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STATE OF MICHIGAN

IN THE SUPREME COURT

MARY ANNE MARKEL,

Plaintiff-Appellant,

v.

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee,

and

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

Defendants.

Supreme Court No. 163086

Court of Appeals Case No. 350655

Oakland County Circuit Court
Case No. 18-164979-NH

Hon. Nanci Grant

DEFENDANT-APPELLEE WILLIAM BEAUMONT HOSPITAL'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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RECEIVED by MSC 3/7/2022 10:18:43 PM

TABLE OF CONTENTS

RECEIVED by MSC 3/7/2022 10:18:43 PM

RECEIVED by MSC 3/7/2022 10:18:43 PM

INDEX OF AUTHORITIES

Cases

RECEIVED by MSC 3/7/2022 10:18:43 PM

RECEIVED by MSC 3/7/2022 10:18:43 PM

Statutes

Other Authorities

Rules

RECEIVED by MSC 3/7/2022 10:18:43 PM

RECEIVED by MSC 3/7/2022 10:18:43 PM

STATEMENT OF QUESTION PRESENTED

Whether in granting summary disposition to Beaumont Hospital on Ms. Markel's ostensible agency claim, the Court of Appeals correctly applied this Court's decision in *Grewe v Mount Clemens General Hosp* and its progeny?

Plaintiff-Appellant says "no."

Defendant-Appellee says "yes."

RECEIVED by MSC 3/7/2022 10:18:43 PM

STATEMENT OF FACTS AND PROCEEDINGS

This is an action for medical malpractice. Plaintiff Mary Anne Markel alleges that Dr. Linet Lonappan did not properly treat her for infection at William Beaumont Hospital and that after Ms. Markel's discharge, Dr. Lonappan failed to tell her the results of a urine culture and prescribe antibiotics. Complaint [Apx 1b].[1] Ms. Markel seeks to hold Beaumont vicariously liable for Dr. Lonappan's alleged negligence under actual and ostensible agency theories. *Id*. at pp 20-21, ¶s 64-65 [Apx 20-21b]. This appeal relates to the ostensible agency issue.[2]

A. Underlying Allegations.

Ms. Markel alleges that on October 9, 2015, after having had outpatient surgery at Beaumont on October 2, she went to Beaumont's emergency center complaining of acute left-sided low back pain, radicular pain, and numbness in her feet. Complaint at 3, ¶s 10-11 [Apx 3b]; Markel Dep at 47-48 [Apx 35b].[3] Various tests were ordered, and Ms. Markel was also seen by her treating neurosurgeon, Dr. Ricky Olson. Complaint at 3-4, ¶s 10-11 [Apx 3b].[4] The next morning, Ms. Markel was transferred to the ER observation unit where Janay Warner, a physician's assistant, reviewed Ms. Markel's history and entered various orders including a repeat urinalysis and urine culture. Warner Dep at 40-49, 64, 71-75 [Apx at 111-114b, 117b, 119-120b].

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[1] The culture showed Strep B, a common bacterium that colonizes the perineal area. See Warner Dep at 69 [Apx 119b]

[2] As recited *infra*, the Trial Court granted summary disposition as to Ms. Markel's actual agency claim but that decision was reversed by the Court of Appeals, which concluded that Beaumont's summary disposition motion did not properly raise the issue.

[3] The October 2 surgery was a hysteroscopic endometrial polypectomy with dilatation and curettage, performed by Dr. Mark Dykowski to address endometrial hyperplasia, polyps, and pelvic pain. Beaumont Medical Records at 2428 [Apx 80b]; Markel Dep at 28 [Apx 30b].

[4] Years prior to her admission, Ms. Markel had two back laminectomy surgeries performed by Dr. Olson. Markel Dep at 33-34, 67-68 [Apx 32b].

RECEIVED by MSC 3/7/2022 10:18:43 PM

That afternoon, Ms. Markel was moved to the hospital floor, where she was seen by Dr. Lonappan, who is a hospitalist with a board certification in internal medicine. Lonappan Dep at 40, 53, 128, 130 [Apx at 141b, 145b, 163-164b]. Dr. Lonappan was aware that a urine culture and repeat urinalysis had been ordered. Lonappan Dep at 61-62, 130-131 [Apx 147b, 164b].[5]

During her hospital stay, Ms. Markel was treated by various physicians, including Dr. Lonappan's colleague, Dr. Mihai Muraru, a hospitalist employed by Hospital Consultants. Lonappan Dep at 31 [Apx 181b]; Muraru Dep at 13-14, 54, 58 [Apx 185b, 195-196b]. Because Dr. Muraru was the on-call hospitalist for Hospital Consultants, Dr. Muraru was contacted at 4 a.m. about an elevated temperature Ms. Markel was noted to have had at 8 p.m. the prior evening. Ms. Markel's temperature was normal at the time of the call. Dr. Muraru reviewed Ms. Markel's medical record, saw that she was stable, and concluded that direct interventions were not required. He asked the nurse to monitor Ms. Markel, check her vital signs, and call him with any updates. Muraru Dep at 14-15, 26-28, 50-52, 60-61 [Apx 185b, 188b, 194b, 196-197b].[6] Dr. Lonappan saw Ms. Markel later that morning. Based upon evaluations performed by Dr. Olson and Dr. Sapeika, a pain medicine specialist, as well as other test results, Dr. Lonappan arranged for Ms. Markel to be discharged with instructions for follow-up with her physicians. Beaumont Records at 2413 [Apx 86b].[7] Later that day (October 11), a preliminary report of the urine culture was issued. The final

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[5] Dr. Lonappan's testimony was based on what she documented in the medical records. She had no independent recollection of Ms. Markel. Lonappan Dep at 41 [Apx 142b].

[6] Thereafter, Ms. Markel's temperature readings were normal through the time of discharge. Muraru Dep at 64, 66 [Apx at 197-198b].

[7] The pain medicine physician, Dr. Daniel Sapeika, saw Ms. Markel on October 11 and diagnosed lumbar radicular pain. He noted that Ms. Markel wanted to be promptly discharged and recommended that if she was discharged later that day, an epidural be performed on an outpatient basis on October 12. Beaumont Records at 2443-2450 [Apx 90-97b].

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results were reported the following day (October 12), Lonappan Dep at 131-132 [Apx 164b], and were positive for Group B Streptococcus. *Id*.

Dr. Lonappan reviewed the final report on October 12. Lonappan Dep at 18 [Apx 164b]. She acknowledged her responsibility as the attending physician to follow up on test results even after Ms. Markel's discharge. Lonappan Dep at 105, 109, 116, 132-133 [Apx 158b, 159b, 160b, 164-165b]. However, Dr. Lonappan did not believe the standard of care required that she inform Ms. Markel of the report because the results were not relevant "to her care at that point." *Id*. at 19-20 [Apx 136b].

Ms. Markel returned to Beaumont on October 13 with complaints of bilateral knee pain and generalized pain in multiple joints at which point the urine culture results were noted. Intravenous antibiotics were administered. Ms. Markel alleges that she underwent bilateral revision of her knee arthroplasties, aspiration and arthrotomy of her right sternal clavicular joint, and various other procedures. Complaint, pp 5-6 [Apx 5-6b]. She remained in the hospital until November 2. *Id*. at 6 [Apx 6b].

B. Depositions.

Multiple depositions were taken during the course of discovery, including the depositions of Ms. Markel and Dr. Lonappan.

1. Markel Deposition.

Ms. Markel testified that she did not recall the physicians who provided treatment to her at Beaumont and did not recall Dr. Lonappan. As to the physicians generally, Ms. Markel testified:

> Q. Do you, as you sit here today, even know the names of any of the doctors who provided treatments to you?
>
> A. *I do not*.
>
> Q. Okay. Do you know Dr. Rick Olson though, I think you said you saw him in the emergency center?

RECEIVED by MSC 3/7/2022 10:18:43 PM

A. I did.

Q. Other than Dr. Olson, do you know the names of any other doctors who were involved in your medical care?

A. *No*, sir. [Markel Dep at 52, Apx 36b (emphasis added)]

* * *

Q. Do you recall Dr. Olson performing any type of examination on you at any point?

A. I don't.

Q. *So as you sit here today then, the treatment that you received from October 9, 2015 at roughly 5:00 p.m. up until you were discharged from the hospital on October the 11th, 2015 at approximately 2:33 p.m., other than Dr. Olson, you don't know the names of any doctors or medical professionals who were involved in your care, correct*?

A. That is *correct*. [*Id*. at 53-54, Apx 37b (emphasis added)]

* * *

Q. And there were various types of doctors from various specialties who saw you during that admission, you're aware of that, right?

A. The *only one I remember seeing was the – they sent one of the pain doctors up about potentially doing an epidural* but they couldn't do it because it was the weekend.

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*. [*Id*. at 55, Apx 37b (emphasis added)]

Ms. Markel was specifically asked if she recalled Dr. Lonappan and responded "not at all." She testified:

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*. [*Id*. at 56, Apx 37b (emphasis added)]

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* * *

Q. I think you've said *you don't have a clue who Dr. Lonappan is, correct*?

A. *I do not*. [*Id*. at 102, Apx 49b (emphasis added)]

Nor could Ms. Markel recall the other hospitalist employed by Hospital Consultants:

Q. Okay. There was a doctor here today, Dr. Ioana Morariu, M-o-r-a-r-i-u, *that name is not familiar to you at all, correct*?

A. *No, sir*.

Q. So that's correct?

A. Yeah. [*Id*. at 55, Apx 37b] (emphasis added)

However, Ms. Markel understood that Hospital Consultants cared for the patients of her primary care physician while admitted to the hospital. She testified:

Q. Okay. Do you know what Hospital Consultants is?

A. I do.

Q. What's your understanding with that?

A. *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*.

Q. And *do you know anybody in the group*?

A. *I don't*. [*Id*. at 102, Apx 49b (emphasis added)]

Ms. Markel did not recall any specific conversations with physicians, nurses, or physician assistants during her October 9-11 hospitalization other than "the emergency room when they talked about my back, they thought it was the back, not a kidney stone" and the "pain doctor." *Id*. at 102-03 [Apx 49b]

Q. *Nobody else*?

A. *No*. [*Id*. at 103, Apx 49b (emphasis added)]

RECEIVED by MSC 3/7/2022 10:18:43 PM

Ms. Markel also testified she did not know or recall the physicians who treated her in the emergency center. She testified:

> Q. Do you have an independent recollection of talking to doctors or medical professionals at Beaumont Royal Oak in the emergency center on October 9, 2015?
>
> A. I do not.
>
> Q. So do you know the name of any doctors or medical professionals who saw you in the emergency center on October 9, 2015?
>
> A. I do not. [Markel Dep at 51, Apx 36b]

To summarize, Ms. Markel unequivocally and repeatedly testified that aside from Dr. Olson, she did not know any of the doctors who treated her in the hospital and, other than the pain doctor, knew nothing about the care any particular doctor provided. She had no recollection ("not at all") of Dr. Lonappan.

