Order

Michigan Supreme Court
Lansing, Michigan

December 7, 2022

Elizabeth T. Clement,
Chief Justice

163086

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

MARY ANNE MARKEL,
Plaintiff-Appellant,

v

SC: 163086
COA: 350655
Oakland CC: 2018-164979-NH

WILLIAM BEAUMONT HOSPITAL,
Defendant-Appellee,

and

HOSPITAL CONSULTANTS, PC, LINET LONAPPAN, MD, and IOANA MORARIU,
Defendants.

_____/

On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered, we REVERSE the April 22, 2021 judgment of the Court of Appeals and REMAND this case to that court for reconsideration under the proper legal standard.

To establish a claim of ostensible agency, a plaintiff must show:

> [First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence. [*Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 253 (1978) (quotation marks and citations omitted; alterations in original).]

In *Grewe*, a patient presented at the emergency room for treatment and received care from a doctor with whom she had no preexisting relationship. *Id*. at 246, 254. The *Grewe* Court explained that to determine if ostensible agency exists, "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." *Id.* at 251. When determining in *Grewe* that the patient had been looking to the hospital for treatment rather than as a mere situs, we

acknowledged as significant that there was "nothing in the record which should have put the plaintiff on notice that [the doctor] . . . was an independent contractor as opposed to an employee of the hospital" and there was "no record of any preexisting patient-physician relationship with any of the medical personnel who treated the plaintiff at the hospital." *Id.* at 253-255. A patient who has clear notice of a treating physician's employment status or who has a preexisting relationship with a physician outside of the hospital setting cannot reasonably assume that the same physician is an employee of the hospital merely because treatment is provided within a hospital.

In concluding the doctor was the hospital's ostensible agent, the *Grewe* Court cited the emergency room setting and the lack of a preexisting relationship between doctor and patient. The rule from *Grewe* is that when a patient presents for treatment at a hospital emergency room and is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital's agent is reasonable unless the hospital does something to dispel that belief. Put another way, the "act or neglect" of the hospital is operating an emergency room staffed with doctors with whom the patient, presenting themselves for treatment, has no prior relationship. See also *Brackens v Detroit Osteopathic Hosp*, 174 Mich App 290 (1989); *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 603 (1997); *Zdrojewski v Murphy*, 254 Mich App 50, 67-68 (2003). The Court of Appeals majority opinion looked to other Court of Appeals decisions purporting to apply *Grewe* to conclude that the plaintiff's ostensible agency claim failed. The panel majority cited *VanStelle v Macaskill*, 255 Mich App 1, 10 (2003), for the requirement that "the putative principal must have done something that would create in the patient's mind the reasonable belief" of agency. But a core aspect of our holding in *Grewe* was that "[a]n agency is ostensible 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." *Grewe*, 404 Mich at 252 (quotation marks and citations omitted; emphasis added). To the extent that *VanStelle* requires a plaintiff to show some additional, affirmative act by the hospital in every emergency room case to prove ostensible agency, it is in direct tension with *Grewe* and therefore overruled.

But a hospital will not be vicariously liable under an ostensible agency theory every time a person receives medical treatment in a hospital. We agree with the panel majority that agency cannot arise "merely because one goes to a hospital for medical care." *Sasseen v Community Hosp Foundation*, 159 Mich App 231, 240 (1987). But that broad statement conceals the most important distinction between *Sasseen* and cases like it and this one: a preexisting relationship between doctor and patient.

The panel majority concluded that because the plaintiff "did not recall" the doctor who treated her at the hospital, she could not have formed a reasonable belief that the doctor was the hospital's agent. *Markel v William Beaumont Hosp*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2021 (Docket No. 350655), pp 6-7. This holding is in tension with *Grewe*, which held that when a patient presents at the emergency

room for treatment, the patient's belief that a doctor is the hospital's agent is reasonable unless dispelled in some manner by the hospital or the treating physician. We also note that patient testimony is not required to establish ostensible agency under *Grewe*.

Judge BECKERING concurred because she believed the panel was bound by our preemptory order in *Reeves v MidMichigan Health*, 489 Mich 908 (2011). *Markel* (BECKERING, P.J., concurring), unpub op at 1. Otherwise, she would have concluded that under *Grewe*, the plaintiff had demonstrated a question of fact as to ostensible agency. *Id*. But *Reeves* was a one-sentence order adopting the "reasons stated" in Judge HOEKSTRA's dissenting opinion at the Court of Appeals. *Reeves*, 489 Mich at 908-909. The order did not explain which aspects of the dissent's analysis it adopted as its own and did not purport to overrule *Grewe.*

Judge HOEKSTRA would have held that there was no ostensible agency in *Reeves*, a case in which the patient presented at the emergency room and was treated by a physician with whom he seemingly had no preexisting relationship. *Reeves v MidMichigan Health*, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2010 (Docket No. 291855) (HOEKSTRA, J., dissenting), p 2; *id*. at 3 (opinion of the Court). Judge HOEKSTRA argued the hospital did not affirmatively act to create a belief of ostensible agency through its consent forms and lab coat insignia. But Judge HOEKSTRA failed to address how that reasoning fit with the rule from *Grewe* that when a patient is admitted to a hospital for emergency care and looks to the hospital for treatment of physical ailments, a hospital may have an obligation to dispel a patient's belief or assumption that those providing treatment are employed by the hospital. We take this opportunity to clarify that *Grewe* has never been overruled. To the extent *Reeves* created confusion about the application of *Grewe* to cases such as this, we limit *Reeves* to its facts. *Grewe* remains our rule.

Because the trial court and the Court of Appeals misinterpreted and misapplied *Grewe*, we remand this case for reconsideration under the appropriate standard.

We do not retain jurisdiction.

VIVIANO, J. (*dissenting*).

In holding that a hospital's mere operation of an emergency room can subject it to liability under the ostensible-agency doctrine, the majority today purports to simply apply *Grewe v Mt Clemens Hosp*, 404 Mich 240 (1978). The fact that the majority must overrule caselaw from the Court of Appeals and all but overrule our own subsequent order in *Reeves v MidMichigan Health*, 489 Mich 908 (2011), however, demonstrates that this is no straightforward application of our precedent. *Grewe* itself was ambiguous and never directly addressed the key point at issue here. Over the decades since *Grewe*, the Court of Appeals has properly read that case to mean that, for ostensible agency to exist, defendant

hospitals must engage in some act or neglect beyond simply operating an emergency room. By taking a broader reading of *Grewe*, the majority overturns this caselaw and disregards the foundations of the ostensible-agency doctrine, setting in motion a sweeping expansion of hospital liability without any accompanying practical benefit to injured plaintiffs. I therefore dissent.

I

On October 2, 2015, plaintiff Mary Anne Markel underwent surgery at defendant William Beaumont Hospital (defendant). She was discharged the same day. On October 9, 2015, she returned to defendant's emergency room with low back pain radiating to her legs, foot numbness, and inability to urinate. The following morning, she was placed in the emergency-room observation unit. Later that day, she was moved to a hospital floor. Plaintiff's internal medicine physician was Dr. John Bonema, who was part of Troy Internal Medicine, which had an agreement with Hospital Consultants PC, under which the latter group supplied services to the former. On October 10, the day after plaintiff arrived at the hospital, a physician from Hospital Consultants, Dr. Linet Lonappan, was assigned as plaintiff's attending physician. This assignment was pursuant to Troy Internal Medicine's arrangement with Hospital Consultants.

Plaintiff claims that Dr. Lonappan overlooked a key test result indicating that she had Group B Streptococcus, which came back three hours after her discharge. Plaintiff was not advised of this result, and the infection went untreated. She returned to defendant's emergency room on October 13, where she received treatment for the infection.

Plaintiff subsequently filed suit, alleging that Dr. Lonappan committed medical malpractice by not informing her of the test result or treating the infection. She further alleges that defendant is liable for Dr. Lonappan's negligence under the ostensible-agency doctrine.[1] Defendant moved for summary disposition, arguing that the record did not support plaintiff's claim of agency. Plaintiff testified at a deposition that she had no preexisting relationship with Dr. Lonappan, whom she believed worked for the defendant hospital. But she also testified that she had no specific recollections of Dr. Lonappan. She stated at the deposition that the name "Dr. Linet Lonappan" was "[n]ot at all" familiar to her, that she had no independent recollection of talking to the doctors at the hospital, and that she knew none of their names. She also said, "My understanding is my internists don't go to the hospital so if I have to go to the hospital they need someone medical to treat me they [sic] it to this kind of group." But she knew nobody in the group.

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[1] Plaintiff also argued that Dr. Lonappan was defendant's actual agent. The trial court held that Dr. Lonappan was not an actual agent. The Court of Appeals held that the grant of summary disposition on this issue was premature. This ruling has not been appealed.

