

STATE OF MICHIGAN
COURT OF APPEALS

JANICE BROWN,

Plaintiff-Appellee,

v

KRISTINE GUPTA, as Personal Representative of
the Estate of SHAM GUPTA, M.D., and DR.
SHAM GUPTA M.D., PC,

Defendants,

and

OAKWOOD HEALTHCARE, doing business as
OAKWOOD SOUTHSORE,

Defendant-Appellant.

UNPUBLISHED
December 15, 2015

No. 322676
Wayne Circuit Court
LC No. 13-007503-NH

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

PER CURIAM.

Defendant-appellant, Oakwood Healthcare, doing business as Oakwood Southshore (“Oakwood”), appeals by leave granted¹ the order denying its motion for summary disposition. We reverse and remand.

This case arises from an incident in which plaintiff suffered complications following a colon resection surgery. In December 2010, plaintiff was admitted to Oakwood Southshore for coughing and shortness of breath. Dr. Michael Neshewat was her attending physician during the hospitalization. Dr. Neshewat previously treated plaintiff for chronic obstructive pulmonary disease (“COPD”). Plaintiff was admitted to Oakwood Southshore on several occasions before the incident for complications arising from COPD. The medical records from plaintiff’s previous admissions to Oakwood Southshore listed Dr. Neshewat as her primary care physician. After plaintiff was admitted to Oakwood Southshore, she began experiencing diarrhea. Dr.

¹ See *Brown v Oakwood Healthcare, Inc*, unpublished order of the Court of Appeals, entered August 22, 2014 (Docket No. 322676).

Neshewat referred plaintiff to Dr. Sham Gupta for a colonoscopy since plaintiff was nearing 50 years old and had a family history of colon cancer. Plaintiff did not know Dr. Gupta before the colonoscopy, but she had faith that Dr. Neshewat would recommend the best surgeon.

Plaintiff underwent the colonoscopy. After the colonoscopy, Dr. Gupta told plaintiff that she had a large tumor in her colon that was most likely cancerous. He told her that she must undergo colon resection surgery. Plaintiff underwent the surgery. She remained in the hospital for approximately 10 days after the surgery, and she experienced excruciating pain. After plaintiff was released from the hospital, she continued to experience excruciating pain. Plaintiff went back to Oakwood Southshore the day after she was discharged, and she was told that the pain she was experiencing was postoperative pain. Plaintiff left the hospital, but continued to be in pain. Plaintiff's husband took her to the hospital the next day, and she fell into a coma on the way there. After three days of observation in the intensive care unit, doctors performed exploratory surgery and discovered a perforation in plaintiff's colon and severe infections. Plaintiff suffered from multiple health complications following the incident. Plaintiff filed a medical malpractice action against Dr. Gupta, defendant Dr. Sham Gupta M.D., PC, and Oakwood.

Oakwood argues that the trial court erred in denying its motion for summary disposition because it was not liable for Dr. Gupta's negligence under the theory of ostensible agency. We agree.

Oakwood brought a motion for summary disposition under MCR 2.116(C)(10). We review de novo a trial court's decision with regard to a motion for summary disposition. *Cichewicz v Salesin*, 306 Mich App 14, 28; 854 NW2d 901 (2014). A motion for summary disposition under MCR 2.116(C)(10) challenges whether the complaint is factually sufficient. *Id.* We review the pleadings, admissions, and other evidence in the light most favorable to the nonmovant. *Id.* Summary disposition under MCR 2.116(C)(10) "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citations omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id.* (citation omitted).

The elements to establish ostensible agency are:

(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 v St. Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).]

In *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250-251; 273 NW2d 429 (1978), the Michigan Supreme Court explained:

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 [the physician] or whether the plaintiff and [the physician] had a patient-physician relationship independent of the hospital setting. [Citations omitted.]

In *VanStelle v Macaskill*, 255 Mich App 1, 8, 11; 662 NW2d 41 (2003), this Court reiterated that the mere fact that a patient went to a hospital for treatment is insufficient to establish an agency relationship, and the hospital must take some action or make some representation to lead the patient to reasonably believe that there was an agency relationship. This Court explained that the fact that a doctor uses a hospital's facilities does not give rise to a reasonable belief that the doctor was acting as an agent of the hospital. *Id.* at 11. Thus, the hospital must take some action to create a reasonable belief in the plaintiff's mind that the physician acted on behalf of the hospital. *Id.* at 10.

