STATE OF MICHIGAN

COURT OF APPEALS

RICHARD STOGDEN and LAURIE STOGDEN,

Plaintiffs-Appellees,

v

HENRY FORD MACOMB HOSPITAL,

Defendant-Appellant,

and

HENRY FORD HEALTH SYSTEM,[1] PHYSICIAN HEALTHCARE NETWORK MACOMB PC, and ANTONINO G. COLOMBO, M.D.,

Defendants.

UNPUBLISHED
June 17, 2021

No. 353669
Macomb Circuit Court
LC No. 2018-002806-NH

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

Defendant, Henry Ford Macomb Hospital (HFMH), appeals by leave granted[2] an order denying its motion for summary disposition as to plaintiff's actual or ostensible agency claim in this medical malpractice case. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

In January 2016, Richard Stogden (Richard) began experiencing sudden ear pain, headaches, dizziness, decreased appetite, and sudden weight loss. Richard went to Physician Healthcare Network, PC, and was seen by Antonino G. Colombo, M.D., complaining of

[1] Henry Ford Health System was dismissed as a party in this case and is not involved in this appeal.

[2] *Stogden v Henry Ford Macomb Hosp*, unpublished order of the Court of Appeals, entered on September 25, 2020 (Docket No. 353669).

headaches, photophobia, eye pain, sweating, vomiting, stiff neck, and trouble sleeping. Dr. Colombo conducted bloodwork and prescribed Tramadol and Zofran. Because his symptoms persisted, on February 10, 2016, Richard went to HFMH's emergency room within the Henry Ford Health System (HFHS), complaining of headaches, light-headedness, confusion, nausea, vomiting, and fatigue. On admission to the hospital, Richard signed a HFHS consent form that stated:

> I agree to receive health care services from [HFHS]. I know that these services may take place in a variety of settings. I agree to have procedures, tests, drugs, and treatments that are necessary for my care. I know that I can ask questions at any time. I know that I can refuse care at any time. I know that some procedures and treatments require a separate consent. My healthcare providers will explain my treatment plan and procedures to me so that I can make decisions about my care. I understand that the practice of medicine is not an exact science, and my treatments or procedures may not achieve the result that was expected.

Richard's emergency room physician, Dr. Mohammadreza Kahnamouei, requested a consultation with Dr. Tracey T. Morson, a neurologist. The next day, Dr. Morson examined Richard and a CT scan revealed an age-indeterminate infarct of the right frontal lobe. Dr. Morson reviewed Richard's previous symptoms, and family history for strokes, then concluded that he suffered from ischemic embolic strokes. Aspirin, Lipitor, and Heparin were prescribed. On February 13, 2016, Richard was discharged from the hospital with a stroke scale of one.

On March 4, 2016, Richard returned to HFMH's emergency room with persistent headaches and photophobia. Richard exhibited a stroke scale of zero, however, a CTA examination revealed that he had an 8x6x7 millimeter aneurysm in an anterior communicative artery. He was then transferred to Henry Ford Hospital in Detroit for additional testing. The next day, Richard underwent a left craniotomy surgery. On March 7, 2016, Richard underwent a second surgery to remove a subgaleal and epidural hematoma. On April 1, 2016, Richard was discharged from the hospital into a nursing facility.

On July 26, 2018, plaintiffs filed their complaint against defendants, alleging vicarious liability, medical malpractice, and loss of consortium. On February 14, 2019, plaintiffs filed their amended complaint. Relevant here, plaintiffs alleged that HFMH breached the applicable standard of care through the acts and omissions of its agents and employees, including Dr. Morson. Plaintiffs also alleged that Dr. Morson breached the applicable standard of care in treating Richard's symptoms, which resulted in significant and preventable injuries to plaintiffs. Plaintiffs further alleged that defendants' negligence proximately caused plaintiffs to suffer significant medical expenses, emotional distress, as well as a loss of companionship and income.

Subsequently, HFMH moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiffs failed to establish a question of fact on the issue whether HFMH acted or represented to plaintiffs that Dr. Morson was its employee or agent. Specifically, HFMH argued, there was no actual agency because HFMH had no right to control Dr. Morson's conduct, and there was no ostensible agency because plaintiffs did not have a reasonable belief that Dr. Morson was an agent of HFMH. In response, plaintiffs argued that when Richard arrived at HFMH's emergency room, HFMH represented that it would provide healthcare services and required Richard's consent to perform those services. Plaintiffs further argued that they had no preexisting relationship with Dr.

Morson and the emergency room environment was held out as part of HFMH, creating a question of fact as to whether Dr. Morson was HFMH's agent. In reply, HFMH argued that plaintiffs failed to support their claim of ostensible agency.

The trial court denied HFMH's motion for summary disposition, stating:

> Plaintiffs have presented evidence to create a question of fact as to whether an ostensible agency relationship existed between [HFMH] and Dr. Morson at the time of Mr. Stogden's treatment. [HFMH] presents evidence that Plaintiffs did not meet Dr. Morson and only knew of her consultation with Mr. Stogden based on her business card that was left in Mr. Stogden's room. [HFMH] also presents evidence that the business card listed her name, private practice, address, and phone number. Yet, the Court finds that a question of fact exists as to whether Mrs. Stogden saw anything other than Dr. Morson's name on the card.
>
> Further, Plaintiffs present evidence that Mr. Stogden signed a consent form upon his arrival at [HFMH]. The consent is for services from HFHS and no mention is made that doctors outside of HFHS may have provided treatment. Further, while Mrs. Stogden testified that she was aware that physicians with private medical practices treated patients at [HFMH], she also stated that based on the consent form, they believed all doctors that treated Mr. Stogden were physicians of [HFMH]. [(Internal citations to the record omitted)].

As a result, the trial court concluded that a question of fact existed as to whether plaintiffs reasonably believed Dr. Morson was HFMH's agent and whether its consent form caused plaintiffs' belief.

After the trial court's order, HFMH applied for leave to appeal with this Court, arguing the trial court erred in denying its motion for summary disposition because there was no genuine issue of material fact as to actual or ostensible agency. In response, plaintiffs argued the trial court correctly denied HFMH's motion because Richard went to HFMH's emergency room without a preexisting relationship with Dr. Morson and consented to treatment from HFMH, only. This Court, in lieu of granting leave to appeal, reversed the trial court's order denying summary disposition, holding in pertinent part that the evidence did not support a finding of actual or ostensible agency. *Stogden v Henry Ford Macomb Hosp*, unpublished order of the Court of Appeals, entered August 20, 2020 (Docket No. 353669).

Plaintiffs moved for reconsideration, arguing that this Court's order was palpably erroneous because it disregarded the evidence of HFMH's representations to plaintiffs that caused plaintiffs to believe Richard was receiving care from HFMH, including the consent form and Mrs. Stogden's affidavit. HFMH responded, arguing that there was no palpable error because plaintiffs merely made the same arguments as in the trial court without presenting new evidence. This Court granted plaintiffs' motion for reconsideration, vacating its previous order and granting HFMH's application for leave to appeal. *Stogden v Henry Ford Macomb Hosp*, unpublished order of the Court of Appeals, entered September 25, 2020 (Docket No. 353669).

II. ANALYSIS

HFMH argues that the trial court erred in denying summary disposition as to the actual or ostensible agency claim, finding there were questions of fact regarding whether plaintiffs reasonably believed an agency relationship existed between Dr. Morson and HFMH, and whether HFMH's conduct caused that belief. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 617-618; 873 NW2d 783 (2015). When deciding a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. A court may not make factual findings on disputed factual issues, nor make credibility determinations during a motion for summary disposition. *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68-69; 919 NW2d 439 (2018). If the evidence before the court is conflicting, summary disposition is improper. *Patrick v Turkelson*, 322 Mich App 595, 605-606; 913 NW2d 369 (2018) (citation omitted).

"[I]n general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and simply uses the hospital's facilities to provide treatment to his patients." *VanStelle v Macaskill*, 255 Mich App 1, 8; 662 NW2d 41 (2003); see also *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978). Likewise, a hospital is not liable for the alleged negligence 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." *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33; 480 NW2d 590 (1991) (quotation marks and citation omitted). Instead, a hospital is only "vicariously liable for the malpractice of actual or apparent agents." *Id*. In an actual agency relationship, "it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability." *Laster v Henry Ford Health Sys*, 316 Mich App 726, 735; 892 NW2d 442 (2016). To determine whether a physician is an apparent or ostensible agent, this Court has articulated a three-part test:

> (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. [*Chapa*, 192 Mich App at 33-34.]

As to the second factor, the hospital, 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." *VanStelle*, 255 Mich App at 10. "[T]he fact that a doctor used a hospital's facilities to treat a patient is not sufficient to give the patient a reasonable belief that the doctor

was an agent of the hospital." *Id*. at 11. In general, "[t]here must be some action or representation by the principal (hospital) to lead the third person (plaintiff) to reasonably believe an agency in fact existed." *Id*. However, "[a]gency is always a question of fact for the jury." *Grewe*, 404 Mich at 253.

In this case, the parties do not dispute that Dr. Morson was not an actual employee of HFMH and, as a result, there was no actual agency relationship between Dr. Morson and HFMH. But HFMH argues that there was also no evidence of an ostensible agency because Mrs. Stogden had prior knowledge that physicians at HFMH were not always employed by HFMH, and neither the consent form nor Dr. Morson's business card established that HFMH made any positive and objective representations to plaintiffs of an agency relationship with Dr. Morson. However, first, we must consider the importance of the kind of representation made by a hospital to patients seeking treatment via the emergency room.

Our Supreme Court, in *Grewe*, distinguished between whether a patient was looking to the hospital to actually provide treatment for the patient's ailment or whether the patient merely viewed the hospital as the location where the patient's own physician would provide treatment. *Grewe*, 404 Mich at 251. In *Grewe*, the plaintiff went to the hospital after dislocating his shoulder at work. *Id*. at 245-246. The plaintiff was admitted to the hospital and examined by an internist, who sought a consultation from an orthopedic surgeon. *Id*. at 246. The internist's associate, who had staff privileges at the hospital, saw plaintiff in pain and attempted to reduce the dislocated shoulder, causing injury. *Id*. Our Supreme Court held that the internist's associate was an ostensible agency, highlighting that: (1) plaintiff went to the hospital for treatment and expected to be treated by the hospital itself; (2) there was no preexisting patient-physician relationship with the personnel who treated plaintiff at the hospital; and (3) there was "nothing in the record which should have put the plaintiff on notice that [the internist's associate] . . . was an independent contractor as opposed to an employee of the hospital." *Id*. 253-256. The Supreme Court reasoned that, where the patient looked to the hospital to provide medical treatment and the assigned physician had no independent physician-patient relationship with the patient, the hospital's representation that treatment would be afforded by its physicians—and neglect to dispel this representation—supported a finding of ostensible agency. *Id*. at 252-253.

Similarly, in *Setterington v Pontiac Gen Hosp*, 223 Mich App 594; 568 NW2d 93 (1997), the plaintiff went to the hospital with concerns about a lump on her leg. *Id*. at 598. The hospital's radiologists assigned to the plaintiff's care failed to timely diagnose the plaintiff's cancer, resulting in her death. *Id*. at 598-599. This Court held that an ostensible agency relationship existed where there was no preexisting patient-physician relationship with the radiologists, and the hospital held out its radiology department as part of the hospital, resulting in patients believing that radiology services were provided by the hospital itself. *Id*. at 603.

A review of the record in this case reveals that Richard went to HFMH for emergency treatment by HFMH. As in *Grewe* and *Setterington*, Richard had no preexisting patient-physician relationship with Dr. Morson. HFMH attempts to distinguish the fact that Dr. Morson was specifically requested by Dr. Kahnamouei—instead of HFMH assigning an on-call neurologist as it does when needed—as evidence that Dr. Morson was not its agent. But the evidence suggests that the specifics of Dr. Morson's assignment to Richard's care were largely unknown to plaintiffs because Richard was unconscious at the time of the consultation, Richard has no memory of his

time in the hospital because of the aneurysm, and Mrs. Stogden was not present during Dr. Morson's consultation. Further, Mrs. Stogden believed that all of physicians were employed by HFMH because she observed all of the physicians in the emergency room wearing scrubs or white jackets and identification badges that said "Henry Ford" on them. On this basis, plaintiffs' belief that Dr. Morson was HFMH's agent was reasonable given that plaintiffs never saw or spoke to Dr. Morson and because, as in *Setterington*, HFMH's neurology department is "held out as part of the hospital, leading patients to understand that the [neurology] services are being rendered by the hospital." *Setterington*, 223 Mich App at 603.

Plaintiffs further argue that the consent form Richard signed on admission to HFMH formed their reasonable belief that Dr. Morson was acting as HFMH's agent. The consent form does generally state that the patient agrees "to receive health care services from HFHS," insinuating that physicians under its control would be performing such healthcare services. In fact, Mrs. Stogden believed that, in signing the consent form, they were agreeing to exclusively allow HFMH to provide all treatment. However, we recognize that the consent form did not represent that Dr. Morson was HFMH's agent nor did it limit the care provided within HFMH to care that could be provided only by its agents or employees. But there is no evidence of the existence of a separate consent form applicable to either Dr. Morson's consultation or to any neurology treatment provided by HFMH's independent contractor-physicians. Given this and a plain-reading of the consent form, it was not an unreasonable interpretation by plaintiffs to believe that HFMH, through its employees and agents, would be providing Richard's medical treatment—as opposed to an independently contracted physician with staff privileges at the hospital.

We consider and reject HFMH's argument that Mrs. Stogden's discovery of Dr. Morson's business card in Richard's hospital room after Dr. Morson's consultation established that plaintiffs knew Dr. Morson was not HFMH's agent. While the business card did include the name and address of Dr. Morson's private practice, Mrs. Stogden's discovery of the business card in the hospital room without ever having met Dr. Morson is not particularly persuasive. Specifically, the business card did not include any request that plaintiffs seek out Dr. Morson, no one ever discussed the business card with plaintiffs, and plaintiffs never used the card to contact Dr. Morson. While there is an the argument that the private practice listed on the business card should have informed plaintiffs that Dr. Morson was not HFMH's employee or agent, Mrs. Stogden's testimony suggests that she did not recall any other information on the business card other than Dr. Morson's name, indicating that she was unaware Dr. Morson had a private practice. Regardless, the business card merely listed Dr. Morson's position within a private practice and does not conclusively represent whether Dr. Morson also had an employment or agency relationship with HFMH.

Further, HFMH's argument that plaintiffs could not have reasonably believed Dr. Morson was HFMH's employee or agent because Mrs. Stogden had knowledge of its staffing practices as an employee at HFMH is not persuasive. Indeed, a review of the record indicates that Mrs. Stogden was employed by HFMH at the time of the medical treatment giving rise to this case. However, Mrs. Stogden was employed, on a contingent basis, as a secretary for HFMH's outpatient rehabilitation services department. Moreover, Mrs. Stogden had just started in her position with HFMH in February 2016. On this basis, we are not persuaded that Mrs. Stogden had prior knowledge as to HFMH's staffing practices and relationship with neurologists within the emergency room department to the extent that plaintiffs should have known Dr. Morson was not

HFMH's employee or agent so as to be charged with "negligence" in that regard. See *Chapa*, 192 Mich App at 33-34.

In conclusion, the trial court properly denied HFMH's motion for summary disposition as to plaintiffs' ostensible agency claim. Genuine issues of fact existed as to whether plaintiffs reasonably believed that Dr. Morson was HFMH's agent or employee and whether HFMH's conduct caused that belief in light of the evidence, including that (1) Richard looked to the HFMH emergency room to provide treatment, rather than to provide the mere situs of treatment, (2) Richard did not have a preexisting patient-physician relationship with Dr. Morson, who was a neurologist at a hospital that would normally provide neurology services, (3) Richard signed a consent form for treatment which stated that he agreed to receive health care services from the hospital and not "independent contractors," (4) the physicians in the emergency room were wearing scrubs, white jackets, and badges with "Henry Ford" on them, (5) neither Richard nor his wife spoke to Dr. Morson during her consultation, (6) Dr. Morson's business card did not indicate that she was not employed by HFMH, (7) Mrs. Stogden's limited employment history and secretarial position at HFMH would not have necessarily given her insight into relevant staffing practices of HFMH; and (8) there was nothing in the record that should have put plaintiffs on notice that Dr. Morson was an independent contractor rather than an employee or agent of HFMH.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Anica Letica