Dr. Lonappan testified that she would wear a white coat with defendant's insignia on it when she treated her patients and that her credentials (which she wore) listed her relationships with both Hospital Consultants and defendant. She further testified that it was her usual practice to tell patients that she was seeing them for their family doctor. She would say, for example, "I'm a hospitalist associated with Dr. Bonema." She was assigned to plaintiff by defendant's emergency-room staff pursuant to the agreement between her employer (Hospital Consultants) and Dr. Bonema's group. She also worked out of defendant's other hospitals in the area.

Plaintiff's cross-motion for summary disposition included an affidavit from plaintiff. In it, plaintiff stated that she did not know Dr. Lonappan prior to her hospital visit. Further, she said, "I was at all times under the impression that Dr. Linet Lonappan, as well as other medical staff at Beaumont Hospital . . . , were employees of Beaumont Hospital . . . ." Plaintiff stated that Dr. Lonappan did not tell her that she was not employed by defendant, and plaintiff further stated that she has worked at defendant for 30 years and was unaware that physicians were not hospital employees.

At her deposition, plaintiff testified that she did not remember interacting with Dr. Lonappan. Plaintiff's counsel conceded, at the summary disposition hearing, that there cannot be a reasonable reliance on something that plaintiff does not remember seeing. The trial court agreed with that assessment, holding that it could not be found that the hospital did anything to create a reasonable belief in plaintiff's mind that Dr. Lonappan was an agent of the hospital when plaintiff had no recollection of Dr. Lonappan at all.

Plaintiff sought to appeal in the Court of Appeals, which denied leave. This Court remanded to the Court of Appeals for consideration as on leave granted. Subsequently, the Court of Appeals affirmed in an unpublished per curiam opinion. The Court of Appeals noted that Dr. Lonappan's jacket contained the names of both defendant and Hospital Consultants and that Dr. Lonappan introduced herself as affiliated with plaintiff's family doctor. Judge BECKERING concurred, requesting that this Court clarify our caselaw on the matter, particularly the requirement that, in order to create an ostensible agency, the hospital engage in conduct that creates a reasonable belief that an agency relationship exists.

We then granted leave to take up the question "whether the Court of Appeals correctly applied the ostensible agency test" as articulated by our caselaw.

II

A

Under our decision in *Grewe*, a claim of ostensible agency requires a showing that, among other things, (1) the plaintiff reasonably believed that the agent was the defendant

hospital's agent (2) because of "some act or neglect of the principal sought to be charged" and (3) the plaintiff was not guilty of negligence in relying on the apparent agency relationship. *Grewe*, 404 Mich 253 (quotation marks and citation omitted). Elsewhere in *Grewe* we stated that while hospitals generally are not vicariously liable for the negligence of physicians who are independent contractors, hospitals can be liable if the patient looked to the hospital for treatment "and there has been a *representation* by the hospital that medical treatment would be afforded by physicians working therein . . . ." *Id*. at 250-251 (emphasis added). In its application of the rule, however, *Grewe* asked only whether the plaintiff, when admitted to the hospital, sought treatment from the hospital or merely viewed it as the location where his or her physician would provide treatment. *Id*. at 251. It is unclear why *Grewe* limited its inquiry in this fashion. And *Grewe* never explained whether, or how, this question related to the "act or neglect" prong of its test. Indeed, *Grewe* never addressed the meaning of that prong at all.

Grewe's silence on this point does not deter the majority from divining its preferred rule from *Grewe*. The majority reads *Grewe* as holding that for a plaintiff visiting an emergency room who "is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital's agent is reasonable unless the hospital does something to dispel that belief." But this gloss on *Grewe* gives hardly any meaning to the "act or neglect" requirement in this context. One would think that an "act" or "neglect" that creates a reasonable belief of an agency relationship represents something more than the hospital simply operating an emergency room with doctors and other staff. One commentator has similarly observed that, by itself, the act-or-neglect requirement would appear to "stand[] as a significant obstacle to plaintiff's recovery" against the hospital. Comment, *Hospital Liability for the Right Reasons: A Non-Delegable Duty to Provide Support Services*, 42 Seton Hall L Rev 1337, 1347 (2012). The bare act of opening an emergency room says little at all about the employment status of those who staff it.

Thus, it is no surprise that for decades the Court of Appeals and this Court have indicated that the act-or-neglect requirement demands something more than the emergency room's mere existence. Trying to make sense of *Grewe*, the Court of Appeals in *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29 (1991), opined that *Grewe* framed its " 'critical question' "—i.e., whether the patient looked to the hospital for care—as it did "because of the facts of that case . . . ." *Id*. at 32, quoting *Grewe*, 404 Mich at 251. "Nothing in *Grewe* indicates that a hospital is liable for the malpractice 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*, 192 Mich App at 33. Such an expansive view of ostensible agency "would not only be illogical, but also would not comport with fundamental agency principles noted in *Grewe* . . . . Simply put, defendant, as putative principal, must have done something that would create in [the patient's] mind the *reasonable* belief that [the physicians] were acting on behalf of defendant." *Id*. at 33-34. A little more than a decade later, the Court of Appeals reaffirmed

this analysis and added that "[a]gency 'does not arise merely because one goes to a hospital for medical care.' " *VanStelle v Macaskill*, 255 Mich App 1, 11 (2003), quoting *Sasseen v Community Hosp Foundation*, 159 Mich App 231, 240 (1986).[2]

More importantly still, this Court endorsed such a view in *Reeves*, 489 Mich 908, when we adopted the dissenting opinion from the Court of Appeals. It is worth noting that both the majority and dissenting opinions in *Reeves*, which similarly addressed emergency-room care, rejected the position now advanced by the majority. The Court of Appeals majority explained that *Grewe*'s " 'critical question' . . . was intended to relate to the patient's belief about the physician's relationship to the hospital, *while taking into consideration the hospital's behavior*." *Reeves v MidMichigan Health*, unpublished per curiam opinion of the Court of Appeals, issued Sept 30, 2010 (Docket No. 291855), p 2. The majority went on to explain that the hospital must hold itself out or allow others to portray it as the principal. *Id.* at 2-3. In its analysis, the majority scrutinized the evidence beyond the hospital's mere operation of a hospital room, looking for other proof that the plaintiff was reasonably led to believe that the defendant hospital was the principal, including who assigned the treating physician, what logo appeared on the physician's coat, and the forms and paperwork given to the plaintiff. *Id.* The dissenting judge did not disagree with the majority's rule, only the application of it. *Id.* (HOEKSTRA, J., dissenting) at 2. He did not believe that the paperwork given to the plaintiff was sufficient to cause a reasonable belief because it said nothing about the relationship between the treating physicians and the hospital. *Id.* And the lab coat did not bear the hospital's emblem. *Id.* Thus, "there [was] no evidence in the record that defendant did or failed to do anything that would create a reasonable belief that [the physician] was acting on its behalf." *Id.*

This analysis—which we adopted—is logically inconsistent with the present majority's reading of *Grewe*. If *Grewe* simply required that the hospital operate an emergency room and provide doctors with no preexisting relationship to the plaintiff patient, then *Grewe*'s test would have been satisfied in *Reeves* and we would have either

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[2] Indeed, some of the very cases the majority cites for its core rule—that "the 'act or neglect' of the hospital is operating an emergency room staffed with doctors with whom the patient, presenting themselves for treatment, has no prior relationship"—actually cut against it. For example, in *Brackens v Detroit Osteopathic Hosp*, 174 Mich App 290, 293 (1989), the Court of Appeals stated that ostensible agency can exist "if the individual looked to the hospital to provide medical treatment and there was a *representation* by the hospital that medical treatment would be afforded by physicians working therein . . . ." (Emphasis added.)

let the Court of Appeals' majority opinion stand or affirmed it. But we did not. *Reeves* thus conflicts with the majority's reading of *Grewe*.[3]

B

The majority does not offer any reason to justify its broad holding today. Despite the caselaw discussed above, establishing a different and much more plausible reading of the ambiguities in *Grewe*, the majority simply declares that this reading is inconsistent with *Grewe* itself. In doing so, the majority treats its holding as a settled rule and avoids the need to offer any rationales for it. Perhaps this is because there is little legal support for this rule.

The view of *Grewe* found in *Chapa*, *VanStelle*, and *Reeves* better reflects the doctrines underpinning ostensible agency and our pre-*Grewe* caselaw on this subject (which, for now at least, remains valid precedent). Ostensible agency is rooted in equitable estoppel.[4] Generally speaking, "[e]quitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527 (2002) (quotation marks and citation omitted). In the present context, this would mean that, as a result of the defendant's conduct, the defendant is precluded from denying that an agency relationship exists.

To be subject to the equitable-estoppel doctrine, the defendant usually must do something more than simply operate a business—generally, there must be a misrepresentation or concealment of material facts. See McWilliams & Russell, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 SC L Rev 431, 448 (1996) ("Generally speaking, estoppel can proceed either from 'some definite misrepresentation of fact, made with reason to believe that another will rely upon it,' or from silence in the knowledge that another misunderstands the silence and is acting in reliance on the misunderstanding."), quoting Prosser & Keeton, Torts (5th ed), § 105, p 733. The Second

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[3] The majority purports to limit *Reeves* to its facts, which means it is essentially overruled—the logic of *Reeves* is fundamentally inconsistent with the majority's holding and therefore can have no future application.

[4] See also 2A CJS, Agency, § 8, p 343 ("Ostensible agency is based on the notion of estoppel . . . ."); *id*. at § 49, pp 371-372 ("Apparent agency is essentially agency by estoppel, which is rooted in the doctrine of equitable estoppel and is based upon the idea that if a principal creates the appearance that someone is his or her agent, that principal should not then be permitted to deny the agency if an innocent third party responsibly relies on the apparent agency and is harmed as a result.").

Restatement of Agency similarly noted that imposition of liability based on estoppel required some higher degree of culpable conduct on the part of the putative principal:

> [W]here a purported principal has not affirmatively misled the third person but has merely carelessly failed to take affirmative steps to deny that another was his agent, the imposition of liability is so extraordinary that it is doubtful whether he should be made liable to a third person who has made a contract with the pretended agent but has not otherwise changed his position. [1 Restatement (Second) of Agency, § 8, comment *d*, p 33.]

This reflects the fact that "estoppel, although founded in fairness, works fairness for a party only where there is some element of fault in the behavior of the other party." *Hospital Liability for Torts*, 47 SC L Rev at 448. We have likewise stated:

> The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe did not exist. *Hubbard* v. *Shepard*, 117 Mich. 25 (72 Am. St. Rep. 548) [1898]. To entitle a party to insist upon an estoppel, he must show that the other party has done something, or represented something, which has had the effect of deceiving and misleading him, and which would render it inequitable to enforce against him the alleged right of such other party. *Crane* v. *Reeder*, 25 Mich 303 [1872]. There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up. *Palmer* v. *Williams*, 24 Mich. 328 [1872]; *DeMill* v. *Moffat*, 49 Mich. 125 [1882]; *Meisel* v. *Welles*, 107 Mich 453 [1895]. There can be no estoppel where one is not deceived or misled, but acts upon his own judgment and with knowledge of the facts. *Northern Michigan Lumber Co*. v. *Lyon*, 95 Mich 584 [1893]; *Thirlby* v. *Rainbow*, 93 Mich 164 [1892]. And a party cannot invoke the aid of the doctrine of equitable estoppel where it appears that the facts were known by both or that both had the same means of ascertaining the truth. *Sheffield Car Co*. v. *Constantine Hydraulic Co*., 171 Mich 423 (Ann. Cas. 1914B, 984) [1912]. [*Shean v US Fidelity & Guaranty Co*, 263 Mich 535, 541 (1933).]

See also *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270 (1997) ("One who seeks to invoke the doctrine generally must establish that there has been," among other things, "a false representation or concealment of a material fact . . . ."). In a similar vein, in the context of a title dispute, we said that "[t]he basis of estoppel is fraud. The doctrine, being equitable, is dependent upon the circumstances . . . ." *Colonial Theatrical Enterprises v Sage*, 255 Mich 160, 171 (1931); see also *Moore v First Security Cas Co*, 224 Mich App 370, 376 (1997) ("The doctrine of equitable estoppel rests on broad principles of

justice . . . .”). In numerous other ostensible-agency cases, we have emphasized the “act” or “neglect” requirement.[5]

The majority’s broader reading of *Grewe* disregards this precedent and its doctrinal foundations. It is true that, in doing so, the majority is not alone—other states have similarly expansive ostensible-agency rules in the hospital setting. See, e.g., *Sword v NKC Hosps Inc*, 714 NE2d 142, 152 (Ind, 1999) (“[A] hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital.”). But when the act-or-neglect requirement is watered down to this level, courts are not truly applying the underlying legal doctrines. Cf. *Hospital Liability for the Right Reasons*, 42 Seton Hall L Rev at 1359 (“Simply stated, courts are not being true to the tests that they purport to rely on.”). Instead,

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[5] See *Reichert v State Savings Bank of Royal Oak*, 274 Mich 126, 131 (1936) (“Agency may be established by an estoppel to deny the existence of such an agency by persons who, *through their conduct*, have given others reason to believe that such agency exists.”) (emphasis added); *Plankinton Packing Co v Berry*, 199 Mich 212, 217 (1917) (“ ‘Gathering together all of these elements, it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity—whether it be in a single transaction or in a series of transactions—his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.’ ”) (citation omitted); *Pettinger v Alpena Cedar Co*, 175 Mich 162, 165-166 (1913) (“This rule [i.e., “agency by estoppel”] has been stated as follows: ‘It is a general rule that when a principal by any such acts or conduct has *knowingly caused or permitted* another to appear to be his agent either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.’ ”) (emphasis added; citation omitted); see generally 12 Williston on Contracts (4th ed), § 35:11, p 286 (“Whether denominated apparent authority or ostensible authority (when the two words are treated as synonyms), this authority arises when the principal by its outward manifestations creates the impression in third parties that the agent possesses authority, despite the fact that the principal has not expressly or impliedly granted the agent the authority in question; or when the principal permits the agent to conduct itself in a certain way, leading third parties to believe that the agent possesses authority.”).

the courts are engaged in a policy-based reallocation of liability to hospitals. *Id*. at 1348 ("Relaxation of the representation requirement reflects the beginnings of a result-oriented approach towards hospital liability. Presumptive findings of hospital representation have undoubtedly eased the burden of persuasion that aggrieved plaintiffs carry, and, importantly, this practice suggests judicial approval of hospital liability in certain circumstances."); see generally *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435, 444 (1994) (noting the policy groundings of its holding).

A hospital that simply operates an emergency room has not necessarily done anything or failed to do anything that would mislead or take advantage of a patient's apparent misunderstanding. Under the rule adopted today, "the hospital is liable simply because it has independent contractors working in the emergency room located in the physical building owned by the hospital; that is, based simply on the fact that the hospital provides the space in which the nonemployee physician exercises independent medical judgment." *Popovich v Allina Health Sys*, 946 NW2d 885, 901 (Minn, 2020) (Anderson, J., dissenting); *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435, 446 (1994) (Moyer, C.J., dissenting) (asserting that the broad view of ostensible agency "make[s] a hospital the virtual insurer of its independent physicians"). The dissent in *Popovich* posited that the rule effectively extends liability to all who receive treatment and thus represents "either strict liability or a close relative of strict liability." *Popovich*, 946 NW2d at 901 (Anderson, J., dissenting).[6]

The rule, therefore, comes down to a policy preference for insuring plaintiffs against loss, not an honest application of estoppel principles. But it has long been noted that an implied agency "cannot arise from any mere argument as to the convenience, utility or propriety of its existence." Mechem, A Treatise on the Law of Agency (1889), § 85, p 62. Thus, hospitals will now be forced to incur liability for the acts of nonemployees unless they somehow dispel a patient's presumptive belief about agency, which as noted below will be a difficult task.

C

Because it hides behind its reading of *Grewe*, the majority avoids examining the policy grounds for its ruling. As a matter of pure policy, it is not at all clear that the majority's rule is appropriate or wise. One of the main reasons for imposing vicarious liability on employers is that they have the power to supervise their agents. That control is absent with independent contractors. "The principal does not supervise the details of the independent contractor's work and is therefore less likely to be able to make him work safely than to make an employee work safely." Posner, Economic Analysis of Law (7th

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[6] It is also worth pointing out that this extension of liability occurs for the provision of services that hospitals are mandated to provide. See 42 USC 1395dd.

ed), p 189; see generally *Laster v Henry Ford Health Sys*, 316 Mich App 726, 735 (2016) ("In an agency relationship, it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability. Conversely, it is this absence of control that explains why an employer is generally not liable for the actions of an independent contractor.") (citation omitted). It therefore is "anomalous" for hospitals to be required to reimburse patients for wrongs committed by physicians over whom the hospital had no control. Note, *The Ostensible Agency Doctrine: In Search of the Deep Pocket?*, 57 UMKC L Rev 917, 930 (1990).

In addition, the majority's near-universal extension of ostensible agency in the emergency-room setting appears unnecessary. Physicians staffing the hospital can be sued directly and will likely have sufficient resources or insurance to make the plaintiff whole. See Epstein & Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 J Legal Stud 625, 639 (2001); Comment, *Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio*, 56 U Cin L Rev 711, 736 (1987). The main effect of the rule adopted today, then, will likely relate to the allocation of risk between the doctor and the hospital rather than the plaintiff and defendants. If the hospital is forced to pay first, it might seek indemnity from the offending doctor, or it might be reluctant to sue its independent contractors. *Hospital Vicarious Liability*, 56 U Cin L Rev at 736-737. In any event, the plaintiff will have already been compensated, and the primary upshot will be this subsequent satellite litigation.[7]

Finally, it is worth noting the clear path the majority has embarked upon today and where it will lead. The majority has essentially made hospital liability in these cases the default rule unless a patient's belief in an agency relationship "is . . . dispelled in some manner by the hospital . . . ." Under this regime, hospitals are now encouraged to somehow communicate, before treatment, the employment status of hospital staff to patients seeking emergency care or their representatives. It is not clear whether delaying treatment to provide this information would even be medically ethical let alone efficacious in helping distressed patients decide whether to seek treatment at the hospital. Code of Ethics for Emergency Physicians, 70 Annals of Emergency Medicine 1, E7-E15 (July 1, 2017)

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[7] There may be more appropriate approaches to making the hospital pay. See generally *Baptist Mem Hosp Sys v Sampson*, 969 SW2d 945, 949 (Tex, 1998) ("A patient injured by a physician's malpractice is not without a remedy. The injured patient . . . may retain a direct cause of action against the hospital if the hospital was negligent in the performance of a duty owed directly to the patient."). Some courts have recognized a cause of action against a hospital "for its own negligence in selecting and retaining nonemployee physicians for staff privileges or as independent contractors . . . ." *Hospital Vicarious Liability*, 56 U Cin L Rev at 712; see also Vernia, *Tort Claim for Negligent Credentialing of Physician*, 98 ALR 5th 533 (discussing caselaw addressing "the tort of negligent credentialing of, or the negligent granting of staff privileges to, independent physicians").

("Emergency physicians shall communicate truthfully with patients and secure their informed consent for treatment, unless the urgency of the patient's condition demands an immediate response or another established exception to obtaining informed consent applies.").[8]

In any event, it seems likely that hospitals' best efforts to educate their patients will come to naught, legally speaking. As one commentator observed, other states with similar rules "have continually disregarded hospitals' attempts to educate patients through the use of admission forms that indicate that treating physicians are not employees of the institution." *Hospital Liability for the Right Reasons*, 42 Seton Hall L Rev at 1356-1357. Although these actions, like notices on admission forms, should theoretically suffice, "courts have often found hospital notice to be artificial and therefore insufficient to immunize the institution from the actions of its physicians." *Id*. at 1357; see also *id*. ("Modern judicial treatment of this 'notice' issue is reflective of the judiciary's reaction to societal expectations compelling hospital accountability."). One wonders whether such notices will meet a similar fate in our state.

III

Under the guise of simply interpreting *Grewe*, the majority today overrules decades of Court of Appeals precedent and creates a new rule that promises to vastly expand hospital liability. I would not disturb the law in this manner. Instead, I would affirm the Court of Appeals' articulation of the ostensible-agency rule—which we tacitly endorsed in *Reeves*—as requiring the hospital to engage in some act or neglect beyond simply operating an emergency room.

Applying the appropriate test, the Court of Appeals reached the proper result. In the Court of Appeals, it appears that plaintiff based her case on the physician's (Dr. Lonappan's) lab coat and Dr. Lonappan's testimony on how she greeted patients. In this Court, she focuses more on the hospital's conduct in being open to the public for the provision of healthcare.

As an initial matter, I agree with the Court of Appeals' treatment of the specific argument before it. The lab coat did not just bear defendant hospital's name but also that of Dr. Lonappan's employer, Hospital Consultants. Dr. Lonappan testified that she was

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[8] Available at <https://www.annemergmed.com/article/S0196-0644(17)30328-1/fulltext> (accessed November 17, 2022) [https://perma.cc/7YD9-8ARE].

wearing her credentials that indicated her connections with defendant and Hospital Consultants.[9]

With regard to plaintiff's argument that the relevant conduct here is simply operating a hospital for the public, I would reject this argument for the reasons above. There is no indication that defendant told anything to plaintiff specifically that would have led her to reasonably believe an agency relationship existed. There is no indication that defendant knew that plaintiff was operating under such a belief and yet failed to clarify the true state of affairs. And plaintiff has presented no evidence that defendant advertised itself as employing the doctors who provide care.[10] Plaintiff testified that she could not even recall Dr. Lonappan—it is difficult to see how she had any reasonable belief about Dr. Lonappan's employment relations with defendant.[11]

IV

For these reasons, I believe the Court of Appeals reached the correct result and I

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[9] And further, I question whether the evidence of the lab coat and Dr. Lonappan's testimony is even very relevant under a liberal reading of *Grewe*, which said that "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*, 404 Mich at 251. What plaintiff might have seen on Dr. Lonappan's lab coat and what Dr. Lonappan might have said to plaintiff would not bear upon her expectations when she arrived at the hospital on the previous day. As noted above, Dr. Lonappan did not see plaintiff until the day after her admission.

[10] Finally, it is noteworthy that plaintiff *works* for the Beaumont Hospital system as a nurse. At the time of events here, she had been in her current position for 17 years and at Beaumont for 30. Despite her testimony to the contrary, it is hard to imagine that a reasonable person in these circumstances would not know that physicians at hospitals were often independent contractors.

[11] Even under the majority's standard, the Court of Appeals on remand will likely need to determine whether there was a preexisting relationship between plaintiff and Dr. Lonappan. In this regard, the Court on remand will need to consider whether such a relationship could be said to exist here—Dr. Lonappan was not assigned freely by defendant hospital, she was assigned pursuant to the direction given by plaintiff's preexisting physician. In other words, plaintiff's care at the emergency room was arranged or directed by her preexisting physician. This arguably could suffice to preclude liability under the majority's new standard.

would affirm its holding.[12] In reversing the decision below, the majority today has upended yet another area of settled law. I therefore dissent.

CLEMENT, C.J., and ZAHRA, J., join the statement of VIVIANO, J.

[12] Because of this conclusion, I would not address defendant's alternative argument that reliance on the hospital's act or omission is required and plaintiff here has failed to demonstrate it. This issue might arise on remand to the Court of Appeals, which should consider this Court's pre-*Grewe* caselaw discussed above to determine whether reliance is required. This Court has stated, in *David Stott Flour Mills v Saginaw Co Farm Bureau*, 237 Mich 657 (1927), that the person relying on the apparent agency relationship must do so " 'in good faith and in the exercise of reasonable prudence.' " *Id.* at 662 (citation omitted). This requirement proved determinative to the issue, as we cited it and the relevant evidence to conclude that "plaintiff was not entitled to a peremptory instruction that defendant was estopped from denying the authority of [the putative agent] to bind it." *Id.* In *Grewe* itself, one of the three requirements is that " 'the third person [i.e., the patient] relying on the agent's apparent authority must not be guilty of negligence.' " *Grewe*, 404 Mich at 253 (citation omitted).

STATE OF MICHIGAN

COURT OF APPEALS

MARY ANNE MARKEL,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee,

and

HOSPITAL CONSULTANTS, PC, LINET LONAPPAN, M.D., and IOANA MORARIU,

Defendants.

UNPUBLISHED
April 22, 2021

No. 350655
Oakland Circuit Court
LC No. 2018-164979-NH

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as on leave granted[1] the trial court's order granting in part, and denying in part, William Beaumont Hospital's (Beaumont) motion for summary disposition. We affirm in part and reverse in part.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In early October 2015, plaintiff underwent an endometrial ablation and was discharged the same day. A week later, on October 9, 2015, plaintiff went to Beaumont's emergency department

[1] *Markel v William Beaumont Hosp*, 505 Mich 961 (2020).

complaining of numbness in her feet, back pain, and an inability to urinate. After a blood count, CT scan, and MRI, it was determined plaintiff had degenerative disc disease in her lumbar spine, with several disc extrusions and protrusions, and a urinalysis was conducted. On October 10, 2015, plaintiff was transferred to Beaumont's observation unit and a physician's assistant, Janay Warner, ordered another urinalysis and a urine culture study. Later that afternoon, plaintiff was admitted to the hospital and seen by defendant, Dr. Linet Lonappan. Dr. Lonappan, a board-certified internist and hospitalist, was employed by defendant, Hospital Consultants, PC. Hospital Consultants had an agreement with plaintiff's physician, Dr. John Bonema, to provide treatment for his patients that presented to Beaumont. Dr. Lonappan completed a history of plaintiff, performed a physical examination, and was aware a urine culture study and urinalysis had been ordered.

On the morning of October 11, 2015, plaintiff, whose fever spiked the night before but had returned to normal since, spoke with a pain-medicine physician, Dr. Daniel Sapeika, regarding her back pain. Dr. Sapeika noted plaintiff's desire to be discharged and recommended that, if she were discharged that day, she was to receive an epidural on October 12, 2015, on an outpatient basis. On the afternoon of October 11, 2015, Dr. Lonappan discharged plaintiff from the hospital and instructed her to follow up with neurosurgery, internal medicine, and pain medicine. Approximately three hours later, at 5:47 p.m., a preliminary result from plaintiff's urine culture tested positive for streptococcus agalactiae. Dr. Lonappan testified that although she was aware of the result of plaintiff's urine culture study, she did not believe the standard of care required her to contact plaintiff with the results, nor that the results were relevant to plaintiff's care. On October 12, 2015, the final report for the urine culture study was released and showed plaintiff was positive for Group B Streptococcus. On October 13, 2015, plaintiff returned to Beaumont's emergency department complaining of pain in both knees and pain in multiple joints. Plaintiff was provided intravenous antibiotics, and had surgical drainage of an epidural abscess and revision of her knee replacements. Plaintiff remained admitted to Beaumont until November 22, 2015.

Plaintiff filed a complaint alleging, relevant here, that Dr. Lonappan was negligent and Beaumont was vicariously liable for Dr. Lonappan's negligent acts. Plaintiff alleged Dr. Lonappan was an "actual agent[], apparent agent[], ostensible agent[], servant and/or employee[] of William Beaumont Hospital" and, as a result, Beaumont was "vicariously liable for the negligent acts and/or omissions" of Dr. Lonappan. Beaumont moved for summary disposition under MCR 2.116(C)(10), asserting, in relevant part, that it was not vicariously liable for the allegations against Dr. Lonappan under either an ostensible-agency theory or an actual agency theory. Beaumont argued that it was undisputed that Dr. Lonappan was employed by Hospital Consultants but never employed by Beaumont. Beaumont further asserted that Dr. Lonappan became involved in plaintiff's treatment through an agreement between Hospital Consultants and Dr. Bonema, and asserted that Beaumont did not make any representations to plaintiff to "lead her to believe that an agency existed between the hospital" and Dr. Lonappan. Beaumont noted that, as a result, and on the basis of existing caselaw, it was not vicariously liable for the allegations against Dr. Lonappan and was entitled to summary disposition under MCR 2.116(C)(10).

Plaintiff responded, arguing the existence of an agency relationship was a question of fact for the jury. Plaintiff also argued that, under *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240; 273 NW2d 429 (1978), and its progeny, Dr. Lonappan was the ostensible agent of Beaumont. Plaintiff, pointing to Dr. Lonappan's deposition testimony, asserted she had a reasonable belief that Dr.

Lonappan was acting on Beaumont's behalf. Plaintiff noted that Dr. Lonappan wore a white laboratory coat with credentials from Beaumont as she provided care and treatment to plaintiff, and that Dr. Lonappan introduced herself to patients by stating her name and indicating she was assigned to their care by Beaumont. Further, plaintiff asserted that Dr. Lonappan "made no statements" and "took [no] affirmative action to indicate to [plaintiff] that she was not an employ[ee] of the hospital."

In reply, Beaumont asserted that plaintiff failed to present evidence establishing that Beaumont "made any representation to lead [plaintiff] to reasonably believe that an agency existed between the hospital and" Dr. Lonappan. Quoting this Court's decision in *VanStelle v Macaskill*, 255 Mich App 1; 662 NW2d 41 (2003), Beaumont noted that an agency relationship did not arise simply by virtue of plaintiff going to a hospital for medical care and receiving treatment. Rather, there had to be an action or representation by the medical professional to lead plaintiff to reasonably believe an agency relationship existed. Moreover, Beaumont argued that statements in plaintiff's affidavit were directly contradicted by her deposition testimony, and that she was improperly trying to create a factual issue through her affidavit.

Following a hearing on Beaumont's motion for summary disposition, the trial court concluded Dr. Lonappan was not an actual agent of Beaumont, noting that once Beaumont assigned Dr. Lonappan a patient, Dr. Lonappan was responsible for examining the patient, coming up with a plan for that patient's diagnosis and treatment, and ultimately deciding whether to discharge the patient. The trial court found there was no evidence suggesting "anyone other than Dr. Lonappan had the final say concerning how [p]laintiff (or any other patient) would be treated." Thus, the trial court agreed that summary disposition of plaintiff's claim for vicarious liability against Beaumont was proper because "the undisputed evidence establishe[d] that Dr. Lonappan was not an actual employee or agent of the hospital."

The trial court also agreed with Beaumont that an ostensible agency did not exist between Beaumont and Dr. Lonappan, and, as a result, summary disposition of plaintiff's vicarious-liability claim was also proper on that basis. The trial court found that plaintiff only recalled seeing a "pain doctor" during her time at Beaumont from October 9, 2015 to October 11, 2015, and plaintiff "essentially testified she had no recollection of Dr. Lonappan." The trial court concluded that, "[w]ithout any recollection of Dr. Lonappan, there [was] nothing to support [p]laintiff's claim that she harbored a reasonable belief that Dr. Lonappan was acting as a hospital employee." Moreover, the trial court concluded it could not consider plaintiff's affidavit because it "conflict[ed] with her previous deposition testimony." The trial court also found that while Dr. Lonappan testified she typically informed patients that Beaumont assigned her to their care, there was no indication Beaumont "encouraged Dr. Lonappan to say this or that it acquiesced in the use of this vernacular." The trial court recognized that Dr. Lonappan's laboratory coat indicated an affiliation with Beaumont, potentially supporting a conclusion Beaumont encouraged a belief that Dr. Lonappan was its employee or agent. However, the trial court noted that Dr. Lonappan's laboratory coat also reflected her affiliation with Hospital Consultants. Additionally, the trial court found the affiliations printed on the laboratory coat "immaterial given that Plaintiff does not even recall having seen it."

Plaintiff moved for reconsideration, which was denied. Plaintiff then applied for leave to appeal the trial court's order. This Court denied plaintiff's application for leave to appeal. *Markel*

v William Beaumont Hosp, unpublished order of the Court of Appeals, entered November 6, 2019 (Docket No. 350655). Subsequently, plaintiff applied for leave to appeal in our Supreme Court, which remanded the matter to this Court for consideration as on leave granted. *Markel v William Beaumont Hosp*, 505 Mich 961 (2020).

II. OSTENSIBLE AGENCY

Plaintiff first argues that the trial court erred in concluding Dr. Lonappan was not an ostensible agent of Beaumont and, therefore, wrongly granted summary disposition in Beaumont's favor. We disagree.

This Court reviews a trial court's decision whether to grant or deny a motion for summary disposition de novo. *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 579; 909 NW2d 533 (2017), remanded on other grounds by 503 Mich 917 (2018).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations and quotation marks omitted).]

"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." *Grewe*, 404 Mich at 250. However, a hospital can be "be vicariously liable for the malpractice of actual or apparent agents." *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33; 480 NW2d 590 (1991).

> [T]he 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. [*Id*. at 33-34.]

"To put it another way, the defendant 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.

> Agency "does not arise merely because one goes to a hospital for medical care. There must be some action or representation by the principal (hospital) to lead the third person (plaintiff) to reasonably believe an agency in fact existed." *Sasseen v Community Hosp Foundation*, 159 Mich App 231, 240; 406 NW2d 193 (1986). Further, the 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. *Heins v Synkonis*, 58 Mich App 119, 124; 227 NW2d 247 (1975). [*VanStelle*, 255 Mich App at 11.]

In granting summary disposition to Beaumont on plaintiff's claim of vicarious liability under an ostensible-agency theory, the trial court found plaintiff could not have reasonably believed Dr. Lonappan acted on Beaumont's behalf when, according to her deposition testimony, plaintiff did not actually recall Dr. Lonappan at all. At her deposition, plaintiff testified that "[t]he only [doctor] I remember seeing was . . . they sent one of the pain doctors up about potentially doing an epidural but they couldn't do it because it was the weekend." The following exchange also took place during plaintiff's deposition:

> *Q.* So if there were different doctors from different specialties seeing you to look at what you had going on medically and to try to evaluate it from different perspectives, you may not recall their names but you do recall seeing different doctors, correct?
>
> *A.* I don't.
>
> * * *
>
> *Q.* There's a co-defendant in the case represented by Mr. Sinkoff, her name is Dr. Linet, L-i-n-e-t, Lonappan, L-o-n-a-p-p-a-n, that name is not familiar to you either then?
>
> *A.* Not at all.

Plaintiff's ostensible agency theory was premised an affidavit she attached to her response to Beaumont's motion for summary disposition. In her affidavit, plaintiff contradicted her deposition testimony by stating that she was treated by multiple medical care providers at Beaumont, including Dr. Lonappan. Plaintiff also stated that while Dr. Lonappan provided medical treatment to her, plaintiff "was at all times under the impression" that Dr. Lonappan was Beaumont's employee, and that Dr. Lonappan did not make any statements or take any affirmative actions to indicate to plaintiff that she was not employed by Beaumont. Plaintiff also stated that she "worked for Beaumont Hospital through the Royal Oak system for over thirty (30) years, and as of October 2015, [she] was unaware that the physicians were not employees of the hospital."