In *Chapa*, the patient was admitted to the hospital, and a hospital physician treated him before his family doctor, Dr. Thepveera, became his attending physician. *Chapa*, 192 Mich App at 30-31. A doctor named Dr. Penput also treated the patient at Dr. Thepveera's request while Dr. Thepveera was out of town. *Id.* at 31. The incident leading to the medical malpractice action occurred after Dr. Thepveera became the patient's attending physician. *Id.* at 30. This Court held that the hospital was not liable since the incident giving rise to the malpractice action occurred *after* the family doctor took over in the case. *Id.* at 32-33. This Court emphasized that the patient did not reasonably believe that he was being treated by agents of the hospital. *Id.* at 34.

In this case, the evidence established that plaintiff had an existing patient-physician relationship with Dr. Neshewat. Plaintiff testified during her deposition that she saw Dr. Neshewat beginning in 2009 for treatment with regard to her COPD. Although plaintiff stated in her affidavit that she believed that Dr. Neshewat was an Oakwood employee, she did not explain the basis for this belief. Instead, Oakwood presented evidence indicating that Dr. Neshewat treated plaintiff with regard to her COPD in his private office, and he was listed on the medical records as her primary care physician during her previous hospitalizations at Oakwood Southshore. The hospital registration form with regard to the December 2010 hospitalization also states that Dr. Neshewat was plaintiff's primary care physician. Furthermore, Dr. Neshewat visited plaintiff during her hospitalization at Henry Ford Wyandotte, which further indicates that she did not have reason to believe he was an Oakwood employee. Plaintiff did not provide evidence that contradicted the fact that she had a prior physician-patient relationship with Dr. Neshewat that existed outside of the hospital setting. Thus, plaintiff had an independent physician-patient relationship with Dr. Neshewat before her admission to Oakwood Southshore. See *Grewe*, 404 Mich at 250-251.

In addition, Oakwood did not take any action or make any representation that would lead plaintiff to reasonably believe that Dr. Gupta was acting as its agent. Plaintiff had not met Dr. Gupta before the hospitalization. Although plaintiff stated in her affidavit that she believed Dr. Gupta was an employee of the hospital, she failed to testify that anyone ever informed her that Dr. Gupta was employed by the hospital. Instead, plaintiff testified that Dr. Neshewat told her that he would refer her to Dr. Gupta. Plaintiff explained that she had faith that Dr. Neshewat would refer her to the best surgeon. Thus, plaintiff's uncontroverted deposition testimony establishes that she relied on Dr. Neshewat, rather than Oakwood, to refer her to a physician to perform the colonoscopy. Like in *Chapa*, the alleged malpractice did not occur until *after* plaintiff's primary care physician became her attending physician, and plaintiff relied on her primary care physician, rather than the hospital, to refer her to another physician for the colonoscopy. See *Chapa*, 192 Mich App at 32-33. There is no indication that Oakwood took any action or made any representation with regard to Dr. Gupta. The mere fact that plaintiff initially went to Oakwood for treatment relating to her COPD was insufficient to establish ostensible agency. See *VanStelle*, 255 Mich App at 11; *Chapa*, 192 Mich App at 33-34. Therefore, there was inadequate evidence that Oakwood took any action or made any representation the led plaintiff to reasonably believe that Dr. Gupta was an agent of the hospital. See *Chapa*, 192 Mich App at 33-34.

The trial court based its ruling on this Court's decision in *Strach v St. John Hosp Corp*, 160 Mich App 251; 408 NW2d 441 (1987). In *Strach*, the plaintiff was injured in an automobile accident and was admitted to a hospital. *Id.* at 255. Upon discharge, the plaintiff's attending physician told him to take his x-rays to a doctor named Dr. Africa. *Id.* Dr. Africa reviewed the x-rays and admitted the plaintiff to another hospital for further testing. *Id.* at 256. Dr. Africa determined after further testing that the plaintiff required emergency surgery for a traumatic aneurysm of his aorta. *Id.* The plaintiff's wife testified that Dr. Africa told her that there was a doctor or a team of doctors at the defendant hospital that could perform the surgery. *Id.* at 257. The plaintiff was admitted to the defendant hospital. *Id.* at 256-257. A physician named Dr. Yap met the plaintiff at the defendant hospital and informed the plaintiff that Dr. Africa asked him to admit the plaintiff to the defendant hospital. *Id.* at 257. Dr. Yap also informed the plaintiff's wife about the details of the surgery. *Id.* Dr. Africa arrived later and wrote the admitting note. *Id.* at 258. Dr. Yap and other physicians that were members of the defendant hospital's "team" for open heart surgery performed surgery to repair the plaintiff's aorta. *Id.* at 258. After the surgery, the plaintiff suffered several complications, including paralysis below the waist. *Id.* at 259. The plaintiff and his wife sued the defendant hospital, as well as Dr. Africa and Dr. Yap. *Id.* at 255.

