

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA MEREDITH, as Personal
Representative of the Estate of JAMES TODD
MEREDITH, Deceased,

UNPUBLISHED
April 8, 2010

Plaintiff-Appellee,

V

OAKWOOD HEALTHCARE, INC., d/b/a
OAKWOOD SOUTHSORE MEDICAL
CENTER,

No. 288507
Wayne Circuit Court
LC No. 07-729397-NH

Defendant-Appellant.

Before: Hoekstra, P.J., and Stephens and M.J. Kelly, JJ.

PER CURIAM.

Defendant, Oakwood Healthcare, Inc. (d/b/a Oakwood Southshore Medical Center), appeals by way of leave granted the trial court's denial of its motion for summary disposition. We reverse and remand for further proceedings.

On appeal, defendant argues that the trial court should be reversed because there is no genuine issue of material fact regarding whether Dr. Ferras Zeni was defendant's agent. We agree. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "Summary disposition is proper pursuant to MCR 2.116(C)(10) when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Vushaj v Farm Bureau Ins Co of Michigan*, 284 Mich App 513, 773 NW2d 758 (2009).

It is well established that a hospital may be held vicariously liable for the actions of its doctors. *Nippa v Botsford Gen Hosp*, 257 Mich App 387, 390-391; 668 NW2d 628 (2003). However, a hospital is generally not liable for the actions of an independent contractor. *Grewe v Mount Clemens Gen Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978). As this Court has previously stated, "[a]ny question relating to the existence and scope of an agency relationship is a question of fact." *Chiamp v Hertz Corp*, 210 Mich App 243, 246, 533 NW2d 15 (1995), citing *Norcross Co v Turner-Fisher Associates*, 165 Mich App 170, 181, 418 NW2d 418 (1987). When determining whether a doctor is the agent of a hospital for purposes of a medical malpractice cause of action, this Court will consider whether the doctor is the actual agent of the

hospital or whether he is the ostensible agent. According to defendant, plaintiff cannot establish that Dr. Zeni was operating as the actual or ostensible agent of Oakwood at the time of the alleged malpractice. We will address each theory of agency in turn.

Actual Agency

Our Supreme Court has explained that in order to ascertain whether an agency relationship exists, a court must consider “‘the relations of the parties as they in fact exist under their agreements or acts’ and note that in its broadest sense agency ‘includes every relation in which one person acts for or represents another by his authority.’” *St Clair Intermediate School Dist v Intermediate Educ Ass’n/Michigan Educ Ass’n*, 458 Mich 540, 557; 581 NW2d 707 (1998), quoting *Saums v Parfet*, 270 Mich 165, 170-171; 258 NW 235 (1935). “[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him [internal citation omitted].” *Id.* “It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent.” *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967). “The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons.” *Saums*, 270 Mich 172.

The agreement in question explicitly states that Dr. Zeni is not an agent of Oakwood and that he is merely an independent contractor. Although it is true that the parties’ characterization of a relationship is without consequence when determining whether an agency relationship exists, *Van Pelt*, 6 Mich App 624, the record in this case supports the language found in the agreement. As stated above, the essential characteristic of an agency relationship is the principle’s right to control the agent. The agreement between Dr. Zeni and defendant does not demonstrate that defendant retained any significant control over Dr. Zeni.

The agreement provides that Dr. Zeni will provide such services as are requested by the hospital. However, it does not restrict him from providing services and accepting staff privileges elsewhere. Plaintiff’s argument on appeal that the agreement allows defendant to prevent Dr. Zeni from consulting with patients where such consultation would interfere with his responsibilities to Oakwood is somewhat speculative where the record does not demonstrate that Dr. Zeni’s responsibilities under the contract ever affected his ability to provide services from his office. Furthermore, even if Oakwood arguably had a certain level of control of Dr. Zeni’s schedule, the agreement does not demonstrate that Oakwood controlled the methodology of care. While the agreement requires Dr. Zeni to perform his duties in accordance with the standard of care, that provision is analogous to a requirement that a carpenter meet industry standards in building a house or that a tradesperson perform in a workman like manner. The portions of the contract where the greatest amount of control is manifest are the sections dealing with practice location and consultation on staffing requirements. The location requirement benefits Oakwood by providing a private practice within a certain geographical area. Similarly, the loan accrues to Dr. Zeni’s benefit to pay for the construction or lease of a practice space. The portion of the agreement relating to staffing does little more than compel a consultation between the parties; it does not, contrary to plaintiff’s assertions on appeal, require that Dr. Zeni hire certain staff nor allow Oakwood the ability to make personnel decisions on employees hired by him. The breadth of Oakwood’s ability to control Dr. Zeni’s staff extends only to Oakwood’s ability to determine whether any member of his staff can perform services at the hospital. The agreement also