The trial court concluded that it could not consider plaintiff's affidavit because it conflicted with her deposition testimony. On appeal, plaintiff asserts the trial court's decision to not consider plaintiff's affidavit was erroneous. We disagree.

"It is well settled that a party may not create an issue of fact by submitting an affidavit that contradicts prior deposition testimony." *Atkinson v City of Detroit*, 222 Mich App 7, 11; 564 NW2d 473 (1997); see also *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006) ("[A] witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition."). In her deposition testimony, in response to whether she recalled seeing doctors other than the "pain doctor[]," plaintiff stated, "I don't." And, when explicitly asked whether Dr. Lonappan's name was familiar to her, plaintiff stated, "Not at all." However, in her affidavit, plaintiff states she was

"treated by multiple medical care providers at William Beaumont Hospital–Royal Oak, including Dr. Linet Lonappan." Plaintiff's affidavit improperly attempts to create an issue of fact that contradicts her previous deposition testimony and, as a result, the trial court did not err in declining to consider it. *Atkinson*, 222 Mich App at 11; *Casey*, 273 Mich App at 396.

Plaintiff alternatively argues that her belief that Dr. Lonappan was Beaumont's ostensible agent was reasonable because (1) Dr. Lonappan's laboratory coat indicated an affiliation with Beaumont and (2) Dr. Lonappan's testimony that she introduced herself to patients by stating her name and indicating Beaumont assigned her to the patient's care. We disagree.

Dr. Lonappan testified that, when working at Beaumont, she typically wore a white laboratory coat with credentials from both Beaumont Health Systems and Hospital Consultants. Dr. Lonappan indicated she did not "have a specific recollection" regarding whether she was wearing those credentials when she saw plaintiff in October 2015, but acknowledged that when she was in the hospital, she wore her laboratory coat and credential. Dr. Lonappan also testified that when she meets a patient for the first time, she introduces herself as Dr. Lonappan. The following exchange took place at Dr. Lonappan's deposition:

> *Q.* Okay. Do you say I'm Dr. Lonappan at Beaumont or I'm Dr. Lonappan at Hospital Consultants, P.C., or just I'm Dr. Lonappan?
>
> *A.* I'm Dr. Lonappan.
>
> *Q.* Okay. And you were assigned Ms. Markel's service by William Beaumont Hospital?
>
> *A.* Yes.
>
> *Q.* Okay. Just foundation.

With respect to the laboratory coat, as the trial court concluded and Dr. Lonappan testified, Dr. Lonappan's laboratory coat indicated not only an affiliation with Beaumont but also with Hospital Consultants. See *VanStelle*, 255 Mich App at 15 (indicating that where a doctor's business card references both a hospital and medical office, there is not necessarily an inference that the doctor is employed by the hospital). Next, although plaintiff repeatedly characterized Dr. Lonappan's testimony as being that Dr. Lonappan typically indicated to patients that she was assigned to their care by Beaumont, the actual testimony of Dr. Lonappan that plaintiff refers to does not state what plaintiff claims. As noted above, Dr. Lonappan was not asked whether she told patients that Beaumont assigned her to their care. Rather, Dr. Lonappan was asked, "[j]ust [for] foundation" purposes whether she was assigned specifically to plaintiff's service by Beaumont. Thus, plaintiff's interpretation of Dr. Lonappan's testimony is incorrect and does not demonstrate that she would inform her patients by whom, or which entity, she was assigned to their care.

Moreover, Dr. Lonappan actually testified that it was her "usual practice" to tell patients she was a "seeing [a patient] for your family doctor . . . ." And, as the trial court also concluded (after properly declining to consider plaintiff's affidavit), we agree that whether Dr. Lonappan's laboratory coat indicated she was affiliated with Beaumont, Hospital Consultants, or both, and

whether Dr. Lonappan told patients she was assigned to their care by Beaumont, was immaterial because the evidence demonstrates plaintiff did not recall seeing any doctors other than a "pain doctor[]" when she was in the hospital in October 2015. Because we agree that the evidence demonstrates plaintiff did not recall seeing Dr. Lonappan, the trial court did not err in concluding that plaintiff's belief that Dr. Lonappan was an ostensible agent of Beaumont was not reasonable. Accordingly, the trial court properly granted summary disposition of plaintiff's claim of vicarious liability against Beaumont on an ostensible-agency theory.

III. ACTUAL AGENCY

Plaintiff also argues that the trial court erred in granting summary disposition of her claim of vicarious liability against Beaumont under an actual-agency theory because, under MCR 2.116(G)(4), Beaumont's motion for summary disposition did not specifically identify that aspect of plaintiff's claim as being challenged and failed to support its motion with documentary evidence. We agree.

"Generally, an issue must be raised, addressed, and decided in the trial court to be preserved for review." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015). In her response to Beaumont's motion for summary disposition, plaintiff did not argue that Beaumont's motion did not adhere to the requirements of MCR 2.116(G)(4). Therefore, the issue is unpreserved for appellate review. This Court reviews unpreserved issues for plain error affecting a party's substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). " 'To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights.' " *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, citation and quotation marks omitted).

When filing a motion under MCR 2.116(C)(10), the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). MCR 2.116(G)(4) further states:

> When a motion under subrule (C)(10) is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [Emphasis added.]

"The level of specificity required under MCR 2.116(G)(4) is that which would place the nonmoving party on notice of the need to respond to the motion made under MCR 2.116(C)(10)." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Additionally, a motion for summary disposition under MCR 2.116(C)(10) must be supported with documentary evidence. *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). If the motion is not properly supported, "the nonmoving party has no duty to

respond and the trial court should deny the motion." *Barnard Mfg Co, Inc*, 285 Mich App at 370; MCR 2.116(G)(4). See also *Meyer*, 242 Mich App at 575 (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

MCR 2.116(I) states, in relevant part, that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs shows that there is no genuine issue of material fact, the court shall render judgment without delay." "Although a trial court may sua sponte grant summary disposition under MCR 2.116(I), the trial court may not do so in contravention of a party's due process rights." *Sandstone Creek Solar, LLC v Twp of Benton*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 352910); slip op at 14, citing *Lamkin v Hamburg Twp*, 318 Mich App 546, 550; 899 NW2d 408 (2017). "Due process requires that a party receive notice of the proceedings against it and a meaningful opportunity to be heard." *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014).

The trial court should not have granted summary disposition of plaintiff's claim of vicarious liability against Beaumont under an actual-agency theory. Beaumont claims it identified plaintiff's actual-agency theory in its motion for summary disposition by citing to this Court's decision in *Laster v Henry Ford Health Sys*, 316 Mich App 726, 739; 892 NW2d 442 (2016). But Beaumont's motion and brief in support cited *Laster* twice: once in the motion itself as part of a string of citations after asserting plaintiff failed to create a genuine issue of material fact to establish Beaumont was vicariously liable related to the allegations against Dr. Lonappan, and again for the proposition that, in Michigan, "liability will typically be imposed 'upon a defendant only for his or her own negligence, not the alleged tortious conduct of others.' " Although *Laster* may, in part, address the control test for purposes of actual agency, Beaumont's motion for summary disposition presented no argument regarding this issue, contrary to its claim on appeal.

Although Beaumont's motion for summary disposition only addressed plaintiff's argument regarding vicarious liability under an ostensible-agency theory, the trial court summarized Beaumont's motion as asserting that the "undisputed evidence establishe[d] that Dr. Lonappan was not an actual employee or agent of the hospital." The trial court noted that a hospital will not be liable for the negligence of an independent-contractor physician, unless the hospital has assumed control over the physician. The trial court found that Dr. Lonappan was employed by Hospital Consultants, not Beaumont, but noted that Beaumont assigned patients to physicians who worked for Hospital Consultants. The trial court also noted Dr. Lonappan's testimony that, once Beaumont assigned her a patient, it was her job to formulate a plan for the patient's diagnosis and treatment, and was her decision whether to discharge patients. The trial court concluded that there was no evidence suggesting "anyone other than Dr. Lonappan had the final say concerning how Plaintiff (or any other patient) would be treated." Thus, the trial court found Dr. Lonappan was not Beaumont's actual agent.

The record does not demonstrate plaintiff was on notice that the trial court was prepared to consider the dismissal of her claim of vicarious liability under an actual-agency theory. Although the record contained some evidence regarding the extent of control Dr. Lonappan had over her treatment of patients in Beaumont, notably through her deposition testimony, none of that was provided in Beaumont's motion for summary disposition. The excerpts of Dr. Lonappan's deposition testimony provided by Beaumont dealt with background information regarding the

events concerning plaintiff's care and which entity employed her. It was not until plaintiff's response that a full transcript of Dr. Lonappan's deposition testimony was provided.

And, as noted, the arguments in Beaumont's motion related to the vicarious-liability claim focused on the ostensible-agency theory. Further, during those portions of argument related to plaintiff's vicarious-liability claim at the hearing on Beaumont's motion for summary disposition, the parties and trial court focused on facts and argument related to the ostensible-agency theory. Thus, while a trial court "may sua sponte grant summary disposition under MCR 2.116(I), the trial court may not do so in contravention of a party's due process rights." *Sandstone Creek Solar, LLC*, ___ Mich App at ___; slip op at 14. Because Beaumont's motion for summary disposition did not specifically indicate it was challenging plaintiff's actual-agency theory of vicarious liability, plaintiff was not put on notice of the need to respond. *Barnard Mfg Co, Inc*, 285 Mich App at 369. Further, because Beaumont did not support its motion with a complete copy of Dr. Lonappan's transcript, but, rather, portions of the transcript not relevant to the actual-agency theory, plaintiff had no duty to respond. *Id*. at 370. Because plaintiff was not put on notice that Beaumont's motion encompassed a challenge to her actual-agency theory, and was not provided an opportunity to address that issue given the lack of notice or any indication the trial court would address the issue, the trial court improperly granted summary disposition of plaintiff's vicarious-liability claim under an actual-agency theory. *Sandstone Creek Solar, LLC*, ___ Mich App at ___; slip op at 14.

IV. CONCLUSION

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Riordan

STATE OF MICHIGAN

COURT OF APPEALS

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Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

BECKERING, P.J. (*concurring*).

I concur in the result. I write separately to address the issue of ostensible agency. Were this Court not bound by the Michigan Supreme Court's order in *Reeves v Midmichigan Health*, 489 Mich 908; 769 NW2d 468 (Mem) (2011), I would conclude that the Supreme Court's detailed analysis of ostensible agency and its ruling in *Grewe v Mt Clemens Hosp*, 404 Mich 240; 273 NW2d 429 (1978), supports a reversal of the trial court's ruling in the present case. But for *Reeves*, I would hold that plaintiff, Mary Anne Markel, has established a question of fact for the jury with respect to whether defendant Linet Lonappan, M.D. was an ostensible agent of defendant William Beaumont Hospital under the circumstances presented.

In the wake of *Grewe*, our Court's rulings have lacked consistency with respect to ostensible agency, and some have added a greater obligation upon a plaintiff than the Supreme Court arguably intended in *Grewe*. In *Grewe*, after receiving an electric shock that caused him to suffer a dislocated shoulder, the plaintiff went to the defendant hospital, where he was admitted after being seen in the emergency room. *Id.* at 245-246, 255. After his admission, the plaintiff was treated by Dr. Gerald Hoffman, an internist. Dr. Hoffman's associate, Dr. Lewis Katzowitz,

an internist with staff privileges at the defendant hospital, also treated the plaintiff. Dr. Katzowitz unsuccessfully attempted to reduce the plaintiff's shoulder dislocation with efforts including placing his foot on the plaintiff's chest and pulling his arm, without first having viewed x-rays. *Id.* at 246. The plaintiff sued for medical negligence, contending that these attempts at reducing his shoulder dislocation resulted in a brachial plexus injury and a fracture of the greater tuberosity. *Id*. The matter eventually went to a second jury trial in which the jury found the defendant hospital negligent and awarded the plaintiff $120,000 in damages. *Id*. at 247. The defendant hospital argued that it could not be held liable for Dr. Katzowitz's negligence because Dr. Katzowitz was not its employee; he merely had staff privileges, and the hospital asserted that it had no control over his treatment of the plaintiff. *Id.* at 247, 250. The Supreme Court disagreed, concluding that a hospital could be held liable for the negligence of a doctor who was an independent contractor under certain conditions:

> 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 *Schagrin v Wilmington Medical Center, Inc*, 304 A2d 61 (Del Super Ct, 1973).
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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. 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. [*Id.* at 250-251.]

The Supreme Court further stated:

> The relationship between a given physician and a hospital may well be that of an independent contractor performing services for, but not subject to, the direct control of the hospital. However, that is not of critical importance to the patient who is the ultimate victim of that physician's malpractice. In *Howard v Park, supra*, the Court of Appeals quoted with approval from the opinion in *Stanhope v Los Angeles College of Chiropractic*, 54 Cal App 2d 141; 128 P2d 705 (1942). We too find the California Court's analysis of this area enlightening:
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> > " 'An agency is ostensible 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.' § 2300, Civ Code. In this connection it is urged by appellant that 'before a recovery can be had against a principal for the alleged acts of an ostensible agent, three things must be proved, *to wit*:' (quoting from *Hill v*

> *Citizens National Tr & Sav Bank*, 9 Cal 2d 172, 176; 69 P2d 853, 855 (1937)); (First) The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; (second) such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence. 1 Cal Jur 739; *Weintraub v. Weingart*, 98 Cal App 690; 277 P 752 [1929].' " [*Id.* at 252-253.[1]]

The Supreme Court concluded that there was nothing in the record that should have put the plaintiff on notice that Dr. Katzowitz was an independent contractor, as opposed to an employee, of the defendant hospital. *Id.* at 253. It explained that the plaintiff's testimony demonstrated he went to the defendant hospital for treatment and expected to be treated by the hospital. There was no evidence that he had any preexisting patient-physician relationship with any doctor who treated him. *Id.* at 253-254. It also explained that the plaintiff was treated by Dr. Hoffman and Dr. Katzowitz because the emergency room doctor had referred him to Dr. Hoffman. *Id.* at 254-255. The Supreme Court concluded that it was "abundantly clear on the strength of this record that the plaintiff looked to the defendant hospital for his treatment and was treated by medical personnel who were ostensible agents of defendant hospital." *Id.* at 255.

One of the leading cases on ostensible agency from this Court is *Chapa v St Mary's Hosp*, 192 Mich App 29; 480 NW2d 590 (1991). In *Chapa*, after the plaintiff took a fall and was rendered unconscious, he was admitted to the defendant hospital through its emergency room. He was treated by the on-call neurologist. *Id.* at 30-31. The next day, the plaintiff's daughter called Dr. Thepveera, the plaintiff's long-time family doctor, who then took over his treatment. *Id.* at 31. The plaintiff alleged that Dr. Thepveera and Dr. Penput, who treated the plaintiff at Dr. Thepveera's request when he was out of town, were negligent. *Id.* At issue was whether Dr. Thepveera and Dr. Penput were ostensible agents of the defendant hospital. *Id.* The plaintiff argued that, based on *Grewe* and what the Supreme Court stated was the "critical test," the relevant inquiry was whether the plaintiff looked to the defendant hospital for treatment at the time of his admission. *Id.* at 32. This Court rejected the plaintiff's framing of the test. *Id.* It explained:

> It is obvious that *Grewe* so framed the "critical question" because of the facts of that case, which differ substantially from those herein. In *Grewe*, the plaintiff, who suffered a dislocated shoulder at work, was admitted on an emergency basis and immediately was (mis)treated by two hospital physicians, apparently on call, with whom he had no prior doctor-patient relationship. It was that treatment that gave rise to the cause of action for malpractice. In this case, [the plaintiff] was treated by a hospital doctor the day he was admitted. There was a question of fact whether [the plaintiff's] family instigated the replacement of defendant's personnel with the

[1] In *Stanhope*, the court concluded that the "appellant did nothing to put respondent on notice that the X-ray laboratory was not an integral part of appellant institution, and it cannot seriously be contended that respondent, when he was being carried from room to room suffering excruciating pain, should have inquired whether the individual doctors who examined him are employees of the college or were independent contractors." *Stanhope*, 54 Cal App 2d at 146.

> family doctor, but it was clear that the family doctor did take over on the day after [the plaintiff's] admission. And it is undisputed that the acts of alleged malpractice began five days after admission. . . .
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> The essence of *Grewe* is that a hospital may be vicariously liable for the malpractice of actual or apparent agents. Nothing in *Grewe* indicates that a hospital is liable for the malpractice 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. Such a holding would not only be illogical, but also would not comport with fundamental agency principles noted in *Grewe* and subsequent cases. Those principles have been distilled into the following three elements that 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. *Grewe*, *supra*, pp 252-253; *Strach v St John Hosp Corp*, 160 Mich App 251, 261; 408 NW2d 441 (1987).
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> Simply put, defendant, as putative principal, must have done something that would create in [the plaintiff's] mind the *reasonable* belief that Drs. Thepveera and Penput were acting on behalf of defendant. *Grewe, supra* . . . . If, as defendant contended below, [the plaintiff's] family arranged for Dr. Thepveera to replace Dr. Schanz, then the question becomes whether it was reasonable for [the plaintiff] to continue to believe that he was being treated by agents of defendant hospital. The reasonableness of the patient's belief in light of the representations and actions of the hospital is the "key test" embodied in *Grewe.* [*Id.* at 32-34.]

In the present case, William Beaumont Hospital argues that Markel cannot show she had a reasonable belief that defendant Dr. Lonappan was acting on behalf of William Beaumont Hospital, and she cannot show that any such belief was generated by it. It relies on the rule that "[a]gency does not arise merely because one goes to a hospital for medical care. There must be some action or representation by the principal (hospital) to lead the third person (plaintiff) to reasonably believe an agency in fact existed." *VanStelle v Macaskill*, 255 Mich App 1, 11; 662 NW2d 41 (2003) (citation and internal quotation marks omitted).

I would submit that, on the basis of *Grewe*, there is a genuine issue of material fact whether Markel had a reasonable belief that Dr. Lonappan was acting on behalf of William Beaumont Hospital when Markel went to William Beaumont Hospital seeking treatment, William Beaumont Hospital assigned Dr. Lonappan to treat Markel, and Dr. Lonappan assumed Markel's in-hospital care. William Beaumont Hospital has produced no document showing that Markel was advised that Dr. Lonappan was not, in fact, its agent.[2] According to *Grewe*, the critical question is whether

[2] Evidence indicated that Dr. Lonappan wore a lab coat with the William Beaumont Hospital insignia, as well as that of Hospital Consultants, P.C., but Dr. Lonappan also testified that she did

Markel, at the time of her presentation to the hospital, was looking to William Beaumont Hospital for treatment of her physical ailments or merely viewed the hospital as the situs where her physician would treat her for her problems, *Grewe*, 404 Mich at 251. In this case, Markel attested to the fact that she was looking to the hospital for her care; she was not viewing it as the situs where her physician would treat her for her problems. And line with *Chapa*, Markel's affidavit makes clear that her expectations did not change while at the hospital; in other words, she made no arrangements to obtain care from her own doctor at any point during her stay. Contrary to the conclusion of my colleagues, I do not deem Markel's statements in her affidavit to contradict her deposition testimony. Simply because she testified at her deposition that she did not remember meeting Dr. Lonappan does not mean should could not have had the reasonable expectation that all medical care providers who were assigned to and attended to her while she was at William Beaumont Hospital were agents of the hospital.[3] Moreover, she did not know Dr. Lonappan prior to her admission to the hospital.

The evidence establishes that Markel went to the William Beaumont Hospital's emergency department because she was experiencing numbness in her feet, back pain, and an inability to urinate a week after an endometrial ablation. Following the results of a blood test, she was admitted to the hospital for additional testing and observation. The hospital provided her with a neurological consult. She was observed by a physician's assistant. She was transferred from the observation unit and admitted to the hospital. The hospital assigned Dr. Lonappan, a board-certified internist and *hospitalist*,[4] to Markel's care. Dr. Lonappan completed a history and performed a physical examination. Dr. Lonappan agreed at her deposition that she was responsible for knowing which studies had been previously ordered for Markel with results pending, she was the doctor responsible for having discharged Markel, and she was the doctor responsible for following up regarding the results of the tests. Importantly, a urine culture showed that Markel was positive for Group B Streptococcus, and Dr. Lonappan did not follow up with Markel. Although Markel did not remember Dr. Lonappan, she did not choose Dr. Lonappan as her doctor. Markel went to the hospital for care and treatment, and the hospital assigned Dr. Lonappan to her care.[5] These facts do not suggest that Markel merely viewed William Beaumont Hospital as the situs where her physician would treat her problems. *Id.* When the benefit of reasonable doubt is

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not tell patients she was serving as an independent contractor while treating her assigned hospital patients. In any event, Markel does not recall meeting Dr. Lonappan because she was in so much pain.

[3] Neither she nor anyone in her family made arrangements with her doctor to meet Dr. Lonappan or any other doctor at the hospital.

[4] In *Grewe*, the Supreme Court agreed with a New York court's rationale that hospitals should shoulder the responsibilities of respondeat superior, just like every other employer, "where medical personnel such as physicians and nurses, though independent contractors, were performing medical services ordinarily performed by the hospital." *Id*. at 252.

[5] While Dr. Lonappan testified that William Beaumont Hospital assigned her to Markel's hospital care based on a contractual arrangement between her professional corporation and Markel's primary physician for when one of his patients presented to the hospital, there is no dispute that this was not made known to Markel.

given to plaintiff, I would conclude based on *Grewe* that reasonable minds could differ as to whether Dr. Lonappan was an ostensible agent of William Beaumont Hospital. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). See *Setterington v Pontiac Hosp*, 223 Mich App 594, 603; 568 NW2d 93 (1997) (stating that the evidence supported the jury's finding of an agency between the radiologists and the defendant hospital when there was no patient-physician relationship between the plaintiff and the radiologists outside the hospital setting, the radiologists just happened to be on duty when the plaintiff arrived at the defendant hospital, and the defendant hospital held the radiology department out as part of the hospital); *Johnson v Kolachalam*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2016 (Docket No. 326615), pp 12-13 (stating that given the plaintiff's pain and distress when she arrived at the hospital, she did not unreasonably fail to ask whether the individual doctor who performed her gallbladder surgery was an employee of the hospital or an independent contractor, and she reasonably could have believed that the surgeon was an employee of the hospital); *Crawford v William Beaumont Hosp*, unpublished per curiam opinion of the Court of Appeals, issued October 2, 2012 (Docket No. 298914), pp 7-8 (stating that there were questions of fact whether an ostensible agency existed when the plaintiff went to the emergency room, he was placed under the care of one of the doctors after his diagnosis of atrial fibrillation, and no one broached the topic of the doctors' status as independent contractors with the defendant hospital with the plaintiff).

This Court's decision in *Chapa* does not change my conclusion that there is a genuine issue of material fact whether Dr. Lonappan was an ostensible agent of William Beaumont Hospital. The Supreme Court in *Grewe*, 404 Mich at 251, stated that the "critical question" was whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments. This Court in *Chapa*, 192 Mich App at 32, 34, stated that the Supreme Court framed the "critical question" in this manner because of the facts before the Supreme Court, which were substantially different from the facts before it, and this Court then reframed the critical question for those substantially different facts. But the facts in the present case are not substantially different from those in *Grewe*—in both cases, the plaintiff went to the hospital seeking emergency care and, while at the hospital, received care by a physician with whom there was no preexisting patient-physician relationship. Accordingly, there is no need to reframe the critical question for the present case. Additionally, although the Supreme Court in *Grewe*, 404 Mich at 252, referenced the three factors for ostensible agency, it did not engage in an analysis of each of those factors before determining that the jury's verdict was supported by the evidence. See *id.* at 253-255. Based on *Grewe*, I would conclude that the trial court erred in granting William Beaumont Hospital's motion for summary disposition with respect to the ostensible agency of Dr. Lonappan.

But, as I mentioned at the outset, I am bound by the Supreme Court's order in *Reeves*.[6] In *Reeves*, the Supreme Court reversed this Court's conclusion that a question of fact existed with respect to ostensible agency for reasons set forth in the Court of Appeals' dissenting opinion. *Reeves*, 489 Mich at 908. The dissenting opinion noted that the "[n]either the admission consent form nor the discharge instructions discuss the relationship between defendant and the physicians providing treatment in its emergency room," the doctor who had been assigned to the patient's[7]

[6] I believe other Court of Appeals opinions are factually distinguishable.

[7] The patient was plaintiff's husband. He suffered a catastrophic stroke and remained in a "vegetative state" after being discharged from the emergency room at Gratiot Medical Center

case . . . . "never discussed his employment status with [the patient], . . . and there is no evidence in the record that defendant did or failed to do anything that would create a reasonable belief that [the doctor] was acting on its behalf." *Reeves v Midmichigan Health*, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2010 (Docket No. 291855), p 5 (HOEKSTRA, J., dissenting). In other words, silence on the part of the hospital and reasonable assumptions on the part of the plaintiff do not provide the plaintiff with a reasonable question of fact when it comes to ostensible agency, the hospital has to do or fail to do something more than that to create a reasonable belief.[8] Because Markel has failed to produce evidence that William Beaumont Hospital did or failed to do anything that would create a reasonable belief that Dr. Lonappan was acting on its behalf, I must concur that summary disposition was proper here.

I implore our Supreme Court to revisit and clarify the proper legal framework for ostensible agency. Too many patients select and seek care from a hospital based on its highly branded, "premier" reputation, and they rightly expect that they will be in the good hands of the hospital's carefully curated, premier medical employees, only to learn later that they merely entered a brick building filled with independent contractors.[9] And when a mistake is made, they learn that the hospital bears no legal responsibility for care that fails to meet expectations, let alone the bare minimum standard of care.

/s/ Jane M. Beckering

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where the defendant doctor had treated him. *Reeves v Midmichigan Health*, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2010 (Docket No. 291855), p 1.

[8] Under this framing of the *Grewe* test, not even the plaintiff in *Grewe* would pass the test.

[9] If a hospital chooses to make clear through consent forms that doctors are independent contractors, those forms should be sufficiently clear so that no innocent assumptions remain.