This Court determined that, even if an independent physician-patient relationship exists, "acts or omissions of a defendant hospital in the particular circumstances of treatment may override the impressions created by a previous relationship and reasonably create a belief that a staff physician is acting on behalf of the hospital." *Strach*, 160 Mich App at 263. This Court further explained that "it seems highly unlikely that any single act or omission on the part of a modern hospital or its alleged agents would render it impervious to proof of an ostensible relationship with staff members." *Id.* at 262-263. This Court determined that the plaintiff had an independent physician-patient relationship with Dr. Africa. *Id.* at 266. In spite of the independent physician-patient relationship, the plaintiff could reasonably have looked to the defendant hospital for treatment since Dr. Africa informed the plaintiff that the defendant

hospital had the facility to perform the surgery, Dr. Africa testified that he was on the staff of the defendant hospital, the defendant hospital's team performed the surgery, Dr. Africa testified that Dr. Yap made arrangements for the defendant hospital's team, and Dr. Africa "merely assisted staff members of [the defendant hospital] who comprised the cardiac team." *Id.* at 267-268. In addition, the plaintiff's wife testified that she was relieved that the plaintiff was being transferred to the defendant hospital, and neither the plaintiff nor his wife was informed of the identity of the physician who would be performing the surgery. *Id.* at 268-269. This Court further reasoned that the fact that the defendant hospital allowed or encouraged Dr. Africa to refer to the physicians performing the surgery as the defendant hospital's "team" encouraged the plaintiff to look to the defendant hospital for treatment. *Id.* at 269. This Court explained that the plaintiff was admitted into the defendant hospital and met with Dr. Yap and hospital personnel long before Dr. Africa arrived at the defendant hospital. *Id.* The defendant hospital permitted Dr. Yap to exercise authority over the hospital personnel, and there was no evidence that the plaintiff had actual knowledge that Dr. Yap was an independent contractor. *Id.* at 270.

This case is distinguishable from *Strach* for several reasons. First, although both cases involve referrals, there was no testimony indicating that Dr. Neshewat or Dr. Gupta informed plaintiff that the hospital staff was performing the colonoscopy or the resection surgery, and there was no reference to Oakwood's "team." See *Strach*, 160 Mich App at 267-268. Instead, plaintiff's attending physician referred her to the specific surgeon who would be performing the colonoscopy and resection surgery, rather than to Oakwood's facility or an Oakwood physician. See *id.* at 268-269. Second, there was no indication that Oakwood encouraged plaintiff to look to the hospital for her treatment in the same way that the defendant hospital in *Strach* encouraged the plaintiff to look to the defendant hospital for treatment. See *id.* at 269. Instead, plaintiff mistakenly believed that both doctors were Oakwood employees, and there is no evidence in the record establishing a reasonable basis for her belief. See *id.* Furthermore, we are not bound by *Strach* since it is a pre-1990 decision of this Court. See *Barrow v Detroit Election Comm*, 301 Mich App 404, 420; 836 NW2d 498 (2013).

Finally, we note that the trial court erred in failing to consider the documentary support for Oakwood's motion. The trial court explained during the hearing on the motion for summary disposition that it would not consider the documentary evidence attached to Oakwood's motion for summary disposition since Oakwood failed to quote or cite to the documents in its motion. The court stated:

Well, you attached a lot of stuff, but I'm not going to go looking through it. I mean, you got to give me a page and where it is or a quotation or something. Not just argument and I'm supposed to go searching through all your attachments. That's not what the Court does.

Contrary to the trial court's remarks during the hearing on the motion for summary disposition, Oakwood referred to its exhibits in its motion for summary disposition and corresponding brief, and the citations included a reference to the specific exhibit, the name of the document cited, and, in some cases, the paragraph on which the information could be found. Although not every sentence in the motion contained a citation to the documents attached to the brief in support of the motion for summary disposition, the motion and brief contained sufficient citations for the trial court to review the documentary evidence. The court rendered its decision during the

hearing. Thus, the court ignored Oakwood's documentary support in rendering its decision. The trial court erred in ruling on the motion for summary disposition without examining the documentary evidence filed with the motion for summary disposition. See MCR 2.116(G)(5) (explaining that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court" when a motion is filed under MCR 2.116(C)(10)). For the reasons discussed above, the trial court erred in denying Oakwood's motion for summary disposition.

We reverse and remand for entry of judgment in favor of Oakwood. We do not retain jurisdiction. As the prevailing party, Oakwood may tax costs. See MCR 7.219(A).

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth Gleicher