STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARY ANNE MARKEL,

Plaintiff-Appellant,

-vs-

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee,

and

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

Defendants.
_____/

Supreme Court No. 163086

Court of Appeals No. 350655

Oakland County Circuit Court No. 18-164979-NH

PLAINTIFF-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page**

Rules

I.

Beaumont filed a motion for summary disposition on Ms. Markel's ostensible agency claim in July 2019. Attached to that motion were five exhibits. One of these exhibits consisted of four pages from the September 2018 deposition of Ms. Markel. (App. 141a - 142a). These were the only four pages of Ms. Markel's deposition that were before the circuit court when it decided Beaumont's summary disposition motion.

Beaumont's brief to this Court as well as the appendix they have filed with that brief have disregarded the fact that only four pages of Ms. Markel's deposition were part of the circuit court record. Beaumont's brief cites to multiple pages from Ms. Markel's deposition that were not part of the circuit court record, and the appendix that it filed includes the entirety of that deposition. (App. 23b-52b). Beaumont's references to material that was not presented to the circuit court are not appropriate. *See* MCR 7.210(A); *Maiden v. Rozwood*, 461 Mich. 109, 126, n.9; 597 NW2d 817 (1999).

Included in the materials that were *not* before the circuit court is a portion of Ms. Markel's deposition on which Beaumont has placed erroneous emphasis in its brief to this Court. Ms. Markel was asked two questions in her deposition concerning Dr. Lonappan's employer, Hospital Consultants:

> 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 refer it to this kind of a group.

Markel Dep, at 102 (App. 49b).

Beaumont uses these two questions to suggest to this Court that *at the time Ms. Markel was hospitalized in 2015*, she was aware of the relationship that existed between her own physician, Dr. Bonema, and Hospital Consultants. Indeed, Beaumont likes these two answers from Ms. Markel's deposition so much that it refers to them no less than five times in its brief to this Court. Def's Brf, at 5, 20-21, 27, 37, 44, n.25. Beaumont argues on the basis of these two questions that Ms. Markel's ostensible agency theory fails because she was aware at the time of her 2015 hospitalization of a relationship between Hospital Consultants and her personal physician.

Ms. Markel was asked in these two questions whether, *as of the date of her deposition*, she was familiar with Hospital Consultants. There is nothing in her deposition answers to suggest that, at the time she was being treated by Dr. Lonappan, she was aware of Hospital Consultant's role and its relationship to her own physician.[1]

Beaumont's has, therefore, improperly referred to evidence that was not part of the circuit court record and, worse, it has used this evidence to suggest to the Court something that is not true. Had this portion of Ms. Markel's deposition testimony been properly presented to the circuit court with Beaumont's motion and had Beaumont intimated in that motion the erroneous inference that Beaumont now asks this Court to draw from this testimony, it would have been met with an affidavit signed by Ms. Markel confirming that, while she was aware of Hospital Consultants and its

[1]It should be noted that Beaumont's attorney who signed the motion for summary disposition was in the room when Ms. Markel was deposed. That attorney obviously had read Ms. Markel's deposition when the motion for summary disposition was filed since four pages of it were attached to the motion. Yet Beaumont's trial attorney must have come to the conclusion that the inference that its appellate attorneys would have this Court draw from this testimony was erroneous, since he did not supply this part of her testimony to the circuit court with the summary disposition motion he filed.

relationship with her own physician *at the time of her deposition,* she had no idea what that entity was or what that entity did at the only time that matters in this case – at the time Dr. Lonappan was treating her.[2]

Beaumont's attempted deception is by no means accidental or incidental. Rather, it is essential to its success in this case. Beaumont is well aware of the fact that this case is identical to this Court's seminal decision on ostensible agency, *Grewe v Mt. Clemens General Hospital*, 404 Mich 240; 273 NW2d 429 (1978), in three important respects:

- When Ms. Markel went to the emergency department of Beaumont Hospital on October 9, 2015, she was "looking to the hospital for treatment" not merely "as the situs where [her] physician would treat [her] . . ." 404 Mich at 251.
- The malpractice that is the subject of this case occurred while Ms. Markel was a patient in Beaumont Hospital.
- Ms. Markel and the doctor alleged to have committed malpractice had never before met each other. They did not have "a physician-patient relationship independent of the hospital setting." *Id.*

Based on this Court's decision in *Grewe*, there is only one way to avoid submission of the ostensible agency issue to the jury under these facts. The Court indicated in *Grewe* that if there was anything that might have put Ms. Markel on notice that Dr. Lonnapan was not the actual agent of Beaumont, her ostensible agency theory might fail. But this Court in *Grewe* observed that "we see nothing in the record which should have put the plaintiff on notice that Dr. Katzowitz . . . was an independent contractor as opposed to an employee of the hospital." *Id.*, at 253.

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[2]Since Beaumont sees some advantage in improperly supplementing the record at this stage, plaintiff would, if the Court is interested, offer to provide an affidavit signed by Ms. Markel attesting under oath that whatever she knew of Hospital Consultants at the time of her deposition, she learned well after October 2015.

Precisely the same is true here. There is nothing in the circuit court record that would have put Ms. Markel on notice that Dr. Lonnapan was *not* an agent of Beaumont. And that is why Beaumont is compelled to both improperly expand the record and why Beaumont asks this Court to draw an inference that is simply untrue.

II.

A principal thrust of the brief that defendants have filed is that Ms. Markel is looking to upset settled law in the area of ostensible agency. The opposite is true. It is Beaumont which seeks to ignore the law that this Court has established in this area.

In drafting her initial brief to this Court, there was a reason why Ms. Markel examined the Court's decisions on the subject of ostensible agency that predated *Grewe*. Because it is this law on ostensible agency, developed long before *Grewe*, that should be reaffirmed and applied in this case. Beaumont is revealingly silent in the face of the general law on ostensible agency that this Court has developed.

It is the plaintiff in this case who seeks to have this Court apply general principles of ostensible agency law to the facts of this case. It is the plaintiff who is asking this Court to apply the general principles of agency law embodied in this Court's opinions on the subject, as well as the law that is reflected in Restatement, Torts, 2d, §429, Restatement, Agency, 3d, §2.03, and in a substantial majority of states that have addressed the same issues.

It is Beaumont that asks this Court to ignore general principles of ostensible agency law that this Court has established over the years and to adopt a special rule of ostensible agency that would apparently apply only to hospitals. *Cf Popovich v Allina Health System*, 946 NW2d 885, 892 (Minn 2020) (holding that it could not "justify granting a hospitals-only exemption from the general rule

of vicarious liability based on apparent authority.").

In *Grewe*, this Court cited to a New York Court's decision in *Bing v Thunig*, 2 NY2d 656; 143 NE2d 3, 8 (1957), for the proposition that "[h]ospitals should . . . shoulder the responsibility bone by everyone else." *Grewe*, 407 Mich at 251. That is all that Ms. Markel is requesting in this case. The same rules of ostensible agency that apply in every other setting should also apply to hospitals.

III.

"Whenever, a principal has placed an agent in such a situation that a person of ordinary providence . . . is justified in assuming that such agent is authorized to perform in behalf of the principal, . . . the principal is estopped from denying the agent's authority." This is the summation of ostensible agency offered by this Court nearly one hundred years ago in *Maryland Casualty Co v Moon*, 231 Mich 56, 62; 203 NW 885 (1925). This is the law applicable in this case. Because Beaumont had a role in placing Dr. Lonnapan in such a position that a reasonable person could be justified in assessing that she was an employee of the hospital she was practicing in, the ostensible agency question had to be submitted to a jury.

IV.

Beaumont contends that it is impossible for Ms. Markel to prevail on her ostensible agency theory based on her deposition testimony that she has no memory of Dr. Lonnapan. Ms. Markel's memory of Dr. Lonnapan or of the treatment she provided is of no relevance to the question of whether Beaumont placed Dr. Lonnapan such a situation that a person of reasonable prudence would be justified in assuming that Dr. Lonappan was an agent of Beaumont.

What we know, even without testimony from Ms. Markel, is that Dr. Lonappan, just like Dr.

Katzowicz in *Grewe,* was inside Beaumont Hospital and provided medical care to Beaumont patients, including Ms. Markel. What we also know is that Ms. Markel was admitted to Beaumont after seeking care in its emergency department. Thus, Ms. Markel was neither directed to Beaumont by her personal physician, nor did she go there with the expectation of being treated by her own physician.

Cases from around the country support the view that these basic facts are sufficient to support an ostensible agency theory against a hospital. Numerous courts in other states have held that it is natural for a patient in these circumstances to assume that a doctor providing care within a hospital, where no prior professional relationship exists between the doctor and the patient, are hospital employees. The Supreme Court of Mississippi expressed this point well in *Hardy v Brantley*, 471 So2d 358 (Miss 1985):

> The basic rationale of these cases is that, unless there is some reason for a patient to believe that the treating physician in a hospital is an independent contractor, it is natural for him to assume that he can rely upon the reputation of the hospital as opposed to any doctor, which is the reason he goes there in the first place. These cases recognize his prerogative to make that assumption.

Id., at 370.

The "rational assumption" referred to by the Court in *Hardy* has been the foundation for numerous decisions around the country holding hospitals liable under an ostensible agency theory. *See e.g. Pamperin v Trinity Memorial Hosp*, 144 Wis2d 188; 423 NW2d 848, 856 (1988) ("Unless the patient is in some manner put on notice of the independent status, it would be rational for the patient to assume that these people are employees of the hospital."); *Gilbert v Sycamore Municipal Hosp*, 156 Ill2d 511; 622 NE2d 788, 794 (1993); *Wilkins v Marshalltown Medical And Surgical Center*, 758 NW2d 232, 237 (Iowa 2008); *Renoun Health, Ins. v Vanderford*, 126 Nev 221; 235 P3d

614, 618 (2010).[3]

This Court in *Grewe* never suggested that the plaintiff's memory of Dr. Katzowitz or of the care he provided was essential to his ostensible agency theory.[4] What is relevant is whether a reasonable person could justifiably conclude that Dr. Lonappan was an agent of Beaumont.

V.

Beaumont complains that the ostensible agency arguments that Ms. Markel makes in this case will render hospitals liable for the malpractice of any physicians who are granted privileges to practice within that hospital. This is an empty critique.

In a substantial number of cases, doctors who are "privileged" to practice in a hospital do so to provide medical care to their own patients. The preexisting professional relationship between these physicians and their patients will foreclose holding a hospital liable for the negligence of a doctor on an ostensible agency theory.

On this point, it is important to return again to the facts of *Grewe*. Dr. Katzowitz was a private physician who had privileges at Mt. Clements General Hospital. It was presumably because he had these privileges that Dr. Katzowicz was even in the hospital on the day that Mr. Grewe

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[3]Plaintiff would note that, while many of the hospital ostensible agency cases from around the country arise out of malpractice committed in hospital emergency departments, there are a number of cases from other jurisdictions where courts have recognized that hospitals could be held vicariously liable for the professional negligence of hospitalists practicing within them under an ostensible agency theory. *See e.g. Ford v Jawid*, 52 NE3d 874 (Ind App 2016); *Passmore v Day Kimnball Hosp*, 2014 WL 3360851 (Conn Super 2014); *Mohr v Grantham*, 172 Wash 2d 844; 262 P3d 490 (2011); *Martinez v St. Vincent Hosp*, 2011 WL 2041841 (NM App 2011).

[4]If the injured party were, in fact, a necessary element of an ostensible agency theory, it would presumably mean that such a claim would never be available in a wrongful death action where the injured parfty is no longer available to testify.

arrived with a dislocated shoulder. Despite the fact that Dr. Katzowitz's relationship to the hospital was as a doctor who had staff privileges there, this Court found in *Grewe* that the hospital could be held liable for the malpractice he committed on Mr. Grewe. What proved important to the Court in *Grewe* was not that Dr. Katzowitz's only connection with the hospital as an independent contractor with privileges to practice in the hospital, but whether a reasonable person would be justified in concluding that Dr. Katzowitz was an agent of the hospital.

Dr. Katzowitz's connection to Mt. Clemens General Hospital that was found to be vicariously liable for his malpractice in *Grewe* must be compared to the facts of this case. Dr. Katzowitz was *not* assigned to care for Mr. Grewe by the hospital; he simply joined with several other doctors in attempting to treat Mr. Grewe. But here, Dr. Lonappan, by her own admission, was assigned to serve as Ms. Markel's doctor by Beaumont. Lonappan Dep., at 50 (App 67a). Thus, in this case, unlike *Grewe*, the doctor, whose negligence forms the basis for plaintiff's vicarious liability claim against Beaumont was specifically assigned with the care of the patient who was the victim of the malpractice.

VI.

Beaumont defends the lower court's decisions striking the entirety of the affidavit that Ms. Markel filed in response to the motion for summary disposition. As explained in plaintiff's original brief, the contents of Ms. Markel's affidavit are irrelevant to the disposition of this appeal - Beaumont's motion should have been denied under *Grewe* even without considering the contents of Ms. Markel's affidavit.

But there is one part of that affidavit that could not be disregarded. Ms. Markel indicated in that affidavit that she believed that *all* of the physicians who treated her during her October 9-11,

2015 hospitalization were employees of Beaumont. Markel Affidavit, ¶5 (App 143a).

This portion of Ms. Markel's deposition was in no way inconsistent with anything that she testitied to in her deposition. Ms. Markel was not questioned in her deposition about her subjective view of the status of any of the doctors who treated her at Beaumont during her October 2015 hospitalization. Because this was not a subject area that was covered in her deposition, this aspect of her affidavit could not have been stricken.

VII.

Beaumont dedicates several pages in its brief to the suggestion that Ms. Markel's ostensible agency claim fails because she cannot demonstrate that she detrimentally relied on a reasonable belief that Dr. Lonappan was Beaumont's agent. Def's Brf., at 34-36. Beaumont would apparently engraft an additional requirement on the law of ostensible agency applicable presumably only in the hospital setting, *i.e.* that Ms. Markel somehow prove that she detrimentally relied on her belief that a physician treating her was the hospital's agent.

There is not a single decision of this Court or the Court of Appeals on the subject of ostensible agency (including *Grewe*) where detrimental reliance was identified as an essential element. Indeed, there is not a single Michigan case in which the term "ostensible agency" is linked together with "detrimental reliance."[5]

Beaumont's suggestion that there is a reasonable reliance to Ms. Markel's ostensible agency

[5]A bit of computer research reveals that only one Michigan appellate case contains both of these terms, the Court of Appeals unpublished decision in *Aero-Taxi-Rockford v General Motors Corp*, Court of Appeals No. 259565. But, even in that case, these two terms were not discussed together.

theory is completely unsupported in Michigan law.[6]

RELIEF REQUESTED

For the foregoing reasons, plaintiff-appellant, Mary Anne Markel, requests that this Court reverse the Court of Appeals April 22, 2021 decision and remand this case to the Oakland County Circuit Court with instructions to reinstate plaintiff's vicarious liability claim against Beaumont based on the negligence of Dr. Lonappan.

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[6]The Restatement, Agency, 3d, also supports this view. Restatement, Agency, 3d, §2.03 sets out the general rule of ostensible agency law that is the subject of this case. Comment e to that provision of the Restatement explains that "[t]o establish that an agent acted with apparent authority, it is not necessary for the plaintiff to establish that the principal's manifestations induced the plaintiff to make a detrimental change in position."