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).