

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA STEMPIAK and THOMAS
STEMPIAK,

Plaintiffs-Appellees,

v

PRIME HEALTHCARE SERVICES - GARDEN
CITY, LLC,

Defendant-Appellant,

and

MOUNTAIN WEST SURGICAL ASSOCIATES,
PLLC, CHRISTINE M CUCCHI, D.O., PLLC, DR.
ROBERT C. GROSS, and DR. KATHERINE
HOMER,

Defendants.

Before: PATEL, P.J., and BOONSTRA and RICK, JJ.

PER CURIAM.

In this medical malpractice action, defendant Primehealth Services-Garden City, LLC (Garden City Hospital) appeals by leave granted¹ an order denying its motion for summary disposition. Because there is a genuine issue of material fact whether defendant Robert C. Gross was an ostensible agent of Garden City Hospital, we affirm the trial court’s denial of the hospital’s motion for summary disposition.

¹ *Stempniak v Primehealth Services-Garden City, LLC*, unpublished order of the Court of Appeals, entered August 18, 2022 (Docket No. 361018).

I. BACKGROUND

On March 16, 2018, plaintiff, Barbara Stempniak,² presented to the emergency department of Garden City Hospital with complaints of severe abdominal pain. The emergency department staff diagnosed Stempniak with cholecystitis (inflammation of the gallbladder) and admitted her to the hospital. The next day, a resident in the emergency department requested Dr. Gross, a general surgeon, to perform a surgical consultation. It is undisputed that Stempniak did not have a prior professional relationship with Dr. Gross. On March 18, 2018, Dr. Gross and Dr. Katherine Homer, a Garden City Hospital resident, removed Stempniak's gallbladder laparoscopically. Stempniak's common bile duct was cut open during the surgery. As a result, Stempniak developed an infection and was transferred to another hospital where she underwent two surgeries to repair the damage to her bile duct. Following a multi-week hospital stay, Stempniak received long-term care in a rehabilitation facility.

Stempniak and her husband filed this medical malpractice action alleging that Dr. Gross negligently cut Stempniak's bile duct during the surgery. Stempniak further alleged that Garden City Hospital was vicariously liable for Dr. Gross's negligence because he was the actual, apparent, and/or ostensible employee of Garden City Hospital. Stempniak testified that she recalled having tests in the emergency room that revealed she needed gallbladder surgery. Because she was in extensive pain before her surgery, she did not recall any of the treating physicians or any conversations with treatment providers or administrators at Garden City Hospital. She vaguely recalled meeting Dr. Homer, but was unsure what role Homer had in her treatment. Although she recalled signing a consent form to perform the surgery, she did not recall any conversations preceding signing it and she was not sure that she understood all the provisions of the consent form because of her high level of pain at the time.

Following discovery, Garden City Hospital moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) arguing that it could not be held vicariously liable because Dr. Gross was an independent contractor and that it had no agency relationship, either actual or ostensible, with Dr. Gross. Garden City Hospital asserted that Stempniak signed a form entitled "General Consent for Treatment" in which she acknowledged, in pertinent part:

Some doctors and staff are not employees of Garden City Hospital. I know that Garden City Hospital is not responsible for their actions. I also know I may receive separate bills from them even though they provide services to me at Garden City Hospital. I will work with their offices to answer questions about my insurance.

In response, Stempniak argued that she presented to the emergency department of Garden City Hospital looking to its agents and employees to treat her severe right upper quadrant abdominal pain. Despite her lack of recall due to her severe pain, Stempniak maintained that she continued to look to Garden City Hospital its agents and employees to treat her physical ailments and the

² Barbara's husband, Thomas Stempniak, has a claim for loss of consortium. References to "Stempniak" in this opinion refers to only Barbara Stempniak.

laparoscopic cholecystectomy was part of that treatment. The trial court denied the motion for summary disposition. This appeal followed.

II. ANALYSIS

Garden City Hospital argues that the trial court erred by denying its motion for summary disposition because there is no genuine issue of material fact that it did not have an agency relationship with Dr. Gross.³ We disagree.

The principle of vicarious liability, or respondeat superior, is that “ ‘a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment.’ ” *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928). Generally, a hospital cannot be held vicariously liable for the negligence of an independent contractor physician. *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978). But a hospital may be held vicariously liable under the theory of ostensible agency if a plaintiff proves the following:

“[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.” [*Markel v William Beaumont Hosp*, ___ Mich ___, ___; 982 NW2d 151, 152 (2022), quoting *Grewe*, 404 Mich at 253 (quotation marks and citations omitted; alterations in original).]

The “critical question” identified by the *Grewe* Court

is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems. A relevant factor in this determination involves resolution of the question of whether the hospital provided the plaintiff with [the doctor] or whether the plaintiff and [the doctor] had a patient-physician relationship independent of the hospital setting. [*Grewe*, 404 Mich at 251.]

“The rule from *Grewe* is that when a patient presents for treatment at a hospital emergency room and is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital’s agent is reasonable unless the hospital does something to dispel that belief.” *Markel*, ___ Mich at ___; 982 NW2d at 153. The fact that the patient does not recall the treating doctor does not preclude a finding that the patient reasonably believed that the

³ “We review de novo a trial court’s decision on a motion for summary disposition.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

doctor was an agent of the hospital. *Id.* at __; 982 NW2d at 153-154. And the patient's testimony is not required to establish ostensible agency under *Grewe*. *Id.* at __; 982 NW2d at 154.

In this case, Stempniak presented to the emergency room of Garden City Hospital for treatment of her abdominal pain that had persisted for three days. A member of the hospital's emergency staff sought a surgical consultation with Dr. Gross. It was ultimately determined that Stempniak needed gallbladder surgery, which was performed by Dr. Gross. It is undisputed that Stempniak had never met Dr. Gross before the consultation and she did not have a pre-existing relationship with him or any of the other medical staff that treated her during her stay at Garden City Hospital. We find that there is sufficient evidence from which a reasonable trier of fact could conclude that Stempniak went to Garden City Hospital for treatment of her physical ailments and expected to be treated by the hospital. See *Grewe*, 404 Mich at 253-254.

Garden City Hospital contends that Stempniak cannot establish that she had a reasonable belief that Dr. Gross was an agent of the hospital because she did not recall meeting him and did not recall any conversations with him. Stempniak's lack of recall does not preclude a finding that she reasonably believed that Dr. Gross was an agent of the hospital. *Markel*, __ Mich at __; 982 NW2d at 153-154.

Garden City Hospital further argues that it did not affirmatively act or make any representations that would create in Stempniak's mind the reasonable belief that Dr. Gross was acting on behalf of the hospital. But a principal does not need to affirmatively act to create ostensible agency. *Id.* at __; 982 NW2d at 153 (overruling *VanStelle v Macaskill*, 255 Mich App 1, 10, 662 NW2d 41 (2003) "to the extent that [it] requires a plaintiff to show some additional, affirmative act by the hospital in every emergency room case to prove ostensible agency[.]"). The *Grewe* Court recognized that "[a]n agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent" 404 Mich at 252 (cleaned up). In other words, a principal's failure to act could give rise to the creation of an ostensible agency.

In *Grewe*, the Supreme Court found that the plaintiff's belief in the defendant doctor's status as the ostensible agent of the defendant hospital was reasonable because there was "nothing in the record which should have put plaintiff on notice that [the defendant doctor] . . . was an independent contractor as to an employee of the hospital." *Id.* at 253. In this case, Garden City Hospital asserts that the record establishes that it affirmatively acted to inform Stempniak that some of the physicians were not its employees when it provided her with a consent form that she signed before the surgery. The two-page "consent for treatment" form, in a section titled, "I understand that," provided:

Some doctors and staff are not employees of Garden City Hospital. I know that Garden City Hospital is not responsible for their actions. I also know I may receive separate bills from them even though they provide services to me at Garden City Hospital. I will work with their offices to answer questions about my insurance.

While the above language arguably informed Stempniak that "some" doctors and staff were not employees of Garden City Hospital, it did not provide her with any information regarding Dr.

Gross's employment status. Further, Stempniak testified that she had no memory of signing the form, no memory of whether its contents were explained to her, and no understanding of what it meant because she was in significant pain at the time that she signed it. Stempniak explained, "I was in so much pain I would have signed anything that I thought was going to help me get rid of the pain." Viewing the evidence in the light most favorable to Stempniak as the non-moving party, we find that there is a genuine issue of material fact whether Stempniak had a reasonable belief that Gross was an agent of the hospital and thus affirm the trial court's denial of the hospital's motion for summary disposition.

Affirmed.

/s/ Sima G. Patel
/s/ Michelle M. Rick