STATE OF MICHIGAN

COURT OF APPEALS

NORBERT P. CHAPP, successor personal representative of the estate of ODETTE CHAPP, deceased,

Plaintiff-Appellant,

v

ST. JOHN HOSPITAL AND MEDICAL CENTER CORPORATION,

Defendant-Appellee,

and

JULIE JACOBS and STEVE C. ROSSMORE,

Defendants.

UNPUBLISHED
September 10, 1996

No. 175340
LC No. 91124879 NH

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

This is a medical malpractice action. Plaintiff appeals as of right from a grant of summary disposition to defendant St. John Hospital pursuant to MCR 2.116(C)(10).[1]

Plaintiff argues that the trial judge erred in granting summary disposition where a factual question existed on the issue of proximate cause. He asserts error in the judge's ruling that Dr. Taylor was not an agent of defendant St. John Hospital. Finally, he argues that the judge erred in denying his motion for rehearing. We affirm.

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*Circuit judge, sitting on the Court of Appeals by assignment.

On September 5, 1990, plaintiff brought Odette Chapp to the emergency room in acute distress. She suffered from vertigo, intractable vomiting and disorientation. She was diagnosed with labyrinthitis. On September 6, 1990, her condition deteriorated. On September 7, 1990, a neurologist examined her for the first time and by then she was brain dead, her brain stem having been damaged by a cerebellar infarction.

Plaintiff, as the personal representative of decedent's estate, brought suit alleging that defendant breached the appropriate standard of care in failing to diagnose and treat decedent's condition. The failure allegedly caused her death.

We review de novo a judge's grant of summary disposition pursuant to MCR 2.116(C)(10). We review the record to determine whether a defendant was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1994), aff'd 446 Mich 482 (1994).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when there is no genuine issue of material fact. *Id*. We consider the pleadings and any other evidence in favor of the party opposing the motion. *Id*.

Initially, we must determine whether the judge properly ruled that Dr. Taylor was not an agent of the hospital. Dr. Taylor allegedly told decedent's family that, had decedent been brought to the hospital before September 7, she would have lived. Plaintiff argues that Dr. Taylor was an agent of the hospital. Therefore, his statement is an admission against the hospital and provides support for plaintiff's claim that the hospital's inaction caused decedent's death. Defendant argues that Dr. Taylor merely had staff privileges at the hospital and was not an employee. Therefore, his statement is inadmissible hearsay.

> For an ostensible agency to be found, three elements must be present:
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> (1) A person dealing with an agent must do so with belief in the agent's authority, and this belief must be a reasonable one;
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> (2) Such belief must be generated by some act or negligence of the principal sought to be charged; and
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> (3) The person relying on the agent's authority must not be guilty of negligence. [*Grewe v Mt Clemens Hospital*, 404 Mich 240, 252-253; 273 NW2d 429 (1978).]

As our Court has previously stated, the critical question is whether the decedent was looking to the hospital for treatment or merely viewed the hospital as the situs where his physician would treat him for his problems. *Sasseen v Community Hospital*, 159 Mich App 231, 237; 406 NW2d 193 (1986).

The record indicates that the decedent looked to defendant hospital for treatment. There had been no prior relationship between decedent and Dr. Taylor. We conclude that Dr. Taylor was an ostensible agent of the defendant hospital. His statement is admissible as an admission under MRE 801(d)(2).

Even though the statement is admissible, we conclude that plaintiff has failed to present sufficient evidence on the issue of proximate cause to withstand defendant's motion for summary disposition. Plaintiff failed to set forth documentary evidence establishing a genuine issue of material fact. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

At best, the documentary evidence presented in the court below established a factual question with respect to breach of the standard of care. There was evidence that a CT scan should have been administered at an earlier time and that a subarachnoid hemorrhage should have been considered by the personnel in the emergency room. However, plaintiff did not submit evidence showing that, but for the doctor's negligence, decedent lost an opportunity to survive. *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990). Dr. Taylor's statement, standing alone, is insufficient for plaintiff to meet his burden.

The judge did not abuse his discretion in denying plaintiff's motion for reconsideration. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989). Plaintiff failed to demonstrate a palpable error by which the judge and the parties were misled. MCR 2.119(F)(3); *Cason, supra*. Plaintiff merely presented the same issues that had already been ruled on by the judge during the original summary disposition motion. See *Charbeneau v Wayne County General Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Affirmed.

/s/ Marilyn Kelly
/s/ Roman S. Gribbs
/s/ William E. Collette

[1] Although plaintiff named Julie Jacobs, MD and Steve Rossmore, MD as defendants, plaintiff acknowledges that they were never served. Therefore, they were not parties in the lower court or in this appeal.