compelled Dr Zeni to accept any applicable third-party reimbursement formulas and billing schedules for his hospital and in-office consultations. He is not compelled to retain the patient after the consultation. The indicia of retained control are thin, at best. Plaintiff cannot meet her burden of going forward on actual agency. Because the record lacks any evidence to demonstrate that Oakwood had the right to control Dr. Zeni when he committed the allegedly negligent act, a jury would be precluded from finding Oakwood liable pursuant to a theory of actual agency.

Ostensible Agency

This Court has explained that an ostensible agency may be created ““when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.”” *VanStelle v Macaskill*, 255 Mich App 1, 9; 662 NW2d 41 (2003), quoting *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 252-253; 273 NW2d 429 (1978). As stated by this Court in *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991):

The following three elements ... 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. [Citations omitted.]

Furthermore, our Supreme Court has specifically addressed ostensible agency in the context of medical professionals. In *Grewe*, 404 Mich 251-252, the Supreme 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. 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.

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. [Internal citations omitted.]

We conclude that there is no genuine issue of material fact regarding whether Dr. Zeni was defendant's ostensible agent. In determining whether there is a genuine issue of material fact regarding ostensible agency, this Court only needs to analyze the second prong of the above-quoted test, as it is the only prong that is in dispute.

In arguing that Oakwood caused decedent to believe that Dr. Zeni was an employee, plaintiff cited her affidavit, in which she stated the following:

9. Todd [the decedent] relied on information contained on the Oakwood website. He always believed that it would be better for our family if we exclusively used the HAP Oakwood network. When Todd was treated by Dr. Zeni, because of the information Todd had looked at on the Oakwood website, he always believed that the doctors that were a part of the network were Oakwood doctors, acting on behalf of, and employed by Oakwood. Neither Oakwood nor anyone else ever told us that even though we had chosen Oakwood as our exclusive healthcare network provider, Dr. Zeni was not Oakwood's agent. When Dr. Zeni scheduled Todd's surgery at an Oakwood hospital, that just confirmed in our minds that Dr. Zeni was an Oakwood doctor. Oakwood never told us it would not be responsible for any negligent treatment that Todd received from Dr. Zeni, or any other Oakwood network physician or facility. (Meredith Affidavit.)

To begin, plaintiff has never provided a URL address to the alleged website that decedent consulted, nor provided any description of the content of the website that caused her husband to select Dr. Zeni. More importantly, the evidence clearly establishes that decedent consulted with Dr. Zeni after receiving a referral from his primary care physician. The first interaction that decedent had with Dr. Zeni did not occur at Oakwood, nor is there any evidence that Oakwood communicated with decedent prior to the first consultation. As stated in *Grewe*, the critical question is whether decedent was seeking treatment at Oakwood or was simply under the impression that his treatment would occur at Oakwood, but would be provided by Dr. Zeni. While it is true that decedent was required by his insurance to choose a doctor in the Oakwood network, there is no evidence that decedent believed that a doctor in his network was necessarily an employee or agent of Oakwood. Rather, it appears that on the basis of his primary care physician's recommendation, decedent chose to consult with Dr. Zeni. The fact that Dr. Zeni subsequently recommended surgery at Oakwood is inconsequential to the legal analysis because that recommendation occurred after decedent and Dr. Zeni formed a doctor-patient relationship. Plaintiff has failed to provide evidence of any action on the part of defendant that could have induced decedent into entering a relationship with Dr. Zeni. Therefore, because decedent and Dr. Zeni had a relationship independent of Oakwood, *Grewe* precludes a finding of ostensible agency.

Conclusion

Because plaintiff has failed to demonstrate the existence of any genuine issue of material fact relating to either actual or ostensible agency, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(10).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly