S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

WINSTON MITEEN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2006
v GENESYS REGIONAL MEDICAL CENTER, Defendant-Appellant, and JOHN TOLFREE HEALTH SYSTEM CORP, d/b/a WEST BRANCH REGIONAL MEDICAL CENTER, DR. ROGER BLACK, DR. STEWART WEINER, DR. MARK RITTENGER, DR. SCOTT GARNER, and DR. ALAN IPPOLITO, Defendants.	No. 262410 Genesee Circuit Court LC No. 03-076705-NH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant, Genesys Regional Medical Center ("Genesys"), appeals by leave granted from an order denying its motion for summary disposition. We reverse.

Defendant argues that the trial court erred by ruling that an issue of material fact exists with respect to plaintiff's vicarious liability claim against Genesys based on ostensible agency. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court properly grants a motion for summary disposition under MCR 2.116(C)(10) when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Plaintiff alleges that Genesys is vicariously liable for the acts of the individually named doctors. The trial court ruled:

> . . . looking at the evidence in the light most favorable to the plaintiff, as I must do in this motion, I find that there is at the very least a fact question on the issue of whether or not Mr. Miteen had a reasonable belief. The use of the phrase reasonable belief is a clear invitation to a jury resolution or a fact finder resolution. That applies . . . to Genesys . . . .

"Generally speaking, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients." *Grewe v Mt Clemens General Hosp,* 404 Mich 240, 250; 273 NW2d 429 (1978); see also *Chapa v St Mary's Hospital*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991). Here, it is undisputed that the individual treating physicians were not employees of Genesys.

However, our Supreme Court acknowledged in *Wilson v Stilwill*, 411 Mich 587, 609-610; 309 NW2d 898 (1981), that a hospital may be liable for the acts of medical personnel who are the hospital's ostensible agents when a plaintiff looks to the hospital for treatment and does not merely view the hospital as the location where his physician will treat him. For plaintiff to prove his ostensible agency theory, he must show that he dealt with the physician with a reasonable belief in the physician's authority as an agent of the hospital, that his belief was generated by an act or neglect on the part of the hospital, and that he was not guilty of negligence. *Zdrojewski v Murphy*, 254 Mich App 50, 66; 657 NW2d 721 (2002). Thus, when an independent doctor-patient relationship exists before the patient's admission to a hospital, a finding of ostensible agency is generally precluded unless the acts or omissions of the hospital override the impressions created by the preexisting relationship to create a reasonable belief that the doctor is an agent of the hospital. *Id.; Chapa, supra* at 33-34.

The record presented to this Court indicates that the only basis for plaintiff's belief that the doctors were employees of Genesys was the fact that they were present and working at the hospital. Nevertheless, plaintiff argues that because he was transferred to Genesys without knowledge of who his treating physician would be at that hospital, Genesys is liable under an ostensible agency theory of liability, i.e., plaintiff "looked to" Genesys for treatment. Plaintiff, however, relies primarily on his counsel's recitation of the facts at the summary disposition hearing, with virtually no citation to the lower court record. Plaintiff devotes significant effort explaining his erroneous belief that the doctors who treated him at Genesys were agents of Genesys was reasonable. But, his brief cites no evidence supporting the second element of ostensible agency: that his belief was generated by an act or neglect on the part of the hospital. *Zdrojewski, supra* at 66.

Plaintiff's deposition testimony demonstrates that neither Genesys nor the doctors who treated him there comported themselves in any manner to create his belief that these treating physicians were employees of Genesys. To the contrary, when plaintiff was asked during his deposition about what he recalled about being at Genesys, he candidly testified, "not very much." Plaintiff offers no evidence that Genesys' actions or neglect generated his purported belief that his treating physicians were employees of Genesys. Therefore, plaintiff's ostensible agency theory of vicarious liability fails as a matter of law. "Simply put, defendant, as putative principal, must have done something that would create in [plaintiff's] mind the reasonable belief

that [the individual doctor] was acting on behalf of defendant." *Chapa, supra* at 33-34. "Apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent." *Alar v Mercy Mem Hosp,* 208 Mich App 518, 528; 529 NW2d 318 (1995). The trial court should have granted Genesys summary disposition. MCR 2.116(C)(10). Because resolution of this issue in Genesys' favor resolves plaintiff's action against Genesys, we need not address the remaining issues Genesys raises on appeal.

We reverse and remand for entry of judgment for defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey