STATE OF MICHIGAN

COURT OF APPEALS

TISHEN R. DRAKE, Individually and as Next Friend of JACAREY L. DRAKE, a Minor, and JEROME POOLE,

Plaintiffs-Appellants,

v

MUSKEGON GENERAL HOSPITAL,

Defendant-Appellee,

and

LISA FARNBERG, D.O., LISA FARNBERG, D.O., P.C., ERIC FARNBERG, D.O., ERIC FARNBERG, D.O., P.C., DANNY MIKESELL, D.O., SHORELINE PEDIATRICS, P.C., LLP, RICHARD J. WOREL, D.O., RICHARD J. WOREL, D.O., P.C., and PROFESSIONAL ANESTHESIA SERVICES,

Defendants.

UNPUBLISHED
May 26, 2000

No. 217747
Muskegon Circuit Court
LC No. 96-335895-NH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

In this medical malpractice case, plaintiffs appeal as of right, challenging the trial court's grant of summary disposition in favor of defendant Muskegon General Hospital (Muskegon General), pursuant to MCR 2.116(C)(10). We affirm.

The trial court granted summary disposition in favor of Muskegon General and dismissed plaintiffs' claim that the hospital was liable under the doctrine of ostensible agency for injuries sustained by JaCarey Drake, plaintiff Tishen R. Drake's minor son, allegedly resulting from the administration of

an anesthetic by Lisa Farnberg, D.O., an independent contractor who practiced anesthesiology at Muskegon General. The trial court also granted summary disposition in favor of Muskegon General with regard to plaintiffs' claim that the hospital was directly negligent because it failed to have a "gas analyzer" available for use by Dr. Farnberg when she administered the anesthetic to JaCarey Drake in April 1995.

Plaintiffs first argue that the trial court erred by granting summary disposition in favor of Muskegon General regarding their ostensible agency claim. We review de novo a motion for summary disposition under MCR 2.116(C)(10). *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), a trial court considers the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The court must review the record evidence and all reasonable inferences drawn from that evidence and decide whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The leading case regarding ostensible agency is *Grewe v Mt Clemens General Hosp*, 404 Mich 240; 273 NW2d 429 (1978). The Court stated:

> Generally speaking, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients. See Anno: *Hospital-Liability-Neglect of Doctor*, 69 ALR2d 305, 315-316. However, if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found. See *Howard v Park*, 37 Mich App 496; 195 NW2d 39 (1972), lv den 387 Mich 782 (1972). See also *Schagrin v Wilmington Medical Center, Inc*, 304 A2d 61 (Del Super Ct, 1973).
>
> In our view, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems. A relevant factor in this determination involves resolution of the question of whether the hospital provided the plaintiff with Dr. Katzowitz or whether the plaintiff and Dr. Katzowitz had a patient-physician relationship independent of the hospital setting. [*Grewe, supra* at 250-251.]

In *Sasseen v Community Hosp Foundation*, 159 Mich App 231, 240; 406 NW2d 193 (1986), this Court affirmed the trial court's award of summary disposition for the defendant, stating:

> As so clearly indicated by the foregoing cited authorities, agency does not arise merely because one goes to a hospital for medical care. There must be some action or representation by the principal (hospital) to lead the third person (plaintiff) to reasonably

> believe an agency in fact existed. *Howard v Park*, 37 Mich App 496, 499-500; 195 NW2d 39 (1972), lv den 387 Mich 782 (1972). In the instant case there is no showing of any act or statement by defendant hospital which would have led plaintiff to believe that Dr. Haney was anything other than an independent contractor performing services for, but not subject to the direct control of the hospital.

See also *Brackens v Detroit Osteopathic Hosp*, 174 Mich App 290, 293-294; 435 NW2d 472 (1989) (concluding that a genuine issue of material fact existed regarding whether Drs. Taras and Tobes were ostensible agents of the defendant hospital where the plaintiff submitted an affidavit averring that she had never met either doctor before her admission to the hospital, that at all times during her hospitalization she knew, understood, and believed that Drs. Taras and Tobes were hospital physicians who would perform and interpret certain tests done upon her, and that she neither believed nor had reason to believe that these doctors were not employed by the defendant hospital); and *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987) (holding that "reasonable persons could conclude that an ostensible agency existed between Dr. Yap, the St. John Hospital cardiac team and St. John Hospital").

In *Setterington v Pontiac General Hosp*, 223 Mich App 594, 603; 568 NW2d 93 (1997), this Court found that the evidence supported the jury's finding that an agency relationship existed between certain radiologists and the defendant hospital, stating:

> Fahr did not have a patient-physician relationship with the radiologists independent of the hospital setting. Rather, the radiologists just happened to be on duty when Fahr arrived at the hospital. Moreover, the evidence showed that the radiology department is held out as part of the hospital, leading patients to understand that the services are being rendered by the hospital.

Muskegon General relies heavily on *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991), where this Court held:

> The essence of *Grewe* is that a hospital may be vicariously liable for the malpractice of actual or apparent agents. Nothing in *Grewe* indicates that a hospital is liable for the malpractice of independent contractors merely because the patient "looked to" the hospital at the time of admission or even was treated briefly by an actual nonnegligent agent of the hospital. Such a holding would not only be illogical, but also would not comport with fundamental agency principles noted in *Grewe* and subsequent cases. Those principles have been distilled into the following three elements that are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. *Grewe, supra*, pp 252-253; *Strach v St John Hosp Corp*, 160 Mich App 251, 261; 408 NW2d 441 (1987).

> Simply put, defendant, as putative principal, must have done something that would create in Mr. Delgado's mind the *reasonable* belief that Drs. Thepveera and Penput were acting on behalf of defendant. *Grewe, supra*; see also *Strach, supra*, p 265 (quoting 1 Restatement Agency, 2d § 27, p 103). If, as defendant contended below, Mr. Delgado's family arranged for Dr. Thepveera to replace Dr. Schanz, then the question becomes whether it was reasonable for Mr. Delgado to continue to believe that he was being treated by agents of defendant hospital. The reasonableness of the patient's belief in light of the representations and actions of the hospital is the "key test" embodied in *Grewe*.

Our review of the evidence in this case discloses no dispute that plaintiffs, at the time of JaCarey's admission to Muskegon General, were "looking to the hospital for treatment of his physical ailments," and did not "merely [view] the hospital as the situs where his physician would treat him for his problems." *Grewe, supra* at 251. The pivotal question is whether "there has been a representation by the hospital that medical treatment would be afforded by physicians working therein." *Id.* at 250-251. As stated in *Chapa, supra* at 33-34, "the belief must be generated by some act or neglect on the part of the principal sought to be charged."

Tishen Drake, as part of the hospital admittance procedure, executed a document entitled "Muskegon General Hospital Preoperative Anesthetic Evaluation Questionnaire" containing no indication that the anesthesiologist was an independent contractor not employed by the hospital. Dr. Farnberg testified that she never told anyone in JaCarey's family that she was not employed by the hospital. In answer to plaintiffs' interrogatories, Muskegon General admitted that, in April 1995, it had no signs posted alerting patients to the fact that Dr. Farnberg was anything other than a hospital employee, and had no written material of any kind to give to patients or their families conveying that information. Finally, Tishen Drake testified that she had never met Dr. Farnberg before their meeting regarding JaCarey's surgery, and that she "figured" that Dr. Farnberg was employed by Muskegon General because "she worked there."

The trial court held that plaintiffs failed to demonstrate a genuine issue of material fact that Tishen Drake's belief in Muskegon General's ostensible agency was reasonable and was generated by some act or neglect on the part of the principal sought to be charged. *Chapa, supra* at 33-34. In her deposition, Drake answered "Correct" to the question, "So you at least had an understanding that some of the doctors weren't employed by the hospital, they just performed care for their patients there; correct?," and answered "No" to the question, "Going back to the anesthesiologist, is there anything that the hospital did that caused you to believe she was employed by the hospital?" Because plaintiffs failed to satisfy *Grewe*'s requirement that "there has been a representation by the hospital that medical treatment would be afforded by physicians working therein," and also failed to satisfy *Chapa*'s first and second criteria, the trial court properly granted summary disposition in favor of Muskegon General.

Plaintiffs next contend that the trial court erred by granting summary disposition in favor of Muskegon General based on the unfamiliarity of their expert witness, Dr. Ronald Katz, with any local

standard of care relating to Muskegon General's duty to attach a gas analyzer to its anesthesia equipment.

In its opinion and order granting summary disposition, the trial court stated:

> The Court first holds that paragraph 26(a) of [plaintiffs'] first amended complaint gives sufficient notice to defendant of the claim based upon its reference to "gas alarms". A central issue in this motion, however, is whether the hospital's alleged breach of the standard of care in its professional decisions is to be determined by a local or community standard, or by a national standard. No Michigan cases have been cited on point.

After determining that "by far the majority of jurisdictions have adopted the 'local' or 'community' standard" regarding this issue, the trial court concluded:

> In the case at bar, there is nothing on the record to indicate that Dr. Ronald Katz, who has since 1973 been Professor and Chairman, Department of Anesthesiology, University of California at Los Angeles, has any familiarity with the local or community standard for hospitals in Muskegon, Michigan. As Dr. Katz was the only witness offered by [plaintiffs] who testified as to a standard of care for the defendant hospital, and he has not demonstrated any knowledge of the local or community standard for Muskegon, defendant hospital is entitled to summary disposition as to [plaintiffs'] gas analyzer claim.

The evidence is clear that Dr. Katz was unfamiliar with any local standard of care relating to Muskegon General. The dispositive question is therefore whether a local standard of care applies to this issue so that Dr. Katz's unfamiliarity with it bars his testimony. As the trial court observed, the majority of jurisdictions that have considered this matter have applied the "local standard" concept. Thus, in anno: *Hospital's liability to patient for injury allegedly sustained from absence of particular equipment intended for use in diagnosis or treatment of patient,* 50 ALR3d, 1141, § 2, p 1144, it is stated:

> Within the context of a hospital's duty to supply proper equipment, the question presented is the nature and extent of that duty. As a general rule, the measure of duty of a private hospital is to exercise that degree of care, skill, and diligence generally exercised by hospitals in the same community or in similar communities or areas. Thus, a hospital may be said to have a duty to possess and supply for a patient's benefit such equipment as is usually and customarily used in the locality in the diagnosis or treatment of the condition in question.

See also 40A Am Jur 2d, Hospitals and Asylums, § 29, p 446 ("The standard of care generally owed by a hospital to its patients is the degree of care, skill, and diligence used in similar circumstances by

hospitals generally in the community – either the national hospital community, or in hospitals located in similar communities."); annotation: *Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto,* 36 ALR3d 440.

Muskegon General contends:

> The plaintiffs' argument, if accepted, would . . . doom the existence of most community and other small hospitals. If a national standard of care applies to a hospital whenever some physician working therein is practicing a specialty, then every hospital, no matter how small, will need the same equipment and capabilities as the largest and best financed institutions. A small hospital that lacks the capability of administering an MRI, for example, will be subject to a claim for malpractice because some expert claims that a radiologist who took an x-ray in that hospital should have had an MRI done too.

We find this argument persuasive and therefore affirm the trial court's grant of summary disposition for Muskegon General.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins