STATE OF MICHIGAN

COURT OF APPEALS

IRENE INGLIS, Personal Representative of the Estate of JAMES INGLIS, Deceased,

Plaintiff-Appellant,

v

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendant-Appellee.

UNPUBLISHED
August 26, 2004

No. 247066
Oakland Circuit Court
LC No. 2001-032693-NH

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Plaintiff, Irene Inglis, Personal Representative of the Estate of James Inglis, appeals as of right an order granting a directed verdict in favor of defendant. We affirm.

Plaintiff first argues that the trial court erred in concluding that the decedent, James Inglis, could not have reasonably believed that the doctor whose allegedly negligent treatment caused his death was defendant's ostensible agent. Plaintiff contends that, when viewed in a light most favorable to her, she presented evidence from which a reasonable jury could have found that the doctor was an ostensible agent of defendant. This evidence included defendant's occupation and control of the facility where James Inglis was examined and treated by the doctor, defendant's name on the consent forms James Inglis signed before surgery, and defendant's signs and logos, which purportedly projected the idea that the doctor was one of its employees or agents. We disagree.

We review de novo a trial court's ruling with respect to a motion for a directed verdict. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). "In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Id.* "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Using this standard, we conclude that the trial court did not err in granting defendant's motion for a directed verdict.

Our Supreme Court has 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. 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. [*Grewe v Mt Clemens Gen Hosp,* 404 Mich 240, 250-251; 273 NW2d 429 (1978) (internal citations omitted).]

This Court recently applied *Grewe* to a factual situation similar to the one here. In *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003), this Court, quoting *Chapa v St Mary's Hosp of Saginaw,* 192 Mich App 29, 33-34; 480 NW2d 590 (1991), explained:

> "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."
>
> To put it another way, the defendant as the putative principal must have done something that would create in the patient's mind the reasonable belief that the doctors were acting on behalf of the defendant hospital.

Here, the relevant belief was *James Inglis's* belief, not plaintiff's, regarding the doctor's status, and the relevant time period to be examined was the time at which James Inglis selected the doctor to treat him. *Id.* at 12-14. Plaintiff stated unequivocally that the doctor who later operated on James Inglis did not indicate to plaintiff that he was an employee of defendant or was acting in the capacity of a staff physician of defendant. Plaintiff's most direct statement of James Inglis's reason for selecting the doctor in question indicates that two criteria were used: (1) his availability, and (2) plaintiff's doctor's recommendation. These reasons are similar to those of the plaintiffs in *Vastelle*, which were held to be insufficient to create a reasonable belief that their doctor was a hospital's ostensible agent. *VanStelle, supra* at 13-14.

The principal evidence plaintiff adduced regarding James Inglis's belief in the doctor's status as defendant's ostensible agent consisted of the facts that the doctor's office was located in defendant's building, which was adorned with defendant's logos and signs, and the doctor's name was included in a listing of doctors in the building. However, none of this testimony proves that James Inglis believed there was any association between the doctor and defendant; at most, it shows only that plaintiff held such a belief.

Even if James Inglis held such a belief, that belief was not reasonable. "The fact that the building in which the doctor performed medical services was owned by the hospital does not justify a belief that the doctor is somehow acting on behalf of the hospital." *VanStelle, supra* at 14. Likewise, the fact that the doctor used defendant's facilities for the surgery on James Inglis does not establish the necessary ostensible agency relationship. *Id.* at 13.

Finally, there is no evidence that James Inglis's belief, if any, that the doctor was defendant's agent was "generated by some act or neglect on the part of the principal sought to be charged." *Id.* at 10. The fact that there was a preexisting relationship between James Inglis and the doctor is significant:

> [A]n independent relationship between a doctor and a patient that preceded a patient's admission to a hospital precludes a finding of ostensible agency, unless the acts or omissions of the hospital override the impressions created by the preexisting relationship and create a reasonable belief that the doctor is an agent of the hospital. [*Zdrojewski v Murphy*, 254 Mich App 50, 66; 657 NW2d 721 (2002).]

The only evidence of defendant's acts or omissions that might have created the impression that the doctor was its agent consisted of the message implied by its signs and logos on the building in which the doctor's office was located. As noted above, this could not have created a reasonable belief that he was defendant's agent. *VanStelle, supra* at 14. Plaintiff also produced various documents to support her claim that defendant's actions created a belief that the doctor was its agent. However, plaintiff never established that James Inglis saw any of these documents prior to selecting the doctor to treat him. Except for the consent forms, which James Inglis signed prior to surgery, most of these documents would have been generated *after* James Inglis was treated. Given that James Inglis died shortly after his surgery, it is unlikely that he saw them at all. There is no evidence whatsoever that any of these documents existed when James Inglis selected the doctor or that they led to a belief that the doctor was one of defendant's staff physicians or otherwise employed by defendant. Consequently, this evidence does not create a genuine factual question upon which reasonable minds may differ regarding whether James Inglis believed that the doctor was defendant's agent, or that he relied on that belief in looking to the doctor for treatment. Therefore, a directed verdict was appropriate. *Kubisz, supra* at 635.

Plaintiff next argues that she presented evidence sufficient to support a jury finding that the doctor and defendant were engaged in a joint venture with regard to the treatment of James Inglis. She contends that defendant can, therefore, be held vicariously liable for the doctor's alleged negligence, and the trial court erred in sua sponte striking her joint venture claim. We disagree.

We note that defendant moved for a directed verdict on the ostensible agency claim and moved to strike the joint venture claim. The trial court granted a directed verdict with respect to the former, and struck the latter claim. MCR 2.115(B) provides: "On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules." "This Court reviews a trial court's decision regarding a motion to

strike a pleading pursuant to MCR 2.115 for an abuse of discretion." *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

We conclude that the trial court did not abuse its discretion in striking plaintiff's joint venture claim because it was not supported by the evidence. Regarding the nature of a joint venture, this Court has stated:

> Basically, a joint venture is an association to carry out a single business enterprise for a profit. Whether or not a joint venture exists is a legal question for the trial court to decide. A joint venture has six elements:
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> (a) an agreement indicating an intention to undertake a joint venture;
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> (b) a joint undertaking of;
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> (c) a single project for profit;
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> (d) a sharing of profits as well as losses;
>
> (e) contribution of skills or property by the parties;
>
> (f) community interest and control over the subject matter of the enterprise.
>
> The key consideration is that the parties intended a joint venture. [*Berger v Mead*, 127 Mich App 209, 214-215; 338 NW2d 919 (1983).]

Plaintiff, citing *Berger*, states that there are *only three* elements necessary to form a joint enterprise: "(1) an agreement indicating an intention to undertake a joint venture, (2) a contribution of skills or property by the parties, and (3) a shared interest and control over the subject matter of the enterprise." However, in light of plaintiff's inadequate proofs regarding this argument, we need not decide whether such a relationship can constitute a joint venture. The sole evidence adduced by plaintiff regarding this issue consists of one of the "Consent for Operation" forms signed by James Inglis before his surgery – a document not appearing in the record. Plaintiff has failed to adduce any proofs, other than conclusory allegations, regarding each of the elements of a joint venture. *Berger, supra* at 214-215. Consequently, the trial court did not abuse its discretion in striking plaintiff's joint venture claim.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin