of SVRA's contract with Saint Vincent, but only if the contract specifically obliged SVRA "to provide 24/7 interventional radiology coverage that included the placement of a cholecystostomy tube." See St. Charles v. Kender, 38 Mass. App. Ct. 155, 157 (1995) (subscriber to health maintenance organization [HMO] may maintain claim against

physician as third-party beneficiary of contract between HMO and physician based on physician's failure to timely provide services to subscriber required by contract). The judge found that disputed issues of material fact remained regarding the scope of SVRA's contract -- specifically, whether the contract required SVRA to have an interventional radiologist on call for the procedure, and whether the contract had been modified.

Following the denial of summary judgment as to the plaintiff's third-party beneficiary contract claim, the parties settled that claim, and we have no occasion to address it further.<sup>8</sup> For the purposes of this appeal, viewing the record in the light most favorable to the plaintiff, we assume that SVRA was contractually obligated to have an interventional radiologist available to treat Brown.<sup>9</sup>

A plaintiff who is not a party to a contract may have a claim in tort if the contractual relationship between the other parties gives rise to a duty of care owed to the plaintiff. See

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<sup>8</sup> SVRA does not argue that the settlement of the contract claim made the plaintiff's negligence claims moot. While the damages that might be available to the plaintiff as a third-party beneficiary of the contract overlap with the damages available for malpractice, see St. Charles, 38 Mass. App. Ct. at 160, the plaintiff's potential recovery on her wrongful death claims, for example, may exceed the damages available on the contract claim. See G. L. c. 229, §§ 2, 6; G. L. c. 231, § 60H.

<sup>9</sup> At trial, SVRA is free to argue that its contract did not include this obligation.

LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 328 (2012); Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 113-114 (1990). "[A] defendant under a contractual obligation 'is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation.'" Parent, supra at 114, quoting Banaghan v. Dewey, 340 Mass. 73, 80 (1959). Thus, in LeBlanc and Parent, the defendants -- a hotel and an electrical generating plant, respectively -- which had contracted with other parties to provide electrical services, were not entitled to summary judgment on tort claims brought by plaintiffs performing work for those other parties, where the plaintiffs' death or injury was caused by the defendants' negligent performance of their duties under their contracts. See LeBlanc, supra; Parent, supra at 113-114. Likewise in Banaghan, where the defendant elevator company's contract with a building owner required it to maintain an elevator in safe condition, the defendant was liable for injuries caused to the plaintiff by the elevator's unsafe condition. See Banaghan, supra. "In those cases, the contract created a relationship between the defendant and third parties, by reason of which the law recognized a duty of reasonable care in the performance of the obligation, that supported a tort action." Anderson v. Fox Hill Village Homeowners Corp., 424 Mass. 365, 368 (1997).

However, a contractual duty may not give rise to a duty in tort to third persons if the duty assumed under the contract goes beyond the duties recognized under common-law tort principles. Thus in Anderson, 424 Mass. at 367-368, where the defendant tenant had, in its lease, contractually assumed sole responsibility for operation and maintenance of the premises, including a provision requiring the defendant to promptly remove snow and ice from all driveways and walkways, the defendant was not liable in tort to a plaintiff who was injured when she slipped and fell on naturally accumulated ice in the parking lot. Under the state of the common law at the time of the decision, the natural accumulation of ice and snow was not considered to be a property defect for which the landowner was responsible. See id. at 369. The court rejected the plaintiff's argument that, under the lease, the defendant "assumed a duty greater than that imposed under tort principles to remove the snow and ice promptly, and negligently failed to do so," id. at 366, because "failure to perform a contractual obligation is not a tort in the absence of a duty to act apart from the promise made." Id. at 368. "To conclude that tort liability exists solely because the defendant did not perform a contractual duty to remove snow and ice would give rise to a common law duty which we repeatedly have declined to impose on

landowners." Id. at 368-369.<sup>10</sup> See Go-Best Assets Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 59-62 (2012) (bank's contractual agreement with Board of Bar Overseers, which required it to report to board certain activity in trust accounts in which attorneys deposited client funds, did not establish duty to report those transactions to attorneys' clients whose funds were held in accounts).

SVRA argues that its only obligation to provide an on-call interventional radiologist was a contractual duty it owed to Saint Vincent, and that it owed no duty of care in tort to provide an on-call interventional radiologist for Brown, let alone to place a cholecystostomy tube. While SVRA may ultimately prevail at trial in proving that the relevant standard of care did not require it to have an interventional radiologist available to perform the procedure in question, it is not entitled to summary judgment on the ground that it owed no duty to Brown whatsoever.

To make a claim for negligence, "a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care,

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<sup>10</sup> The common law of Massachusetts now recognizes that landowners owe a duty of reasonable care to remove natural accumulations of snow and ice from their property. See Papadopoulos v. Target Corp., 457 Mass. 368, 378 (2010). If Anderson had been decided today, the defendant would potentially have been liable to the plaintiff in tort for failure to take reasonable care with respect to the accumulated snow and ice in the parking lot.

that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." Jupin v. Kask, 447 Mass. 141, 146 (2006). See Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 (2009) (applying same elements in patient's negligence claim against hospital). "Whether a party owes a duty of care to another is a legal question, determine[d] by reference to existing social values and customs and appropriate social policy" (quotations and citation omitted). Williams, 480 Mass. at 290. "Although juries are uniquely qualified to determine the scope of the duty at issue, the existence of a duty, including an ordinary duty of reasonable care, 'is a question of law appropriate for resolution by summary judgment.'" Shea v. Caritas Carney Hosp., Inc., 79 Mass. App. Ct. 530, 539 n.12 (2011), quoting Afarian v. Massachusetts Elec. Co., 449 Mass. 257, 261 (2007). See Jupin, supra.

Viewing the facts in the light most favorable to the plaintiff, under SVRA's contract with Saint Vincent, SVRA effectively agreed to act as Saint Vincent's radiology department. Accordingly, it assumed the duty to provide medical treatment consistent with the standard of care in the practice of radiology. See Medina v. Hochberg, 465 Mass. 102, 106 (2013) ("A physician owes a legal duty to a patient to provide medical treatment that meets the standard of care of the average

qualified physician in his or her area of specialty"). That common-law duty included whatever duty the radiology department of an acute-care hospital with an emergency unit owes to the hospital's patients. See Restatement (Second) of Torts § 324A (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . he has undertaken to perform a duty owed by the other to the third person").<sup>11</sup>

"Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any

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<sup>11</sup> In a case holding that a hospital did not have a duty to warn third parties when it released a patient who had been civilly committed, the Supreme Judicial Court noted, "Some courts in other jurisdictions have determined that, in limited circumstances, hospitals may be directly liable for care provided in their emergency rooms, and that hospitals have a duty to provide adequate emergency care. At least three States have recognized a hospital's 'nondelegable duty' to provide adequate emergency medical care." Williams, 480 Mass. at 295 n.6, quoting Simmons v. Tuomey Regional Med. Ctr., 341 S.C. 32, 44-46 (2000). This appeal does not concern, and we express no opinion on, the allocation of duty as between Saint Vincent and SVRA for the failure to provide adequate emergency services to Brown. The plaintiff's claims against Saint Vincent have been resolved by stipulation of dismissal, and neither Saint Vincent nor SVRA filed a cross claim against the other.

manifested intention of parties to a contract or other bargaining transaction." Anderson, 424 Mass. at 368, quoting W. Prosser & W. Keeton, Torts § 92, at 656 (5th ed. 1984). We have no difficulty concluding that a hospital with an emergency department owes a duty of reasonable care to patients admitted on an emergency basis. To the extent the standard of reasonable emergency care requires having certain radiology services available, and to the extent SVRA was required by contract to provide those services on behalf of Saint Vincent -- both of which are contested issues for trial -- SVRA owed a duty of care to patients to provide those services. The contract required SVRA to assume duties to Brown recognized at common law -- no more, but no less.

SVRA further argues that any common-law duty must involve affirmative negligent conduct rather than failure to act. See Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 396 (2003) (Sullivan), quoting Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 144 (1937) ("Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort"). For example, an insurer may be liable in contract for failure to comply with its duty to defend, but liable in tort for negligent handling of a defense. See Sullivan, supra, citing Abrams,



supra at 143-144; Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 118 (1994). As SVRA's argument goes, it would be liable if one of its radiologists had negligently performed a percutaneous cholecystostomy on Brown, but it is not liable for failure to perform the procedure.

