STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHNATHAN MYERS,

Plaintiff, **CASE NO. 20-114261-NH**

-vs- **JUDGE JOSEPH J. FARAH**

BOARD OF HOSPITAL MANAGERS, et al, **OPINION AND ORDER REGARDING MOTION FOR SUMMARY DISPOSITION BASED ON VICARIOUS LIABILITY**

Defendant.

TRUE COPY

At a session of said Court held in the City of Flint, County of Genesee, State of Michigan on the 3rd day of November, 2022.

PRESENT: HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE

INTRODUCTION

Plaintiff Johnathan Myers (Myers) has sued, among others, Hurley Hospital (Hurley) and Dr. Laszlo Hoesel, M.D. (Dr. Hoesel) for malpractice for amputation of his right hand. Myers originally entered the hospital through the emergency room for treatment for a gunshot wound to the abdomen. Eventually, however, the treatment migrated from the wound to the abdomen to addressing unexplained bleeding with subsequent focus on Myers' hand.

BACKGROUND

Significant factual discussion about the injuries and treatment is not necessary on this segment of Defendants' three-pronged attack on the claims through its summary disposition motion. However, the record facts amongst Myers, Dr. Hoesel, and Hurley will be more fully discussed below as those facts coalesce around the legal principles concerning vicarious liability involving a treating doctor and the hospital where treatment is rendered.

STANDARD OF REVIEW

A motion for summary disposition tests the factual support for a claim. Pursuant to MCR 2.116 (C)(10), a motion for summary disposition may be granted if, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

Because a motion under MCR 2.116 (C)(10) tests the factual sufficiency of the claim, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. All of the proffered evidence is viewed in the light most favorable to the nonmoving party. Where this 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 (1999) (citing MCR 2.116 (C)(10), (G)(4); *Quinto v Cross & Peters Co,* 451 Mich. 358 (1996)). In evaluating a motion for summary disposition under (C)(10), the Court must take caution to limit its task to the identification and articulation of a genuine issue of material fact and not decide the question identified and articulated.

APPLICABLE AUTHORITY

The Court is guided by *Grewe v Mt. Clemons General Hospital,* 404 Mich 240 (1978) and *Chapa v St. Mary's Hospital of Saginaw,* 192 Mich App 29 (1991). These cases, when read together, delineate the elements required to be shown to establish a claim of ostensible agency[1] between doctor and hospital. In tandem, *Grewe* and *Chapa* instructed that, simply because a physician treats a patient at a hospital, that does not make the hospital vicariously liable, but a more searching inquiry is needed, as stated:

> Generally speaking, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients. However, if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found.
>
> In our view, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems. A relevant factor in this determination involves resolution of the question of whether the hospital provided the plaintiff with [the physician] or whether the plaintiff and [the physician] had a patient-physician relationship independent of the hospital setting. *Grewe, pp.* 250-51. (Internal citations omitted).
>
> 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

[1] Myers does not dispute no actual agency is involved here.

> 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.
>
> [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." *Chapa,* pp. 33-34.

SALIENT FACTS ON THE ELEMENTS

Myers presented to Hurley on April 25, 2019 with a gunshot wound to the abdomen. He was brought to Hurley by ambulance because it was the closest hospital. He soon became unconscious after arrival. No one had accompanied him other than EMS staff, nor did anyone arrive afterwards. Myers stayed unconscious for weeks. He had no prior relationship with Dr. Hoesel who treated him during his stay at Hurley.

ARGUMENTS AND ANALYSIS

Hurley maintains that Myers cannot make out any of the *Grewe/Chapa* elements stated above, much less all of them. These elements bespeak a focus, as they must, on each of the participants in the relevant scenario: (a) the patient, the agent, and the principle. Myers responds that, viewed in a light most favorable to the non-moving party, a genuine issue of material fact on the ostensible agency question. Myers points to the providing of Dr. Hoesel to treat Myers in its emergency room, Dr. Hoesel wearing a Hurley name tag, and advertising that the ER was part of Hurley.

Turning to the elements, the Court will not discuss element three because there is no claim of negligence on the part of Myers and the record reveals none as well. But the first two elements are squarely at odds.

Hurley contends that Myers being unconscious and unaware vitiates any claim under the first element that the person dealing with the agent must do so with a reasonable belief in the agent's authority in relation to the principal. This point is well taken. Myers came to Hurley dictated by the circumstances. Myers is oblivious to the "what and why" of his initial weeks at Hurley, including the treatment by Dr. Hoesel. Hurley buttresses its position by positing that element two, involving some act or neglect

by the principal evaporates – even if it did exist – because no record evidence indicates any awareness by Myers exists to form his reasonable belief.

As stated, Myers counters the principal (Hurley) held itself out as having an emergency room and by extension supplied emergency physicians. One of the physicians was badged with Hurley's name. Myers argues that the state of the law is not so cut and dry and could indeed be scheduled for a revamp.

The Court concludes Hurley's position is better taken. Under the current state of the law, *Grewe* and *Chapa* carry the day and Myers cannot establish the elements of ostensible agency. While indeed it may be the case that "A Change is Gonna Come,"[2] when the Supreme Court decides *Markel v Beauman Hospital, et al,* Supreme Court No. 163086, orally argued October 12, 2022 on the issue of the application of *Grewe*, at this juncture is compelled – after analysis – to sustain Hurley's position. Accordingly, Hurley's motion under 2.116(C)(10) is GRANTED, the Court finding no genuine issue of fact on ostensible agency.

IT IS SO ORDERED.

JOSEPH J. FARAH, Circuit Judge

Dated: 11/3/22

[2] Sam Cook, "A Change is Gonna Come," 1964