2. Lonappan Deposition.

Beaumont does not employ Dr. Lonappan. Lonappan Dep at 128 [Apx 163b]. It is undisputed that Dr. Lonappan practices as a "hospitalist" in her capacity as an employee of Hospital Consultants, P.C. *Id.* Dr. Lonappan was working at Beaumont Hospital because she had been scheduled by Hospital Consultants to work at the hospital on those days. *Id*. Hospital Consultants is called upon to treat the patients of Troy Internal Medicine, P.C., the internal medicine group that employed Ms. Markel's internist, Dr. John Bonema, when they are admitted to the hospital. Lonappan Dep at 128-29 [Apx 163-164b]. See also Warner Dep at 76-77 [Apx 150-151b].

Dr. Lonappan has been employed by Hospital Consultants since 2011. Lonappan Dep at 7, 128 [Apx 133b, 163b] Because Ms. Markel was a patient of Dr. Bonema and Troy Internal Medicine, Dr. Lonappan was assigned to her care and treatment while in the hospital. Lonappan

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Dep at 111, 128-29 [Apx 159b, 163b]. Ms. Markel later testified about this arrangement. Although she did not know anyone affiliated with Hospital Consultants, she testified "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." Markel Dep at 102 [Apx 49b].

Dr. Lonappan does not remember coming to Ms. Markel's room on October 10 or meeting Ms. Markel. Lonappan Dep at 47-48. [Apx 143b] Dr. Lonappan typically wears a lab coat and credentials that identify her as a physician and also say Beaumont Health System and Hospital Consultants, P.C. *Id*. at 48-49 [Apx 143b-144b]. She does not recall whether she was wearing the credentials when she saw Ms. Markel on October 10. *Id.*

Dr. Lonappan was asked how she introduces herself to a patient:

> Q. … Do you introduce yourself when you typically meet a patient for the first time?
>
> A. Yes.
>
> Q. How do you introduce yourself?
>
> A. Dr. Lonappan.
>
> Q. Okay. Do you say I'm Dr. Lonappan at Beaumont on I'm Dr. Lonappan at Hospital Consultants, P.C. or just I'm Dr. Lonappan?
>
> A. I'm Dr. Lonappan. [*Id.* at 49-50, Apx 144b]

Dr. Lonappan was asked if she was assigned to Ms. Markel by Beaumont and responded "yes." *Id*. at 50 [Apx 144b]. However, she was later asked to describe the process of patient assignment in more detail and testified that the hospitalist is typically assigned by the on-call physician for Hospital Consultants.

> Q. Okay. By the way, if you know, how is it that you become involved in this patient's care, does – because obviously I'm sure there's patients that come to the ER and the ER doctor doesn't even call the hospitalist, right?
>
> A. Yes.

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Q. Okay. Is that a decision that you're involved in or is that the ER doctor's decision to call you or to put the patient on your service?

[objection omitted]

A. *So when Dr. Bonema's patients come to the hospital, if they need to be admitted to the hospital, then the ER physicians calls the on-call physician for our group and that physician decides which patient – which physician the patient would be admitted under*. [*Id*. at 111, Apx 159b (emphasis added)][8]

Upon further questioning by Ms. Markel's lawyer, Dr. Lonappan testified that she would typically tell patients she was seeing them because of the relationship with their family doctor. Dr. Lonappan testified:

Q. When you made contact with Ms. Markel, you didn't tell her that you were seeing her because of her relationship or Dr. Bonema's relationship with Troy Internal Medicine, would you?

A. *I would, that's my usual practice. When I say I'm Dr. Lonappan and then I would say I'm seeing you for your family doctor, I'm a hospitalist associated for Dr. Bonema*. [Lonappan Dep at 133, Apx 165b (emphasis added)]

Ms. Markel's attorney probed further on this subject:

Q. Okay. So that's not what you told me earlier?

A. You—no, that's—I said I would introduce myself as Dr. Lonappan, that's what you asked.

Q. Okay. And then I thought I asked would you say, you know, Beaumont Hospital or Hospital Consultants, P.C. and you said no and no?

A. Yeah, I said I usually don't bring up Hospital Consultants, P.C. because it doesn't matter to the patient. I do bring up that I'm seeing them for their family doctor.

Q. Okay. And do you tell them who you're employed by?

A. No.

[8] Ms. Markel's description of Dr. Lonappan's testimony on the assignment issue repeatedly disregards Dr. Lonappan's further explanation. See Pl Br at 1, 4, 24, 25, 32.

RECEIVED by MSC 3/7/2022 10:18:43 PM

Q, Okay, Do you tell them that you're employed by Troy Internal Medicine, for example?

A. No.

Q. You don't tell them you're employed by Beaumont, right?

A. No.

Q. You don't them you're employed by Hospital Consultants, P.C.?

A. No.

Q. Okay. *But you do tell them that you're seeing them in place of their PCP*?

A. *Correct*.

Q. *And would you mention Dr. Bonema by name*?

A. *Yes*. [Lonappan Dep at 133-34, Apx 165b (emphasis added)]

C. Summary Disposition Proceedings.

Beaumont thereafter moved for summary disposition, arguing that Ms. Markel's claim for vicarious liability was not cognizable because Dr. Lonappan was not employed by Beaumont and ostensible agency could not be established. Beaumont also moved for summary disposition as to Ms. Markel's direct liability claim. See Beaumont's Motion for Summary Disposition [Apx 214b]. As to ostensible agency, Beaumont argued in part that to establish vicarious liability based upon ostensible agency, Beaumont must have acted in some way to cause Ms. Markel *to have reasonably believed that Dr. Lonappan was Beaumont's agent*, but given Ms. Markel's failure to recall Dr. Lonappan, a reasonable belief could not be shown. *Id*.

In opposition to summary disposition, Ms. Markel submitted an affidavit that fully contradicted her deposition testimony. Plaintiff's Resp to SD Motion [Apx 282b]. In the affidavit, Ms. Markel purported to recall Dr. Lonappan, recited an "impression" Ms. Markel had while Dr. Lonappan was rendering care, and described statements and actions (or the absence thereof) attributed to Dr. Lonappan. More specifically:

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- Although Ms. Markel previously testified that she did not recall seeing different doctors from different specialties and did not know or recall Dr. Lonappan, her affidavit states "I was treated by multiple medical care providers at William Beaumont-Royal Oak, including Dr. Linet Lonappan." Affidavit at ¶3.

- Although Ms. Markel previously testified that Dr. Lonappan's name was not familiar to her ("not at all") and that she did not have a clue who Dr. Lonappan was, her affidavit states "while Dr. Lonappan provided medical treatment to me during my admission of October 9th, 2015, I was at all times under the impression that Dr. Linet Lonappan, as well as the other medical staff at Beaumont Hospital – Royal Oak, were employees of Beaumont Hospital – Royal Oak." Affidavit at ¶5.

- Although Ms. Markel previously testified that she did not recall any specific conversations with physicians, nurses, or physician assistants during her October 9-11 hospitalization other than "the emergency room when they talked about my back" and the "pain doctor," and had no clue who Dr. Lonappan was, the Affidavit states "at no time during my admission of October 9th, 2015 did Dr. Linet Lonappan make any statements or take any affirmative action to indicate to me that she was not employed by Beaumont Hospital – Royal Oak." Affidavit at ¶6.

Affidavit [Apx 355b]. Ms. Markel claimed 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." *Id*. Beaumont filed a reply in support of its motion arguing, *inter alia*, that Ms. Markel's affidavit improperly contradicted her deposition testimony and must not be considered. Beaumont SD Reply [Apx 396b].

At oral argument on Beaumont's motion, Ms. Markel's counsel confirmed that Ms. Markel does not remember seeing Dr. Lonappan. 7/31/2019 Hearing Tr at 8 [Apx at 408b]. The Trial Court queried how there could have been a reasonable belief held by Ms. Markel that an agency relationship existed between Beaumont and Dr. Lonappan when Ms. Markel could not recall Dr. Lonappan or anything about the care she received. Ms. Markel's counsel conceded "there can't."

> THE COURT: … We're talking about [Plaintiff's] reliance. You can't do that. You can't say my client doesn't remember anything but if she – but if she had remembered everything, this is what would have happened.
>
> We have to deal with what your client has stated. Your client has stated she doesn't remember seeing Dr. Lonappan. How can there be reasonable reliance now?

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> MS. ALI: That is – I understand. Okay.
>
> THE COURT: Answer the question. And I'm –
>
> MS. ALI: So she does not have to –
>
> THE COURT: – going to get out the oath that you took not so long ago. Answer the question. *How can there be a reasonable reliance on something she doesn't remember seeing*?
>
> MS. ALI: *There can't*. [7/31/2019 Hearing Tr at 11-12, Apx at 411-412b (emphasis added)]

Through this exchange, Ms. Markel effectively conceded that her claim failed as a matter of law because she could not show that she had a reasonable belief in the agency relationship. See e.g., *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991) ("the person dealing with the agent must do so with the belief in the agent's authority and this belief must be a reasonable one.")

D. Trial Court Opinion.

The Trial Court issued an opinion granting summary disposition for Beaumont on Ms. Markel's actual and ostensible agency claims but denying summary disposition as to direct liability. 7/31/2019 Opinion ("Op") [Apx 425b].[9] As to actual agency, the Trial Court concluded that the undisputed evidence established that Dr. Lonappan was not an actual employee or agent of the hospital. *Id*. at 2 [Apx 426b]. The Court noted that in an agency relationship, "it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability," citing to *Breighner v Mich High Sch Athletic Ass'n, Inc*, 255 Mich App 567, 583; 662 NW2d 413 (2003), aff'd 471 Mich 217; 683 NW2d 639 (2004), and *Little v Howard Johnson Co*, 183 Mich App 675, 680; 455 NW2d 390 (1990). The absence of control, the Court said, "explains why an

[9] Ms. Markel stipulated to dismiss the direct liability claim by order entered September 12, 2019. See Order Dismissing Plaintiff's Remaining Direct Liability Claim Against Defendant, William Beaumont Hospital, With Prejudice [Apx 432b]

RECEIVED by MSC 3/7/2022 10:18:43 PM

employer is generally not liable for the actions of an independent contractor." *Id*. at 2 [Apx 426b]. The Trial Court concluded that Beaumont did not control the exercise of Dr. Lonappan's professional judgment, which formed the basis for Ms. Markel's claim for malpractice. The Trial Court explained:

> Consistent with this case law, a hospital will not be held vicariously liable for the negligence of a physician who is an independent contractor, unless the hospital has assumed control over the physician. *Grewe v Mount Clemens Gen Hosp*, 404 Mich 240, 250 (1978). Here, the parties do not dispute that Dr. Lonappan was employed by Hospital Consultants, P.C.—not Defendant—at all relevant times. According to Dr. Lonappan's deposition testimony, Hospital Consultants is "an organization that employs physicians and contracts with the hospital. . . ." As relevant here, Hospital Consultants had an agreement with Dr. John Bonema's medical group (Troy Internal Medicine) to provide treatment to its patients at Defendant's facility. When necessary, Defendant assigned patients to the physicians who worked for Hospital Consultants.
>
> Dr. Lonappan testified that, after Defendant assigned her a patient, it was her job to examine the patient and to "formulate a plan for [his or her] diagnosis and treatment." Dr. Lonappan also testified that it is her decision whether to discharge her patients. There is no evidence to suggest that anyone other than Dr. Lonappan had the final say concerning how Plaintiff (or any other patient) would be treated. Accordingly, because it is undisputed that Plaintiff's medical malpractice claim is predicated on Dr. Lonappan's exercise of professional judgment—over which Defendant had no control or influence—Dr. Lonappan was not an actual agent of Defendant at any relevant time. See *Laster*, 316 Mich App at 739. Although Plaintiff adamantly argues that the question of actual agency is one for the jury and provides citations to legal authority to support this, the Court finds that it is proper for it to decide this issue given that the undisputed evidence clearly establishes that an actual agency relationship did not exist. [Op at 3-4, Apx 427-428b]

The Trial Court also granted summary disposition on the ostensible agency claim, noting that vicarious liability does not arise merely because the patient looked to the hospital for treatment or because a physician used the hospital to treat the patient. "Rather," the Trial Court noted, "'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,'" quoting *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003). Op at 4 [Apx 428b].

RECEIVED by MSC 3/7/2022 10:18:43 PM

The Trial Court noted that *VanStelle* reaffirmed the ongoing vitality of *Chapa*'s three-part test for determining 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. [Op at 4 (citing *VanStelle*, 225 Mich App at 10].

Reviewing the evidence, the Trial Court concluded that the requirements could not be satisfied:

> In the present case, Plaintiff testified at her September 7, 2018 deposition that she only recalled seeing a "pain doctor" during her time at Defendant's facility from October 9 through October 11, 2015. More specifically, she testified as follows:
>
> Q. And there were various types of doctors from various specialties who saw you during that admission, you're aware of that?
>
> A. The only one I remember seeing was the—they sent one of the pain doctors up about potentially doing an epidural but they couldn't do it because it was the weekend.
>
> 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.
>
> *Thus, Plaintiff essentially testified that she had no recollection of Dr. Lonappan. Without any recollection of Dr. Lonappan, there is nothing to support Plaintiff's claim that she harbored a reasonable belief that Dr. Lonappan was acting as a hospital employee.* [Op at 4-5, Apx 428-429b (emphasis added)]

The Trial Court also concluded that under Michigan law, Ms. Markel could not contradict her sworn deposition testimony with the subsequent affidavit:

> Although Plaintiff has provided this Court with an affidavit that indicates that she "was at all times under the impression that Dr. Linet Lonappan, as well as other medical staff at Beaumont Hospital—Royal Oak, were employees of Beaumont Hospital—Royal Oak," this Court cannot consider Plaintiff's affidavit because it conflicts with her previous deposition testimony. See *Casey v Auto Owners Ins Co*, 273 Mich App 388 396 (2006) ("a witness is bound by his or her deposition

RECEIVED by MSC 3/7/2022 10:18:43 PM

> testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition"). [*Id*. at 5, Apx 429b].

Addressing Ms. Markel's other arguments, the Trial Court concluded that Dr. Lonappan's introduction was insufficient to create a reasonable belief that Dr. Lonappan was an agent of Beaumont given the absence of any evidence that Beaumont told Dr. Lonappan what to say:

> Further, although Plaintiff repeatedly points to the fact that Dr. Lonappan testified that she typically reports to patients that she was assigned to their service by Defendant, there is no indication that Defendant encouraged Dr. Lonappan to say this or that it acquiesced in the use of this vernacular. Cf. *Strach v St John Hosp Corp*, 160 Mich App 251, 270 (1987) ("that the defendant hospital acquiesced in the use of the vernacular 'St. John Hospital team' and in the direct exercise of authority over its employees is conduct of the principal tending to create ostensible agency."). [*Id*. at 5, Apx 429b][10]

The Trial Court also dispelled the notion that Dr. Lonappan's lab coat and credentials could create a question of fact because Ms. Markel did not recall seeing Dr. Lonappan:

> The only evidence that could potentially support that Defendant – as opposed to Dr. Lonappan – had taken some action as to encourage a belief that Dr. Lonappan was its employee or agent is that it provided her with a lab coat that indicated that she was affiliated with Beaumont Health Systems. However, the lab coat also reflected that Dr. Lonappan was affiliated with Hospital Consultants. Furthermore, *what was printed on the lab coat is immaterial given that Plaintiff does not even recall having seen it*. [*Id.* at 5, Apx 429b (emphasis added)

The Trial Court thus concluded that because Ms. Markel "has failed to establish a genuine issue of material fact regarding the elements of ostensible agency, summary disposition in favor of Defendant is proper with respect to Plaintiff's claims of vicarious liability related to Dr.

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[10] Dr. Lonappan did not testify that she told patients Beaumont assigned them to her care. In response to questioning as to how she came to be assigned, Dr. Lonappan initially answered that she was assigned by Beaumont. However, upon further questioning by Ms. Markel's attorney, Dr. Lonappan explained that she would say she was "seeing [a patient] for your family doctor . . . ." *Markel v William Beaumont Hosp*, unpublished per curiam opinion of the Court of Appeals issued April 22, 2021 (Docket No. 350655) at *6, 2021 WL 1589739. [Apx 484b]. Patients were assigned to Hospital Consultants hospitalists because of Hospital Consultants' agreement with Troy Internal Medicine. Lonappan Dep at 111, 128-29, Apx 159-163b.

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Lonappan." Op at 5 [Apx 429b]. Ms. Markel filed a motion for reconsideration, which the Trial Court denied. See Markel's Mot for Recon [Apx 438b]; 8/27/19 Recons Op [Apx 457b].

E. Appellate Proceedings.

The Court of Appeals denied Ms. Markel's subsequently-filed application for leave to appeal. In lieu of granting leave, this Court remanded the case to the Court of Appeals for consideration as on leave granted. Following full briefing and argument, the Court of Appeals, majority (Judge Karen Fort Hood and Judge Riordan) affirmed as to the ostensible agency claim, stating "[b]ecause 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." *Markel*, unpub op, at *5 [Apx 483b]. The majority reversed as to the actual agency claim, stating the issue was not specifically identified in Beaumont's summary disposition motion and was not supported with documentary evidence. The majority also concluded that Ms. Markel's affidavit could not be considered under Michigan law because her statement that she did not remember Dr. Lonappan's name—"[n]ot at all"—contradicted her affidavit statement that she did recall multiple medical care providers at Beaumont, including Dr. Lonappan, and was under the impression that she was an employee of Beaumont. *Id.* at * 5-6 [Apx 483-484b].

The majority rejected the assertion that a lab coat which bore an insignia for Beaumont Health Systems and Hospital Consultants was a reasonable basis for Ms. Markel to believe that Dr. Lonappan was Beaumont's ostensible agent, reemphasizing that Ms. Markel testified she did not remember Dr. Lonappan. *Id.* at 6. The majority also rejected the contention that Dr. Lonappan's testimony that she typically tells patients that she is assigned to their care by Beaumont formed the basis for Ms. Markel's reasonable belief. The majority reasoned that Dr. Lonappan simply testified for foundational purposes that she was assigned to Ms. Markel by Beaumont, not that she so told

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this to Ms. Markel (or any other patient), and in fact Dr. Lonappan's undisputed testimony is that she would not tell patients "I'm Dr. Lonappan at Beaumont" but simply "I'm Dr. Lonappan." *Id*. at 6, citing and quoting Lonappan Dep at 50.

Judge Beckering concurred because she believed she was compelled to do so by this Court's order in *Tally v MidMichigan Health*, 489 Mich 908, 909; 796 NW2d 468 (2011) (adopting the dissent in *Reeves v MidMichigan Health*, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2010 (Docket No. 291855).[11] But for *Reeves*, the concurrence would have held that summary disposition was improper because Beaumont failed to negate a reasonable belief that Dr. Lonappan was acting on its behalf. *Id*. at 7.

INTRODUCTION

Ms. Markel recognizes that under the standard articulated in *Grewe* and applied by Michigan courts for over 40 years, the evidence does not support ostensible agency. Under *Grewe v Mount Clemens Gen Hosp*, 404 Mich 240; 273 NW2d 429 (1976), and its progeny, *VanStelle v Macaskill*, 255 Mich App 1; 662 NW2d 41, and *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29; 480 NW2d 590 (1991), a finding of ostensible agency in the hospital setting requires a plaintiff to prove that she reasonably believed that her physician was the hospital's agent because of some act or statement made by the hospital. By Ms. Markel's own testimony, she cannot satisfy these requirements. To preserve her claim, she therefore asks this Court, under the guise of clarification, to create a new rule that will alleviate her burden and in effect make hospitals

[11] Although Judge Beckering's concurrence refers to "the Supreme Court's order in *Reeves*," it appears that this Court's order is reported as *Tally v MidMichigan Health*. Specifically, the caption in that matter identified the plaintiff as "Denise Reeves, Guardian of Arthur L. Reeves a/k/a Michael TALLY." *Id.* Thus, although the unpublished Court of Appeals opinion is referred to as *Reeves v MidMichigan Health*, this Court's subsequent decision is referred to as *Tally v MidMichigan Health*.

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throughout the state responsible for the malpractice of any physician granted hospital privileges. Ms. Markel's request should be denied.

A. First, Rewind.

This Court should rewind this proceeding. This case does not present an appropriate context for a jurisprudential pronouncement on *Grewe* and its progeny, which close the door to Ms. Markel because Ms. Markel admits that she does not recall Dr. Lonappan ("not at all"). Absent any memory of Dr. Lonappan, Ms. Markel cannot prove that at the time of her treatment, Ms. Markel reasonably believed that Dr. Lonappan was Beaumont's ostensible agent, and that the belief was caused by something Beaumont did or did not do. Ms. Markel cannot satisfy this essential reasonable belief requirement, as her attorney admitted at the summary disposition hearing. Nor can she show that she acted in reliance upon a reasonable belief.

The Court of Appeals majority held that because the evidence demonstrates that Ms. Markel does not recall Dr. Lonappan, the Trial Court did not err in concluding that Ms. Markel's purported belief that Dr. Lonappan was Beaumont's ostensible agent was not reasonable. Ms. Markel does not address the basis for the majority's ruling or explain why it is wrong. Ms. Markel engages in a detailed analysis of the underpinnings of current law that has little relevance to this case given Ms. Markel's inability to prove a reasonable belief.

The bottom line is this: given the factual context established by Ms. Markel's own testimony, *Markel* does not present an appropriate case for the "clarification" of *Grewe* and its progeny. That is apparent from Ms. Markel's argument. She cannot win under current law so she advocates a new, overly broad, and expedient rule that is contrary to precedent, shifts the burden of proof, and is tantamount to strict liability. If this Court accepts Ms. Markel's invitation to turn long-established agency principles on their head—as Ms. Markel urges to win this case—the impact will not be limited to hospitals. Ms. Markel's rule will have far-reaching and disruptive

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consequences across all segments of civil society that rely upon the current law of ostensible agency.

B. Jurisprudential Upheaval.

Ms. Markel's current argument is purely an exercise in legal gymnastics—how can she impose liability upon the hospital when she has no recall of Dr. Lonappan? When, in the development of agency law, has what the plaintiff recalls and believes (or not) been so completely ignored and disregarded in arguing the ostensible agency issue? Here there is no evidence whatsoever that Ms. Markel formed a reasonable belief that Dr. Lonappan was Beaumont's agent. Nor is there any evidence that Ms. Markel relied upon anything Beaumont did or failed to do when Dr. Lonappan was engaged to treat her. Under such circumstances, even if this Court accepted Ms. Markel's argument that it is natural for such a belief to be formed unless the hospital acts to negate it (which is not current law), there is *no evidence* that Ms. Markel had any such belief and therefore nothing to negate and nothing to analyze.

Here, even though Ms. Markel cannot prove that she had a reasonable belief in the agency relationship (an undisputed *Grewe* requirement) that was formed in reliance upon some action taken by Beaumont (another undisputed *Grewe* requirement), Ms. Markel is asking this Court to rule *as a matter of law* that ostensible agency exists because Dr. Lonappan treated her at the hospital. This is not a request to *clarify* the law; it is a request to overrule the law as it has existed for decades. Ms. Markel makes this request without any discussion of *stare decisis* and what our law requires to disturb it.

C. Shifts the Burden and Creates a Presumption.

It has always been plaintiff's burden to prove ostensible agency, also known as agency by estoppel. Ms. Markel admits that the essence of ostensible agency under Michigan law is that the principal has done something that leads a reasonable person to conclude the person is an agent of

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the principal. See Pl Br at 25, 26, 27 n 11. But now, Ms. Markel wants the law to presume an ostensible agency relationship and shift the burden to the hospital to show action it took to disavow it.[12] Under Ms. Markel's new rule, the analysis shifts from a reasonable belief caused by something the hospital did [or did not do], to an automatic legal presumption based upon treatment within the hospital through the granting of hospital privileges. Ms. Markel's bad facts will make bad law. If leave to appeal is not reconsidered, Ms. Markel's argument should be soundly rejected.

ARGUMENT

I. This Case does not Present a Proper Context for a Jurisprudential Analysis of *Grewe* and its Progeny.

Given Ms. Markel's testimony that she does not recall Dr. Lonappan or the treatment Dr. Lonappan provided, this case does not present a proper context for deciding what a hospital must do or fail to do to create in the patient a "reasonable belief" that ostensible agency exists. The analysis should go no further than finding an absence of evidentiary support to satisfy the "reasonable belief" requirement (which is where the Trial Court and the Court of Appeals properly ended the analysis). Ms. Markel's attorney admitted at the summary disposition hearing that there cannot be a reasonable belief if Ms. Markel does not recall Dr. Lonappan. Consequently, there is no basis for considering what *Grewe* means and whether it has been properly applied.

"[T]this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), rev'd on other grounds by *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006) (citing *Anway v Grand Rapids R Co*, 211

[12] Under *Grewe*, the hospital's actions must cause the reasonable belief. Ostensible agency cannot be found if the reasonable belief is caused by someone other than the putative principal, even if the putative principal has not then somehow acted to negate it.

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Mich 592, 610; 179 NW 350 (1920)). This Court reiterated this principle in *Glass v Goeckel*, 473 Mich 667, 703; 703 NW2d 58 (2005), where a majority declined to rule on issues that were not raised. The majority reiterated that, "[i]n general, we reserve the judgment of this Court for 'actual cases and controversies' and do not 'declare principles or rules of law that have no practical legal effect in the case before us . . . [ ].'" *Id.* (citations omitted).

It goes without saying that this Court's responsibility to the development of Michigan jurisprudence goes well beyond the parties before the Court. An essential first step is to determine whether the case provides a proper factual context for the issue it is being asked to decide in light of the parties' arguments. Here, Ms. Markel frankly testified that she does not recall Dr. Lonappan. Absent any recall of Dr. Lonappan, it is impossible for Ms. Markel to establish that (1) at the time of her treatment by Dr. Lonappan, she reasonably believed that Dr. Lonappan was Beaumont's ostensible agent, and (2) she formed that belief because of some affirmative action or inaction of Beaumont. No one else can provide this evidence, and without it, the requirements for ostensible agency cannot be established.

So, in the end, it does not matter whether *Grewe* and its progeny require that the ostensible principal cause a reasonable belief by an affirmative act or by a failure to act (an issue to which Ms. Markel devotes a large part of her argument). Ms. Markel does not recall Dr. Lonappan and did not testify that Beaumont's action or inaction caused her to believe that Dr. Lonappan was employed by, or the agent of, the hospital. If anything, Ms. Markel's testimony evidences her understanding that Dr. Lonappan was employed by Hospital Consultants because she testified that Hospital Consultants cared for the patients of her primary care physician when those patients were admitted to the hospital. Ms. Markel testified:

Q. Okay. Do you know what Hospital Consultants is?

A. I do.

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Q. What's your understanding with that?

A. *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*.

Q. And *do you know anybody in the group*?

A. *I don't*. [*Id*. at 102, Apx 49b]]

Because Ms. Markel's testimony erects roadblocks to recovery, Ms. Markel urges this Court to replace the reasonable belief requirement with a legal presumption that arises whenever a doctor treats a patient in the hospital. In other words, because Ms. Markel cannot prevail under *Grewe* (irrespective of the affirmative act versus failure to act issue), this Court is being asked to adopt an overly broad and expedient rule that is contrary to precedent, abandon the analytical framework of ostensible agency, and venture into the arena of strict liability with the attendant far-reaching and dire consequences. Respectfully, this Court should take another look at what it is being asked to decide and revoke its grant of leave.

II. The Court of Appeals Majority Properly Applied Ostensible Agency Analysis in Granting Summary Disposition to Beaumont.

A. The Standard of Review is De Novo.

This case comes before this Court on the Trial Court's grant of summary disposition to Beaumont, which was affirmed by the Court of Appeals. A decision to grant or deny summary disposition is subject to de novo review. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

B. Under *Grewe* and its Progeny, Ms. Markel Must Prove That Beaumont Caused Her to Reasonably Believe that Beaumont Employed Dr. Lonappan.

In Michigan, liability will typically be imposed on a defendant "only for his or her own acts of negligence, not the tortious conduct of others." *Laster v Henry Ford Health Sys*, 316 Mich App 726, 734; 892 NW2d 442 (2016). In *Grewe*, this Court explained that in general, a hospital is

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not vicariously liable for the negligence of a physician who is an independent contractor and simply uses the hospital's facilities to treat his patients. However, *Grewe* recognized an exception based upon ostensible agency principles. If the patient looks to the hospital to provide medical treatment and the hospital makes a representation that medical treatment would be afforded by physicians working at the hospital, an agency by estoppel may be found. *Grewe*, 404 Mich at 250-51.

Grewe noted that the critical question is whether, at the time of admission, the patient was looking to the hospital for treatment or merely viewed the hospital as the place where his physicians would treat him, finding it relevant to determine whether the hospital provided the doctor or whether a physician-patient relationship existed independent of the hospital setting. *Id*. at 251. *Grewe* found enlightening the three-part test articulated in *Stanhope v Los Angeles College of Chiropractic*, 98 Cal App 2d 141, 146; 128 P2d 705, 708 (1942), as the standard that must be satisfied before one can recover against a principal for the acts of an ostensible agent:

> (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*, 404 Mich at 252-253 (internal citations and quotations omitted)].[13]

The Court ultimately concluded that there was nothing in the record which should have put the plaintiff on notice that the doctor was an independent contractor rather than a hospital employee.

In *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29; 480 NW2d 590 (1991), the Court of Appeals noted that "[t]he essence of *Grewe* is that a hospital may be vicariously liable for the malpractice of actual or apparent agents" but concluded that "[n]othing in *Grewe*

[13] That this is the test adopted in *Grewe* is not disputed. See Pl Br at 8 (referring to "the three-part test of ostensible agency that was adopted by this Court in *Grewe*."

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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." *Id*. at 33. *Chapa* explained that "such a holding would not only be illogical, but also would not comport with fundamental agency principles noted in *Grewe* and subsequent cases." *Id*. Those principles, *Chapa* explained, "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*, 404 Mich pp 252-253, 273 NW2d 429. [*Chapa*, 192 Mich App at 33-34].

Simply put, the putative principal must have done something that would create in the patient's mind a reasonable belief that the doctors were acting on behalf of the hospital. *Id*. at 34.

> 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*.][14]

Considering *Grewe*, the Court of Appeals in *VanStelle v Macaskill*, 255 Mich App 1; 662 NW2d 41 (2003), noted that in some cases, and depending on the circumstances, "the most critical question is whether the patient 'looked to' the hospital for treatment." *Id*. at 11. But *VanStelle* also considered the *Grewe* three-part test and how *Chapa* had interpreted the "comments" of the *Grewe* court, ultimately concluding that "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." *Id*. at 10. The fact that a doctor used a hospital's facilities to

[14] The requirement that the putative principal must have done something that would create in the third party's mind a reasonable belief that the ostensible agent was acting on the principal's behalf is a long-standing principle of agency by estoppel, another term for ostensible agency, as Ms. Markel acknowledges in describing early cases. See, e.g., Pl Br at 13-14. In other words, the principal must do something to "hold out" the ostensible agent.

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treat a patient "is not sufficient to give the patient a reasonable belief that the doctor was an agent of the hospital." *Id.* at 11.[15] Absent proof of such conduct by the principal, summary disposition must be granted in favor of defendant-hospital.

Ms. Markel appears to argue that *VanStelle* diverged from *Grewe* when it stated that 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," and "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." See Pl Br at 22. However, each proposition is supported by a citation to prior case law, including *Grewe*, *Sasseen*, and *Heins*. See Pl Br at 22, quoting *VanStelle*, 255 Mich App at 11. *VanStelle* did not invent these propositions. They existed in the law for decades before *VanStelle* was decided.

In *Sasseen v Community Hosp Foundation*, 159 Mich App 231; 406 NW2d 193 (1986), the Court of Appeals discussed the post-*Grewe* cases and concluded that the authorities clearly indicate:

> 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. [*Id.* at 240]

The Court in *Heins v Synkonis*, 58 Mich App 119, 124; 227 NW2d 247 (1975), held that the sole fact that the hospital's facilities were used by the doctor to treat plaintiff "was not a

[15] Ms. Markel argues that the "one important" distinction between *Grewe* and *VanStelle* is that the alleged malpractice did not occur within the confines of the hospital but rather at the physician's private office. Pl Br at 22. Ms. Markel fails to mention that the office was in a medical professional building affiliated with and owned by the hospital and leased to the doctor's employer. The court recognized the separate corporate identities of the various entities but also concluded, "the sole fact that the Riverview defendants' office facilities were used by Dr. U is not a sufficient act by the Riverview defendants to create the appearance that Dr. U was their agent." 255 Mich App at 13. The Court also noted that the "Riverview defendants made no representations that would lead plaintiffs to reasonably believe that Dr. U was an agent of St. John Riverview Hospital." *Id.* at 14.