SVRA's reliance on Sullivan is misplaced. There, the court held that an insurer's negligent performance of its contractual duty to defend was a tort that did not give rise to a claim for breach of contract. See Sullivan, 439 Mass. at 396-397. Sullivan does not suggest that failure to act cannot give rise to a tort claim. And even if Sullivan can be read in that manner, this case does not involve a "mere failure to perform" a contractual duty within the meaning of Sullivan and the insurance cases it cites. Id. at 396. Unlike an insurer that refuses to defend altogether, here SVRA affirmatively provided radiology services for Saint Vincent pursuant to its contract and thus took on a duty of reasonable care in its performance. See id., citing Abrams, 298 Mass. at 144 ("by undertaking the defense of its insured as mandated by contract, [the insurer] engaged in affirmative action, and that action exposed its insured's legally protected interests to the risk of harm. The insurer's action, therefore, gave rise to a duty of reasonable performance, the violation of which was tortious").

For example, we have affirmed a jury verdict against a hospital for negligently allowing a pregnant woman who entered the hospital while in labor "to remain unattended and without an examination by a physician or resident and thereby exposing her to a danger which involved an unreasonable risk of harm." Samii v. Baystate Med. Ctr., Inc., 8 Mass. App. Ct. 911, 912 (1979). We have also reinstated a jury verdict against a hospital in favor of a patient who was admitted to the emergency room in a disoriented state and was injured falling off a hospital bed, where the hospital had negligently left the patient unsupervised and unrestrained. See Bennett v. Winthrop Community Hosp., 21 Mass. App. Ct. 979, 980-981 (1986).

That the negligence in this case may be attributable to SVRA as an entity, rather than to any individual physician, does not relieve SVRA of liability. See Santos v. Kim, 429 Mass. 130, 135-136 (1999) (recognizing that because of "variety of organizational schemes that obtains in the provision of modern medical services," there may be cases of institutional malpractice without any one responsible physician).

There remain disputed issues of material fact regarding the extent of SVRA's duty and whether it breached that duty. The summary judgment record included the affidavit of Dr. John Robert Kirkwood, a board certified radiologist, who stated that the standard of care for radiology groups at larger city

hospitals in Massachusetts, including Saint Vincent, was to have interventional radiology services available at all times.

Similarly, Dr. Michael S. Hickey, a board certified general surgeon with experience in general and trauma surgery, opined to a reasonable degree of medical certainty that SVRA "departed from the standard of care of the average qualified radiology group providing such services to the [e]mergency [d]epartment when it failed to have an interventional radiologist on call when Mr. Brown required placement of a cholecystostomy tube pursuant to hospital policy and its agreement with the hospital." See Samii, 8 Mass. App. Ct. at 912 (hospital liable in tort based on failure to act). Hickey also stated that SVRA departed from the standard of care by failing to inform the hospital staff that such services were not available. See Millard v. Corrado, 14 S.W.3d 42, 48 (Mo. Ct. App. 1999) (holding that "'on call' physicians owe a duty to reasonably foreseeable emergency patients to provide reasonable notice to appropriate hospital personnel when they will be unavailable to respond to calls" and that duty "exists independently of any duties flowing from a physician-patient relationship").

Finally, the hospital's own policy and procedures manual required that "vascular and interventional radiology" services be available during regular business hours, and that a staff member from the vascular and interventional radiology department

be on call and available at all other times for emergency procedures. While Saint Vincent's policies do not create a duty, they are relevant in determining the scope of SVRA's duty in tort as a radiology department. See Correa v. Schoeck, 479 Mass. 686, 697 (2018); Lev, 457 Mass. at 246-247; Mass. G. Evid. § 414 (2024).

We hold that SVRA had a duty to Brown that existed in tort in the performance of its contractually assumed duties. SVRA's contract with Saint Vincent created a relationship between SVRA and Brown "by reason of which the law recognize[s] a duty of reasonable care in the performance of the obligation." Anderson, 424 Mass. at 368. "A patient who goes to the emergency room, if conscious, is mostly concerned with getting care, not with untangling the contractual relationship between the hospital and the doctors who work there." Estate of Essex v. Grant County Pub. Hosp. Dist. No. 1, 546 P.3d 407, 409 (Wash. 2024).

Conclusion. The order granting summary judgment on the plaintiff's negligence claims is reversed. The case is remanded so that the plaintiff may proceed to trial on her negligence claims against SVRA.

So ordered.