

STATE OF MICHIGAN
COURT OF APPEALS

PATTY FLETCHER, Personal Representative of
the Estate of THOMAS FLETCHER, Deceased,

UNPUBLISHED
February 29, 2000

Plaintiff-Appellant,

v

No. 208768
St. Clair Circuit Court
LC No. 95-002944-NH

PORT HURON HOSPITAL,

Defendant-Appellee,

and

WALID DEMASHKIEH, M.D., and
HURON SURGICAL CLINIC, P.C.,

Defendants.

Before: Doctoroff, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals by right from an order granting summary disposition in favor of defendant hospital, based on the determination that Walid Demashkieh, M.D., was not an ostensible agent of defendant hospital. We affirm.

Plaintiff first argues that because the trial court erred in ruling that, as a matter of law, Dr. Demashkieh was not an ostensible agent of defendant hospital when he performed surgery on the decedent during his September 1992 admission to the hospital, the trial court's grant of summary disposition was erroneous. We disagree. Although defendant hospital brought its motion for summary disposition pursuant to both MCR 2.116(C)(8) and (10), because the court relied on matters outside the pleadings, we review this issue under the standard applicable to subsection (C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Our Supreme Court addressed the issue of ostensible agency between a hospital and a physician in *Grewe v Mt Clemens Hosp*, 404 Mich 240; 273 NW2d 429 (1978). The *Grewe* Court made the following pertinent observations:

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 *Schgrin 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 [the physician in question] or whether the plaintiff and [the physician] had a patient-physician relationship independent of the hospital setting. [*Id.* at 250-251.]

After reviewing the evidence in a light most favorable to plaintiff, we conclude that the trial court correctly determined that at the relevant time, no ostensible agency relationship existed between Dr. Demashkieh and defendant hospital. The decedent was treated by Dr. Demashkieh in 1983 after being referred by Dr. Cerniak, a Yale, Michigan physician. The record does not support plaintiff's contention the Dr. Demashkieh's services were supplied to the decedent by defendant hospital at that time. Thus, the decedent had a prior physician-patient relationship with Dr. Demashkieh prior to his September 1992 admission to defendant hospital. See *Wilson v Stilwill*, 411 Mich 587, 610; 309 NW2d 898 (1981). Furthermore, there is nothing in the record that supports the proposition that the acts or omissions of defendant hospital in September 1992 overrode "the impressions created by [this] previous relationship and reasonably create[d] a belief that" an ostensible agency existed between Dr. Demashkieh and defendant hospital. *Strach v St John Hosp Corp*, 160 Mich App 251, 263; 408 NW2d 441 (1987). Accord *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 34; 480 NW2d 590 (1991). Indeed, plaintiff admitted below that she was aware at the time that Dr.

Demashkieh was a surgeon who had an office outside defendant hospital's facility and that he was independently employed.

Plaintiff contends that the trial court should have drawn favorable inferences from the testimony of two hospital nurses who cared for the decedent in September 1992. According to plaintiff, the testimony of these nurses created a genuine issue of material fact regarding whether Dr. Demashkieh was brought into the care and treatment of the decedent by hospital personnel using an on-call list, and not as a result of a direct referral by the decedent's treating physician. We agree with the trial court, however, that plaintiff's proofs on this matter were speculation and not reasonable inferences that could be construed in plaintiff's favor. Moreover, we disagree with plaintiff's contention that the trial court engaged in unwarranted factfinding and improper weighing of the credibility of plaintiff's proofs.

Finally, although we believe the trial court abused its discretion in failing to compel discovery of medical records pertaining to decedent's alleged November 1988 office visit with Dr. Demashkieh, we believe the error was harmless. Even if plaintiff could establish that those records had been altered, this would not be enough either by itself or in combination with any other evidence in record to create a genuine issue regarding ostensible agency.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly