# STATE OF MICHIGAN

# COURT OF APPEALS

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ZIARA FITZGERALD, a Minor by her Next Friend, GEAMILL GIBSON,

Plaintiff-Appellant,

v

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT, d/b/a HURLEY MEDICAL CENTER,

Defendant-Appellee,

and

LARRY D. YOUNG and NORTHPOINTE COMMUNITY AND EDUCATION CENTER, a/k/a HAMILTON COMMUNITY HEALTH NETWORK, INC.,

Defendants.

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UNPUBLISHED
December 30, 2008

No. 280032
Genesee Circuit Court
LC No. 04-080012-NH

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent.

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). When reviewing a summary disposition decision, the evidence is viewed in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of material fact exists for trial. *Id*. Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Summary disposition is suspect where motive and intent are at issue or where the credibility of the witness is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App

271, 276; 514 NW2d 525 (1994). The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003).

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

To obtain recovery against a principal for the alleged acts of an ostensible agent, the plaintiff must prove that: (1) the person dealing with the agent believed in the agent's authority and this belief was reasonable; (2) the belief was generated by some act or neglect of the principal sought to be charged; and (3) the person relying on the agent's apparent authority must not be guilty of negligence. *Id.* at 252-253. "Agency is always a question of fact for the jury." *Id*. at 253 quoting *Stanhope v Los Angeles College of Chiropractic*, 54 Cal App 2d 141, 146; 128 P2d 705 (1942).

Review of the testimony reveals that the acting plaintiff, Geamill Gibson, suffered from some degree of disability. Plaintiff's mother suspected that she was pregnant and took her to the Northpointe Clinic. There, plaintiff saw the person characterized as her "family doctor." After confirming the pregnancy, this doctor, Dr Syed, prescribed pre-natal vitamins and advised her to return for pre-natal care. Plaintiff was unaware that Dr. Syed would no longer be treating her. Rather, the next time she returned to "Hurley's Northpointe Clinic," Dr. Pyatt was "in the room." Plaintiff testified that, toward the end of her pregnancy, Dr. Pyatt introduced her to Dr. Young, defendant's alleged ostensible agent, at the clinic. However, plaintiff testified that Dr. Pyatt indicated that Dr. Young would be treating her temporarily. Although Dr. Young had a private practice elsewhere, plaintiff never met with him at his practice; all visits were at the clinic. Plaintiff testified that the sign in front of the building identified the clinic as the "Hurley Northpointe" clinic, and she further opined that the clinic door indicated that it was a "Hurley" facility. When plaintiff was admitted to the hospital, Dr. Young was "on call" that day which was why he delivered plaintiff's baby.

Defendant asserted that plaintiff failed to present any reasonable evidence regarding the association or representation of Dr. Young by defendant as its agent. It was alleged that plaintiff failed to present any evidence regarding the signs, and the pre-existing relationship between plaintiff and Dr. Young precluded any claim of ostensible agency. However, the burden of demonstrating entitlement to summary disposition rests with the moving party, and the burden does not shift to the nonmoving party until that burden is satisfied. *Quinto, supra*. Although

defendant presented a contractual agreement to evidence a change in ownership of the clinic, defendant failed to present any evidence of the signs and when, and if, the signs were changed to reflect the ownership change. Plaintiff testified regarding her experience when visiting the clinic, and her recollection of the representation that the clinic was a Hurley facility. Additionally, although both Dr. Pyatt and Dr. Young had private practices, plaintiff did not receive treatment at either office. Indeed, Dr. Young took over plaintiff's care at the clinic, she was not advised to transfer to Dr. Pyatt's private practice. There is evidence from the testimony that plaintiff received treatment at the clinic by the doctors who were provided because Medicaid was accepted there. Further, Dr. Young delivered the baby because he was on call at the time of admission. In light of the conflicting evidence, I would conclude that a factual issue is presented that must be resolved by the trier of fact. Therefore, I would reverse.

/s/ Karen M. Fort Hood