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sufficient act by [the hospital] to create any appearance that [the doctor] was its agent." *Chapa* concluded that "[n]othing 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." 192 Mich App 33. In *Revitzer v Trenton Medical Center, Inc*, 118 Mich App 169, 175; 324 NW2d 561 (1982), the Court found that plaintiff "did not rely on any of defendant's activities in continuing her physician-patient relationship" and plaintiff was not misled "into believing that the defendant's medical facility was offering her independent benefits." The *Grewe* principles obviously leave room for courts to reach the opposite conclusion where the facts warranted that result. For example, in *Strach v St John Hosp*, 160 Mich App 251, 270; 408 NW2d 441 (1987), the Court concluded the fact that "the defendant hospital acquiesced in the use of the vernacular 'St. John Hospital team' and in the direct exercise of authority over its employees *is conduct of the principal tending to create ostensible agency*" (emphasis added).

Ms. Markel more particularly objects to a number of cases following *VanStelle* that failed to find ostensible agency "because the plaintiff was unable to point to any 'action or representation' on the part of the hospital to support the reasonable belief that the physician … was an agent of the hospital." Pl Br at 22-23. That is not a new requirement. Ostensible agency has long required a holding out *by the principal*. See, e.g., *Wierman v Bay City-Michigan Sugar Co*, 142 Mich 422, 438; 106 NW 75 (1905) ("[t]he apparent power of an agent is to be determined by the acts of the principal, and not by the acts of the agent"); *Michigan Nat'l Bank of Detroit v Kellam*, 107 Mich App 669, 680-81; 309 NW2d 700 (1981) (apparent authority may not be established by representations of agent).[16] But it is premature to engage this Court in a back-and-forth volley

[16] In arguing that *Grewe* found facts sufficient to support an ostensible agency without identifying any action or representation made by the hospital, Ms. Markel apparently believes that *Grewe* did

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between an affirmative act and a failure to act. Ms. Markel's unequivocal testimony proves her inability to establish any belief in an agency relationship irrespective of whether the precipitating action occurs by affirmative act or by omission. That lack of belief is dispositive.

C. Ms. Markel Has not Raised a Question of Fact Supportive of a Reasonable Belief or of Action or Inaction Taken by Beaumont to Cause the Belief.

To establish a jury question on ostensible agency under *Grewe*, Ms. Markel must show that at the time she submitted to treatment by Dr. Lonappan, Ms. Markel reasonably believed that Dr. Lonappan was employed by Beaumont and that the belief was caused by something Beaumont did. Here, the Majority correctly concluded that Ms. Markel could not show that she reasonably believed Dr. Lonappan was Beaumont's agent because she did not recall Dr. Lonappan or the treatment she provided. No one else can provide this evidence, and without it, the requirements for ostensible agency cannot be established.[17]

a. Ms. Markel's Deposition Testimony.

As quoted above, Ms. Markel testified affirmatively that she did not recall Dr. Lonappan. See Markel Dep at 55-56, 102 [Apx at 37b, 49b]. Because Ms. Markel does not recall Dr. Lonappan, the treatment she provided, or even her name, it is impossible for Ms. Markel to establish that at the time treatment was rendered, she reasonably believed that Dr. Lonappan was Beaumont's agent and that the belief was caused by Beaumont's actions. As the Trial Court appropriately queried and Ms. Markel's counsel frankly admits: "Q. How can there be a

not apply the very three-part test it adopted (and Ms. Markel admits that the three-part test is what this Court "adopted" in *Grewe*).

[17] Ms. Markel testified that among her family members she is the only person who, from her perspective, has firsthand knowledge of the treatment she received at Beaumont from October 9-11, 2015. Markel Dep at 11-12 [Apx 26b].

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reasonable reliance on something she [Plaintiff] doesn't remember? A. There can't." 7/31/2019 Hearing Tr at 11-12 [Apx at 411-412b].

A reasonable belief does not just materialize from thin air. It must have an evidentiary basis. See e.g., *VanStelle, supra,* 255 Mich App at 15 (examining the evidence plaintiffs purportedly relied upon in forming a belief, i.e., signs and advertisements, and deeming them insufficient because there was no evidence plaintiffs saw them). Although she does not know Dr. Lonappan, Ms. Markel does know who Hospital Consultants is. She testified that Hospital Consultants would provide a doctor to treat her in the hospital because her primary care physician does not "go to the hospital." She testified:

> Q. Okay. Do you know what Hospital Consultants is?
>
> A. I do.
>
> Q. What's your understanding with that?
>
> A. *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*.
>
> Q. And *do you know anybody in the group*?
>
> A. *I don't*. [Markel Dep at 102, Apx 49b (emphasis added)]

This testimony shows that if Ms. Markel had any belief at all regarding the physician who treated her in the hospital, it would reflect her understanding that the physician was employed by Hospital Consultants. Ms. Markel has produced no evidence that she believed otherwise.

b. Ms. Markel's Affidavit.

Ms. Markel proffers a contradictory affidavit to ameliorate the consequence of her deposition testimony. Acknowledging that a party cannot create an issue of fact by submitting an affidavit that contradicts prior deposition testimony, Ms. Markel argues that her affidavit is "not

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directly contrary" to her testimony. [Pl Br at 36]. This semantic argument aside, the affidavit is all contradiction.

Here, Ms. Markel testified that she did not recall different doctors from different specialties during her course of treatment, and that Dr. Lonappan's name was not familiar to her, ("[n]ot at all."). Markel Dep at 51, 56 [Apx 36b, 37b] She also testified that she did not recall any specific conversations with physicians, nurses, or physician assistants during her October 9-11 hospitalization other than "the pain doctor" and in the emergency room. It is therefore contradictory for Ms. Markel to state in her affidavit that she was treated by multiple medical care providers at Beaumont, including Dr. Lonappan, Affidavit, ¶ 3 [Apx 356b], that she was "under the impression" that Dr. Lonappan and other physicians that treated her at Beaumont were employed by Beaumont, *id.* at ¶ 5 [Apx 356b], and that Dr. Lonappan failed to make statements to her or take any affirmative action to indicate that she was not an employee of Beaumont. *Id*. at ¶ 6 [Apx 356b].

To state the obvious, if Ms. Markel was not familiar with Dr. Lonappan or the other doctors such that she could not even recall their names or the treatment rendered, it is an outright contradiction for Ms. Markel to now testify that she was under the "impression" that Dr. Lonappan and the other providers were hospital employees and to testify as to what Dr. Lonappan did or did not say. These statements are not clarifications; they contradict Ms. Markel's deposition testimony and are inadmissible. The inadmissibility of contradictory affidavits is well established under Michigan law. "Neither a party nor that party's legal representative may contrive factual issues by relying on an affidavit when unfavorable deposition testimony shows that the assertion in the affidavit is unfounded." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). See also *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146

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(1991) (affirming trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) where trial court refused to consider a later filed affidavit which was contrary to earlier damaging deposition testimony); *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972) (A party may not "create factual issues" in responding to a motion for summary disposition "by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition."); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001).

In addition, the statements in Ms. Markel's affidavit are inadmissible because they lack the requisite foundation. MRE 602 states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

Here, Ms. Markel's deposition established that she does not possess the requisite personal knowledge to support the statements in her affidavit. If the affidavit is not based on personal knowledge, it is inadmissible.

Ms. Markel's assertion that the lack of recall at her deposition went only to "the names of of the doctors who had treated her during her Beaumont admission, including Dr. Lonappan" (Pl Br at 35), is transparently inaccurate. The transcript shows that Ms. Markel was given the opportunity to say that, while not recalling the physicians' names she did recall seeing different doctors. She answered: "I don't." Markel Dep at 55 [Apx 37b].

Even if the post-deposition affidavit was based on personal knowledge, admissible, and not contradictory, it is still insufficient to raise a question of fact under *Grewe*. The operative statement is in ¶ 5, where Ms. Markel states that she was "under the impression" that Dr. Lonappan and other providers were Beaumont employees. "Under the impression" is not described in any detail in the affidavit but it is nonetheless insufficient. An impression is not the same as a

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"reasonable belief." An impression is "an often indistinct or imprecise notion or remembrance." https://www.merriam-webster.com/dictionary/impression. A belief is "conviction of the truth of some statement or the reality of some being or phenomenon especially when based on examination of evidence." https://www.merriam-webster.com/dictionary/belief.

Further, the affidavit does not say how the "impression" was formed or what it was based upon. It certainly does not aver that Ms. Markel formed a reasonable belief that Dr. Lonappan was authorized to act on behalf of Beaumont as Beaumont's agent because of something Beaumont said or did or failed to say or do. At best, the Affidavit speaks in terms of what Dr. Lonappan failed to say or do. See Affidavit, ¶ 6 [Apx at 356b]. But, as discussed above, a belief in ostensible agency cannot be caused by Dr. Lonappan's actions or inactions. It must result from the actions of the putative principal. Nothing in the Affidavit recites any actions taken by Beaumont to create in Ms. Markel's mind a reasonable belief in an agency relationship. The Affidavit does not even say the impression was formed during the rendering of treatment. Ms. Markel purports to have had the impression through years of employment at Beaumont but based on what, Ms. Markel does not say.

c. Dr. Lonappan's Introduction and the Lab Coat.

The majority properly rejected the proposition that a question of fact was created by the way Dr. Lonappan introduced herself or by the laboratory coat she purportedly wore.[18] Ms. Markel suggests that Dr. Lonappan testified that she introduced herself to Ms. Markel by stating her name and indicating that Beaumont assigned her to Ms. Markel. Pl Br at 5 (citing Lonappan Dep at 49-

[18] Although both the Trial Court and the Court of Appeals indicated that Dr. Lonappan's lab coat stated her affiliation with both Beaumont and Hospital Consultants, Dr. Lonappan's deposition testimony was that her *credentials*, not her lab coat, stated her affiliation with both entities. Lonappan Dep at 48-49 [Apx at 143-144b]. Nevertheless, given Ms. Markel's deposition testimony that she did not recall Dr. Lonappan and thus could not have recalled the lab coat or the credentials she may have worn, the analysis is the same.

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50 [Apx 144b]). It is uncontested that the credentials worn by Dr. Lonappan indicated not only an affiliation with Beaumont but with Hospital Consultants as well. Lonappan Dep at 48-49 [Apx 143-144b]. Under *VanStelle*, 255 Mich App at 15, where a physician's business card referenced both a hospital and medical office, there is no necessary inference that the doctor is employed by the hospital.

Further, Dr. Lonappan does not tell her patients she is assigned to their care by Beaumont. Her testimony regarding the Beaumont assignment was in response to a question regarding how she happened to treat Ms. Markel, not what she told her patients about how she came to be assigned to their care. See Lonappan Dep at 50 [Apx 144b]. Dr. Lonappan testified that she typically told her patients that she was seeing them for their primary care physician. Lonappan Dep at 133-34 [Apx 165b]. Ms. Markel was aware of the arrangement. Although she did not know anyone affiliated with Hospital Consultants, she testified "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." Markel Dep at 102 [Apx 49b].

In any event, because Ms. Markel does not recall any doctor, any treatment, or any conversation while in the hospital other than a "pain doctor" and in the ER, how Dr. Lonappan introduced herself and the entities named on her lab coat could not have caused a belief that Dr. Lonappan was Beaumont's ostensible agent.

d. Case Law Supports Summary Disposition.

As explained above, ostensible agency does not arise merely because a person goes to a hospital for medical care. See e.g., *VanStelle*, 255 Mich App at 11. There must be some action or representation by the hospital which leads the patient to reasonably believe that an agency in fact exists. *Id.* at 10-11. Where a patient-plaintiff cannot demonstrate what the hospital did to cause a reasonable belief in the agency relationship, summary disposition is appropriate. While

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unpublished, a few exemplar cases are addressed below to show resolution of the reasonable belief requirement in cases that considered some of the facts alleged here. In two of the cases (*Weigand* and *Schmitt*), leave to appeal to this Court was requested but denied. In one case (*Miteen*), leave was not sought. The application in another case (*Maitland*) is being held in abeyance pending this Court's decision in the present case.

- *Miteen v Genesys Regional Med Ctr*, unpublished per curiam decision of the Court of Appeals, issued Jan 24, 2006 (Docket No. 262410) at *2, 2006 WL 171514 [Apx 498b] (entering judgment for defendant on plaintiff's ostensible agency claim where plaintiff testified that he remembered "not very much" about his interactions with the doctors who treated him at defendant-hospital and there was no evidence that the hospital's actions or neglect caused his purported belief that his physicians were employees of the hospital).
- *Wiegand v Yamasaki*, unpublished per curiam decision of the Court of Appeals, issued December 19, 2017 (Docket No. 334598) at *3, 2017 WL 6502938 [Apx 500b], lv denied, 503 Mich 871; 917 NW2d 630 (Mem) (2018) ("Assuming without deciding that the decedent reasonably believed that the allegedly negligent doctors were agents or employees of defendant, summary disposition was required because plaintiff failed to provide any evidence that defendant made any action or was negligent in any manner that would have caused the decedent's belief").
- *Schmitt v Genesys Regional Med Ctr*, unpublished per curiam decision of the Court of Appeals, issued August 9, 2018 (Docket No. 337619) at *3, 2018 WL 3788365 [Apx 503b], lv denied 503 Mich 948 (2019) (plaintiff could not establish ostensible agency through a hospital "ID Badge" where defendant-physician "never showed

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plaintiff the badge" and there was no question of fact that defendant "took no action and made no representation to convey that [the doctor] was its agent.").

- *Maitland v Jaskierny*, unpublished opinion of the Court of Appeals, issued July 8, 2021 (Docket No. 348216), 2021 WL 2877958 [Apx 471b], lv app held in abeyance, 967 NW2d 623 (Mem) (the fact that the patient chose the physician before she would have had the opportunity to see the ID badge, and that the doctor routinely left it in her vehicle instead of wearing it into the hospital, both suggested that plaintiff could not establish ostensible agency).

Cases have also gone the other way, depending upon their facts. For example, in *Brackens v Detroit Osteopathic Hosp*, 174 Mich App 290, 293-94; 435 NW2d 472 (1989), plaintiff testified by affidavit that "at all times during her confinement at [the hospital], she knew, understood and believed that Drs. Taras and Tobes were hospital physicians who would perform and interpret certain tests done upon her" and that "she neither believed nor had reason to believe that said Dr. Tobes and Dr. Taras were not employed by [the hospital]." In *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 603; 568 NW2d 93 (1997), "the evidence showed that the radiology department is held out as part of the hospital, leading patients to understand that the services are being rendered by the hospital." In *Strach v St John Hosp*, 160 Mich App 251, 268; 408 NW2d 441 (1987), the Court concluded that the hospital acquiesced in references to the "St. John team" and "on the staff," and that "hearing such statements" the plaintiff "could reasonably have looked to the hospital itself, in addition to [the doctors], for treatment." The Court also referenced the hospital's acquiescence in actions taken by one of the physicians "in conjunction with hospital personnel" that "are not those of an independent contractor, but those of one who is an integral part of the St. John Hospital 'team.'" *Id.* at 270. In *Zdrojewski v Murphy*, 254 Mich App 50, 67-

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68; 657 NW2d 721 (2002), the Court found evidence supporting an agency relationship with two of three physicians participating in plaintiff's thyroid surgery who plaintiff became aware of after the surgery. However, the ostensible agency analysis in *Zdrojewski* is dicta because the hospital failed to object to a jury instruction that specifically informed the jury the physicians were agents of the hospital and thus effectively waived the defense.

The cases cited above, which are distinguishable on their facts, demonstrate the workability of the *Grewe* analysis and show how different facts lead to different results. This is unlike the test Ms. Markel proposes, which will lead to ostensible agency irrespective of the facts.

D. Ms. Markel Cannot Show That She Detrimentally Acted in Reliance on a Reasonable Belief that Dr. Lonappan was Beaumont's Agent.

Under actual agency, liability is imposed on the principal as a matter of law for the acts and omissions of its agents and employees. See, e.g., *Laster*, 316 Mich App at 734. The same is not true of ostensible agency. To impose liability for the acts or omissions of an ostensible agent, a plaintiff must not only show that an act of the principal caused her to hold a reasonable belief in the agency relationship but that the plaintiff detrimentally acted in reliance upon the reasonable belief. See, e.g., *Howard v Park*, 37 Mich App 496, 499; 195 NW2d 39 (1972) ("an agency by estoppel is established where it is shown that the principal held the agent out as being authorized, *and a third person, relying thereon, acted in good faith upon such representation*.") (emphasis added). In other words, it is not sufficient to show a reasonable belief "in the air," i.e., standing alone. A plaintiff must show that in reliance upon the belief, the plaintiff did something she would not have done if she did not have a belief in the employment relationship.[19]

[19] In *Early Detection Ctr, PC, v. New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986), the Court of Appeals stated that "a claim for civil conspiracy may not *exist in the air*; rather, it is necessary to prove a separate, actionable, tort" (emphasis added). In the same way, a reasonable belief in the agency relationship, standing alone, is not sufficient to recover on an

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In *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990), the plaintiff slipped on a walkway that was located on property on which a restaurant was operated as a franchise of the defendant franchisor. In considering whether the franchisee was an ostensible agent of the defendant, the court quoted *Grewe*'s three-part test, and then stated: "Hence, the alleged principal must have made a representation that leads the plaintiff to reasonably believe that an agency existed and to suffer harm on account of a *justifiable reliance* thereon." *Id*. at 683 (emphasis added). The court found *there was no evidence that the plaintiff "was harmed as a result of relying on the perceived fact that the franchisee was an agent of defendant*," or that the plaintiff "justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant." *Id*. Ms. Markel likewise lacks evidence of reliance here. There is no allegation, let alone evidence, that she took some action in reliance on her reasonable belief in the agency relationship that she would not otherwise have taken. [20]

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ostensible agency claim. To recover, a putative plaintiff must show some act detrimentally taken in reliance upon the belief in the agency relationship. Ms. Markel's lack of recall also negates any possibility of showing that she did something to her detriment in reliance upon a belief in the agency relationship.

[20] In *Johnson v Outback Lodge & Equestrian Center, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2016 (Docket No. 323556), pp 1-2, the plaintiff was injured at a horseback riding camp held on the property of the defendant horse ranch and sponsored by the defendant Girl Scouts. In considering whether the ranch was an ostensible agent of the Girl Scouts, the court stated that "the alleged principal must have made a representation that leads the plaintiff to reasonably believe that an agency existed and to suffer harm on account of a *justifiable reliance* thereon." *Id*. at 7, quoting *Little*, 183 Mich App at 683. The court found that although there was a question of fact with respect to the three requirements of ostensible agency, there was no evidence that the plaintiff's injuries resulted from an ostensible agency relationship. *Id*. The court stated that *there was no evidence that the plaintiff's mother "would not have sent her on the trip had she known that defendant had hired a third party to provide equine instruction*." *Id*. (emphasis added). Although unpublished, *Johnson* is cited because it goes beyond the reasonable belief inquiry and addresses the requirement that a plaintiff must detrimentally act in reliance upon his or her reasonable belief in the agency relationship. An analysis of this element is missing from Ms. Markel's discussion but is likewise fatal to Ms. Markel's claim. *Johnson* is attached; see Apx 463b.

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III. This Court Should Reject Ms. Markel's Request for a Ruling That Presence in the Hospital Through the Grant of Hospital Privileges is a Sufficient Affirmative Act to Cause a Reasonable Belief in the Agency Relationship.

Ms. Markel cannot prevail under *Grewe* so for the expedience of *this one case*, she asks this Court to rule that that allowing a physician to practice in the hospital (i.e., the granting of hospital privileges) is sufficient to create in the patient a reasonable belief that the physician is employed by the hospital. This Court should deny that request.

A. The Rule Ms. Markel Advocates is Contrary to *Grewe*.

There is nothing enigmatic about the *Grewe* requirements and no need for clarification. Ms. Markel simply seeks to supplant them. The rule Ms. Markel advocates cannot be reconciled with *Grewe* or its progeny. Ms. Markel argues that ostensible agency can be found by omission if the hospital does not take affirmative action to disavow the appearance of agency created by a physician's mere presence in the hospital. Alternatively, if *VanStelle* correctly requires an affirmative act, Ms. Markel argues the affirmative act exists in the hospital's action in allowing a physician to "practice within [Defendant's] hospitals." In other words, Ms. Markel asks this Court to rule that the hospital acts affirmatively to hold out an agency relationship whenever a hospital grants privileges to a physician. Pl Br at 24. Whether by affirmative act or omission, the result is the same: the doctor's mere presence in the hospital creates a reasonable belief. If by failure to act, "the omission of an affirmative disavowal of an agency relationship [] may be sufficient to create a reasonable belief of a person's agency status." Pl Br at 30. If by affirmative act, the action or representation "is established in this and presumably every other case in which the alleged malpractice occurs within the hospital setting" and "[i]n *all* such cases, the hospital has taken action of some kind in allowing the doctor …to treat one of its patients." Pl Br at 23-24 (emphasis in original).

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Plaintiff makes a grandiose argument but it does not apply to Ms. Markel, who testified to her understanding that Hospital Consultants' doctors cared for her doctor's patients when they were in the hospital. As Ms. Markel argued in her brief, "this relationship between Hospital Consultants P.C. and Dr. Bonema might serve to undermine Ms. Markel's ostensible agency theory only if that relationship had actually been conveyed to Ms. Markel." Pl Br at 33. Ms. Markel's testimony shows that she clearly understood the relationship. See Markel Dep at 102 [Apx 49b]. This too should be dispositive of Ms. Markel's argument.

Beyond that, Ms. Markel's analysis eliminates *Grewe*'s "reasonable belief" requirement. A reasonable belief is personal to the plaintiff; it does not arise by operation of law as Ms. Markel suggests. "The reasonableness of the patient's belief in light of the representations and actions of the hospital is the 'key test' embodied in *Grewe*." *Chapa*, 192 Mich App at 34. See also, *VanStelle*, 255 Mich App at 10 (concluding that "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.") (emphasis added); *Wallace v Garden City Osteopathic Hosp*, 111 Mich App 212, 219; 314 NW2d 557 (1981), rev'd on other grounds, 417 Mich 907; 330 NW2d 850 (1983) ("No evidence was produced that the decedent relied upon or was led to believe that the Tumor Board would be acting as an agent of the defendant hospital," citing *Grewe*, and further stating that "[a]bsent such a showing, the plaintiff failed to make a prima facie showing of agency by estoppel."). To accept Ms. Markel's proposed rule, this Court would have to overrule *Grewe's* reasonable belief requirement.

B. Mere Presence in the Hospital Through the Granting of Hospital Privileges Has Been Rejected as a Basis for a Reasonable Belief.

Ms. Markel broadcasts the bottom line when it comes to her proposed new rule: "Thus, the mere fact that Dr. Lonappan was inside Beaumont Hospital providing care to Beaumont patients

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when she treated Ms. Markel is sufficient to support a claim of ostensible agency." Pl Br at 24, n9. This is a stinging rebuke of existing law which can certainly be interpreted as having already rejected presence in the hospital and even hospital privileges as a basis for ostensible agency liability. As discussed above, *Grewe* explained that a hospital is not vicariously liable for a physician who is an independent contractor and simply uses the hospital's facilities to treat his patients. *VanStelle* concludes that a doctor's use of a hospital's facilities to treat a patient "is insufficient to create the appearance of an agency relationship between the defendant hospital and the physician." 255 Mich App at 13.

This is so even if the patient looked to the hospital at the time of admission. *Id*. at 10. In *Wallace v Garden City Osteopathic Hosp*, 111 Mich App 212, 219; 314 NW2d 557 (1981), rev'd on other grounds 417 Mich 907; 330 NW2d 850 (1983), the Court observed that "[t]he general rule is that a hospital cannot be held liable for the actions of a physician who is an independent contractor and merely uses the hospital facilities to render treatment to his patients," citing *Grewe*. And in *Heins v Synkonis*, 58 Mich App 119; 227 NW2d 247 (1975), the Court held that the sole fact that the hospital's facilities were used by the doctor to treat plaintiff "was not a sufficient act by [the hospital] to create any appearance that [the doctor] was its agent." *Chapa* concluded that "[n]othing 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." 192 Mich App 33.

Michigan courts have rejected the very notion that the granting of hospital privileges is an affirmative act supportive of ostensible agency. Arguments directed to physicians who "merely had staff privileges at the hospital" provided part of the factual context for the ostensible agency analysis in *Grewe* but that was not sufficient to either create ostensible agency or to escape it. See

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e.g., *Sasseen*, 159 Mich App at 236 ("[t]he standard by which to determine whether a hospital is vicariously liable for the negligence of a physician *who has staff privileges at the hospital* but is not directly employed by the hospital is described at length in *Grewe* …."). If hospital privileges were sufficient, the ostensible analysis addressed in *Grewe* would have been unnecessary.

In *VanStelle*, the Court of Appeals explained that it was not reasonable to assume that a physician was a "staff doctor" merely because he had privileges to work at the hospital. *VanStelle*, 255 Mich App at 13-14, 17. The Court explained, "the fact that a doctor has staff privileges at a hospital, by itself, is insufficient to establish an agency relationship." Even a hospital's acknowledgement that a physician has hospital privileges is not sufficient. *Van Stelle* concluded that "*Grewe* [] does not warrant holding a hospital liable for merely acknowledging that a doctor has staff privileges at that hospital." *Id*. at 17. In *Sasseen*, the Court explained that "there is nothing which indicates that plaintiff honestly believed Dr. Haney was the hospital's agent rather than his own longtime personal physician *who had staff privileges at the hospital*." 159 Mich App 239-40.

Ms. Markel argues that ostensible agency ordinarily presents a question of fact for the jury but certainly that statement must be qualified. Under Michigan's summary disposition procedures, if the plaintiff's evidence is not sufficient to raise a question of fact as to any required element of her claim, the court can determine that no question of fact exists and enter judgment in favor of the opposing party. There is nothing in the law Ms. Markel cites or in this Court's *Grewe* decision that immunizes ostensible agency from the summary disposition procedure. Whether a question of fact exists is a determination made by the Court as a matter of law.[21]

[21] Where the record is ***conflicting***, the existence of a principal-agent relationship is for a jury to decide. See *Lincoln v Fairfield–Nobel Co,* 76 Mich App 514, 519; 257 NW2d 148 (1977) (emphasis added); *Jackson v Goodman,* 69 Mich App 225, 230; 244 NW2d 423 (1976). However, where there is no testimony or evidence sufficient to create a factual issue regarding agency, the

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C. This Court Should Reject the Legal Presumption Ms. Markel Urges This Court to Adopt.

To show ostensible agency, the principal must either "intentionally or by want of ordinary care," cause a third person to believe another to be his agent. *VanStelle, supra*, 255 Mich App at 9, quoting *Grewe*, 404 Mich at 252–53, 273. The granting of hospital privileges to a physician cannot be so characterized. Privileging is a statutory requirement governed by provisions of the Michigan Public Health Code. MCL 333.21513(c) provides that the "owner, operator, and governing body of a hospital licensed under this article . . . *[s]hall assure* that physicians and dentists admitted to practice in the hospital *are granted hospital privileges* consistent with their individual training, experience, and other qualifications" (emphasis added). A hospital *must* ensure that a physician is appropriately privileged as a threshold requirement to allowing the physician to see patients in the hospital. Because this credentialing process is mandatory, any physician who treats a patient in a hospital setting will necessarily have been granted privileges.[22] It would be wholly inappropriate for this Court to characterize the fulfillment of a hospital's statutory obligation to credential physicians who provide treatment in the hospital as a representation that the hospital employs the physicians to whom privileges are granted. Privileging is certainly not "intentionally" designed to make that representation and does not reflect a "want of ordinary care."

In *Wallace*, the Court rejected plaintiff's attempt to hold the hospital liable for the actions of the medical staff's tumor board under an ostensible agency theory explaining that the medical

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court may decide the issue as a matter of law. See *Chapa, supra*, 192 Mich App at 38 ("we find no error in the court's conclusion that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law.")

[22] See Bradford C. Kendall, *The Ostensible Agency Doctrine: In Search of the Deep Pocket?*, 57 UMKC L Rev 917, 930 (1989) (arguing that "holding a hospital liable for any and all malpractice that occurs within its walls is unconscionable, particularly because hospitals are hamstrung by an inherent inability to control the manner in which physicians conduct their procedures").

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staff is independently organized and merely uses the hospital's facilities for the treatment of patients. The Court explained:

> The testimony at the time of trial demonstrated that the professional committees, such as the Tumor Board, consist of members of the medical staff. Physicians on the medical staff are not employees of Garden City Hospital, are not paid by the hospital, and do not contract with the hospital. The medical staff physicians are subject to bylaws, rules, and regulations developed by themselves and not by the hospital. The disciplining of staff physicians is handled by the independent medical staff itself, according to rules developed by the independent medical staff. *The hospital and the medical staff are separate entities. The staff doctors simply use the hospital facilities to render treatment to their patients.* [*Id*. at 218-19 (emphasis added)]

The *Wallace* discussion is relevant here. The granting of hospital privileges should not be infused with an unintended legal meaning.

Providing a space for patient care and treatment is the very essence of a hospital. Under Ms. Markel's proposed rule, that purpose would be synonymous with ostensible agency. There is no support whatsoever for so greatly altering the general rules of ostensible agency in the hospital setting where the independent treatment decisions and judgment of medical providers cannot ethically be controlled by hospitals. The rationale for vicarious liability does not support this drastic extension. And Ms. Markel fails to explain why there should be a hospital specific exception to the well-established "holding out" requirement. In other contexts, ostensible agency requires a reasonable belief formed in reliance upon an act or representation of the putative principal. Ms. Markel fails to explain why the rule should be different in the hospital setting.

Whether the granting of hospital privileges should give rise to a presumption of vicarious liability as a matter of law is a decision that should be made by the Legislature. Examination of Michigan's Public Health Code demonstrates that hospitals are strictly regulated, as they are at a federal level. For example, hospitals with emergency rooms cannot turn away persons needing emergency care, regardless of the ability of the patient's ability to pay. See generally EMTALA;

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42 USC § 1395dd (2018). Neither the Michigan Legislature nor Congress has chosen to prohibit the use of independent contractor physicians in hospitals or to burden the granting of privileges with the liability Ms. Markel asks this Court to impose. This Court should decline to take that responsibility upon itself.[23]

There is a further reason to reject Ms. Markel's proposed rule. Traditionally, a party is only liable for his or her own acts and omissions but for policy reasons, an exception holds the principal liable for persons who have express or implied authority to act on its behalf. Vicarious liability motivates the principal to ensure that the agent exercises reasonable care and acts appropriately when furthering the business of the principal. See e.g., *Laster*, 316 Mich App at 736-37 ("the

[23] The *Markel* concurrence not only adopts the notion that operating a hospital and accepting patients is sufficient "holding out," it avers that the hospital would have an affirmative obligation to produce documentation showing that the patient was advised that the staff physicians in the hospital were not in fact the hospital's agents. *Markel* concurrence at 4-5. Presumably, this means that if the hospital posts signs and adds disclosures to patient consent forms, there would be no basis for a reasonable belief in agency. But it is unlikely that would be the end. It is noteworthy that hospitals routinely notify patients of the nature of their independent contractor relationships with physicians in consent forms but claims of ostensible agency are made irrespective of such disclosures. See, e.g., *Laster v Henry Ford Health Sys*, 316 Mich App 726, 729; 892 NW2d 442, 445 (2016) ("plaintiff and her mother acknowledged Dr. Lim's employment status when they signed a "consent to surgery" form that expressly stated that Dr. Lim was not an employee of Henry Ford."); *In re Estate of Bean*, unpublished opinion of the Court of Appeals, issued July 22, 2021 (Docket No. 353960), 2021 WL 3117675, p *2 (noting that the plaintiff "signed a consent form that placed her on notice that some of the physicians in the hospital were independent contractors and were not the hospital's agents or employees. Indeed, the consent form explicitly disavowed that all physicians were hospital employees."); *Estate of Wiegand by Wiegand v Yamasaki*, unpublished opinion of the Court of Appeals, issued December 19, 2017 (Docket No. 334598), 2017 WL 6502938, p *2 ("the decedent's wife signed a consent to treat agreement on the decedent's behalf, which contained a clause stating that some doctors at defendant hospital were independent contractors rather than employees."); *Purcell v Sturgis Hosp*, unpublished opinion of the Court of Appeals, issued December 11, 2008 (Docket No. 277793), 2008 WL 5197155, p *2 (noting that plaintiff signed at least 11 consent forms which "specified that the radiologists were not employees of the hospital and specifically identified radiologists as "independent contractors and . . . not agents of the Hospital.") The unpublished cases described herein are cited for the purpose of illustrating examples of the consent forms referred to above. They are attached to the appendix [Apx 460b, 495b].

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power or ability of the principal to control the agent [] justifies the imposition of vicarious liability" but "[c]onversely, it is this absence of control that explains why an employer is generally not liable for the actions of an independent contractor."). Here, the hospital does not control what the physician does in treating the patient and does not control the exercise of the physician's professional judgment. But the breadth of the rule Ms. Markel urges this Court to adopt will swallow ostensible agency as an exception to non-liability in hospital settings and assure liability in nearly every instance. [24]

D. Ms. Markel's Rule is Tantamount to Strict Liability and Shifts the Ostensible Agency Burden to Hospitals.

Even if Ms. Markel purports to begin the analysis she advances with a predicate reasonable belief based upon a physician's presence in the hospital, the belief would arise from a legal presumption. Ms. Markel's rule replaces *plaintiff's burden to show a reasonable belief* with a legal presumption that such a belief arises from the granting of hospital privileges, ultimately transferring the burden to the hospital to show otherwise. In other words, Ms. Markel argues that *Grewe* permits a finding of ostensible agency if there is a failure to negate the impression created

[24] Ms. Markel cites cases from other jurisdictions as having relied upon Restatement Torts, 2d, § 429 to establish vicarious liability against hospitals under ostensible agency principles. Pl Br at 16-17. This point is unremarkable. *Grewe* recognizes ostensible agency in the hospital setting. The question here is whether Ms. Markel can satisfy the *Grewe* test without evidence that Beaumont did something to cause her to reasonably believe that Dr. Lonappan was its employee. However, it should be noted that this Court has never adopted this Restatement provision or Restatement Agency, 3d, §§ 1.03, 2.03, and 3.03, which Ms. Markel also relies upon. "While this Court has looked to the Restatement for guidance, it is our caselaw, as developed through the years, that provides the rule of law for this State." *Hoffner v Lanctoe*, 492 Mich 450, 478-79; 821 NW2d 88 (2012).

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by a doctor's presence in the hospital.[25] But ostensible agency requires the principal's actions to *create* the belief, not to *negate* a belief caused by something or someone else.

Further, *Grewe* does not presume a reasonable belief; the plaintiff must prove it. Under Ms. Markel's rule, rather than require plaintiff to prove ostensible agency, the burden falls upon the hospital in nearly every case to dispel a legal presumption that would arise when a hospital provides a setting for the care and treatment of patients. This is tantamount to strict liability and contravenes well-established principles regarding the burden of proof in ostensible agency cases.

In *Grewe*, this Court noted that the party seeking to recover pursuant to an ostensible agency theory bears the burden of proof. See *Grewe, supra,* 404 Mich at 252–53 ("before a recovery can be had against a principal for the alleged acts of an ostensible agent, three things must be proved . . . [ ]"). Subsequent decisions demonstrate clearly that the burden has always been on the plaintiff to prove the existence of an ostensible agency relationship. In *Zdrojewski v Murphy*, 254 Mich App 50, 66; 657 NW2d 721 (2002), the Court of Appeals explained:

> We agree with defendants that the evidence of ostensible agency between Dr. Murphy and Beaumont was tenuous at best. *In order to prove that Dr. Murphy was the ostensible agent of Beaumont, plaintiff must show that* (1) she dealt with Dr. Murphy with a reasonable belief in the physician's authority as an agent of Beaumont, (2) her belief was generated by some act or neglect on the part of the hospital, and (3) she was not guilty of negligence. [*Id.* (citing *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33–34; 480 NW2d 590 (1991)) (emphasis added)]

[25] While Ms. Markel suggests the hospital may to negate a patient's reasonable belief regarding a physician's status as a potential way to avoid liability, this argument is a non-sequitur because under her proposed rule, the presumption attaches automatically and irrespective of plaintiff's belief. See Pl Br at 27-30. And here, of course, Ms. Markel's testimony shows she did not have a belief in the agency relationship so Ms. Markel's rule is clearly for another time and another case in which it might be factually appropriate to consider.

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The Model Civil Jury Instructions established by this Court further provide that "[i]n order to establish the liability of the hospital under this theory, *the plaintiff has the burden of proving* . . . [ ]." M Civ JI 30.30.[26]

E. Ms. Markel's Argument is Inconsistent with *Reeves.*

In lieu of granting leave in *Reeves*, this Court issued an order reversing the judgment of the Court of Appeals and granting summary disposition to the hospital "for the reasons stated in the Court of Appeals dissenting opinion." The dissent found no evidence in the record that the hospital did or failed to do anything that would create a reasonable belief that the doctor was acting on its behalf. This Court's *Reeves* order reflects the import of *Grewe, Chapa*, and *VanStelle* as requiring

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[26] This burden-shifting was implicitly acknowledged in the *Markel* concurrence, which remarked that "William Beaumont Hospital has produced no document showing that Markel was advised that Dr. Lonappan was not, in fact, its agent." *Id*. at * 4 (footnote omitted). This burden shifting thwarts the use of the summary disposition procedure to address ostensible agency issues. Typically, a defendant may support its motion for summary disposition under MCR 2.116(C)(10) by identifying the absence of evidentiary support for an allegation on which the plaintiff has the burden of proof. In *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996), this Court explained that a party seeking summary disposition under (C)(10) may satisfy its initial burden in one of two ways:

> First, the moving party may submit affirmative evidence that negates an essential element of the non-moving party's claim. Second, the moving party may demonstrate to the Court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. [451 Mich at 362, citing *Celotex v Catrett*, 477 US 317, 331 (1986)]

There is nothing in MCR 2.116 suggesting that the party seeking summary disposition must come forward with evidence to negate the opponent's claim in the first instance.

> If the moving party is asserting the absence of evidentiary support for an allegation of the opponent, on which the opponent has the burden of proof, the moving party is not required to 'prove a negative.' In such circumstances, it is sufficient for the moving party to assert the absence of evidence for the proposition, and the opposing party must provide evidentiary support for the allegation in order to avoid summary disposition. [§ 2116.10 Affidavits and Hearing—Supporting Materials for a Motion for Summary Disposition, 1 Mich Ct Rules Prac, Text § 2116.10 (8th ed)]

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evidence that the hospital did something (or failed to do something) to create a belief in agency other than the mere granting of privileges or the failure to disavow an agency relationship in the first instance. If the mere presence of a physician treating patients in the hospital or the mere granting of hospital privileges were sufficient to form a reasonable belief, the *Reeve*s order would have affirmed.

IV. Ms. Markel's Ostensible Agency Rule Abandons Precedent Without Any Discussion of Stare Decisis.

The rule Ms. Markel advocates is unquestionably a reversal of prior law. Yet Ms. Markel cavalierly acts as if her new rule has been the law all along and disregards the requirements for overruling precedent. Such disregard should not be countenanced. Stare decisis is the bedrock of Michigan jurisprudence and must be addressed if there is any inclination to deviate from established precedent. Under the rules, such a departure is unjustified.

A. The Requirements for Overruling Decades of Michigan Jurisprudence Cannot be Satisfied.

This Court has recognized the importance of *stare decisis*, the purpose of which is to establish "uniformity, certainty and stability in the law." *Parker v Port Huron Hosp*, 361 Mich 1, 10; 105 NW2d 1 (1960). Stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969 (1998). A compelling justification must exist to overrule precedent. *Peterson v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009).

Robinson instructs that the first question this Court must ask is whether the decision was wrongly decided. *Id*. at 464. A decision is wrongly decided if it misunderstood or misconstrued a plainly worded statute, or if a decision "has fallen victim to a subsequent change in the law." *Id*.

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at 465. *Robinson* acknowledges that "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson*, 462 Mich at 465. See also, *McEvoy v City of Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904); *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014). The Court will only overrule an erroneous decision if overruling the case results in less injury than leaving it in place, *McEvoy*, 136 Mich at 178; see also *Robinson*, 462 Mich at 471-72, which requires the Court to examine the effects of overruling the decision. *Robinson*, 462 Mich at 466.

This second step invokes a three-part test: (i) whether the questioned decision defies practical workability; (ii) whether changes in the law or facts no longer justify the decision; and, most importantly, (iii) whether reliance interests would work an undue hardship if the decision were overturned. *Id*. at 464. In weighing this last factor, *Robinson* instructs the Court to ask whether the questioned decision "has become so embedded, so accepted, so fundamental, to expectations that to change it would produce not only readjustments but practical real-world dislocations." *Id*. at 466.

1. *Grewe* was not Wrongly Decided.

This Court's decision in *Grewe* was not wrongly decided. The decision does not "misunderstand or misconstrue" any statutory authority, nor has it fallen victim to a change in the law. The *Grewe* Court considered the unique circumstances that govern the relationship between physicians, hospitals, and patients and reasonably applied well-established principles of agency in a manner consistent with other jurisdictions. See, e.g., this Court's discussion of *Howard v Park*, *supra*, and *Stanhope v Los Angeles College of Chiropractic*, 54 Cal App 2d 141; 128 P2d 705 (1942). Ms. Markel presents no grounds upon which it can be concluded that *Grewe* reflects a fundamental misunderstanding or misapplication of statutory or other authority, and the numerous decisions by courts in this state which apply *Grewe* do not support that the approach established

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by this Court was contrary to law or reason at the time it was decided, nor do they support that this situation has changed in the decades that have followed.

2. *Grewe* does not defy Practical Workability.

The decision in *Grewe* does not defy practical workability. The general rule that a hospital should not be liable for the acts or omissions of independent contractors absent holding out, a reasonable belief, and reliance has been applied successfully for decades and is consistent with the rule applied in other types of cases addressing agency principles. There is no reason for a departure from the principles of apparent or ostensible agency in the context of physician and hospital relationships. Numerous decisions of the Court of Appeals, published and unpublished, demonstrate the inherent workability of the *Grewe* standard in their consistent application of the principles this Court set forth to a wide range of different circumstances. Moreover, the consistent application of the same standard across various causes of action has not only made the standard workable but has also induced reliance across professions regarding the applicable standard, as discussed below.

3. Reversal of *Grewe* is not Warranted by Changes in the Law.

There have been no changes in the law or facts that would no longer justify the decision in *Grewe*. Ms. Markel's argument is premised largely on expediency due to the facts presented in her particular case as opposed to a principled stance with respect to the state of the law and the *Grewe* framework. This is not an appropriate reason to overrule precedent. Ms. Markel has not made even a *prima facie* effort to satisfy the test established by this Court with respect to this issue, and she could not satisfy the requirements even if she had attempted to do so.

B. Reliance Interests Warrant Adherence to *Grewe*.

The standard set forth in *Grewe*, as well as the cases applying the *Grewe* standard—such as *Chapa* and *VanStelle*—have been consistently followed for decades in a variety of actions and

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has become "so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. These reliance interests greatly favor adherence to the *Grewe* standard. Michigan Courts have relied on the analytical framework established by *Grewe* for more than forty years, not only in hospital settings but across the spectrum of circumstances in which ostensible agency issues arise. Individuals and institutions throughout the state have formed relationships with each other, and governed their conduct generally, in accordance with the *Grewe* standard.

RELIEF REQUESTED

For the above reasons, as well as those articulated by amici curiae supportive of Defendant-Appellee's position, Defendant-Appellee William Beaumont Hospital respectfully requests that this Court affirm the Court of Appeals decision directing the entry of summary disposition for Beaumont.

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Dated: March 7, 2022

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CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that on March 7, 2022, she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Cynthia J. Villeneuve
Cynthia J. Villeneuve