

STATE OF MICHIGAN
COURT OF APPEALS

KYONGAE SEVELIS and CRAIG SEVELIS,

Plaintiff-Appellants,

and

THE WELLNESS PLAN,

Intervening Plaintiff,

v

JOHN D. SELLERS, JOHN D. SELLERS, D.O.,
P.C., ROBERT I. BOORSTEIN and ADVANCED
SURGICAL ASSOCIATES,

Defendants,

and

BOTSFORD GENERAL HOSPITAL,

Defendants-Appellee.

UNPUBLISHED

May 17, 2005

No. 252398

Oakland County Court

LC No. 01-029236-NM

Before: Judges O’Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order of dismissal in this medical malpractice action. We affirm.

Plaintiff¹ argues that the trial court erred in granting summary disposition in favor of defendant, Botsford General Hospital, by indicating that defendant was not vicariously liable for the actions of Dr. Robert Boorstein. We disagree. A trial court’s decision on a motion for

¹ Plaintiff Craig Sevelis’ claim was for loss of consortium. For purposes of this opinion, “plaintiff” will refer to Kyongae Sevelis individually.

summary disposition is reviewed de novo. *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 523; 687 NW2d 143 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). In deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ensink, supra* at 523. This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Review is limited solely to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

“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 Hospital*, 404 Mich 240, 250; 273 NW2d 429 (1978). However, a hospital may be liable for the negligence of its apparent agents through ostensible agency. *Chapa v St Mary’s Hospital of Saginaw*, 192 Mich App 29, 33; 480 NW2d 590 (1991). To establish ostensible agency, three factors must be met:

- (1) 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, (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. [*Id.* at 33-34.]

“Simply put, defendant, as putative principal, must have done something that would create in [plaintiff’s] mind the reasonable belief that [Dr. Boorstein] was acting on behalf of defendant.” *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.* However, a hospital may not be held vicariously liable where a physician, referred by plaintiff’s own personal physician, treats a patient in a hospital setting. See *id.* at 35-36.

The elements of ostensible agency necessary to hold Botsford General Hospital vicariously liable were not established in this case. First, even if plaintiff believed that Dr. Boorstein was an agent of Botsford General Hospital, the belief was not a reasonable one. *Id.* at 33-34. It is undisputed that Dr. John D. Sellers is plaintiff’s personal physician, and not an agent of defendant. Dr. Sellers called Dr. Boorstein into surgery because Dr. Sellers thought that Dr. Boorstein was a good surgeon and he wanted his opinion. Dr. Boorstein also indicated that Dr. Sellers called him in. Where a patient’s physician calls in another physician to assist him with a patient, a hospital may not be held vicariously liable, even if treatment occurs in a hospital setting. See *id.* at 35-36. Further, plaintiff was put on notice of the nature of Dr. Boorstein’s involvement immediately after surgery when Dr. Boorstein stated that Dr. Sellers called him in to surgery. Plaintiff stated:

Dr. Boorstein say you got a lot of scar tissue, so he said your bowel covered your uterus. So Dr. Seller call me, you never seen me before, but Dr. Sellers call me

because I'm working in the hospital, so he say I, he called me and he wanted me to help him. So I look at your, your bowels covered uterus so I had to cut two feet, okay? That's what he told me.

Any belief that plaintiff had that Dr. Boorstein was an agent of Botsford General Hospital during the initial surgery was, therefore, unreasonable. Any belief that Dr. Boorstein was an agent of Botsford General Hospital during subsequent treatments of the hospital was also unreasonable because plaintiff was already on notice of Dr. Boorstein's relationship with the hospital. Because there was no reasonable belief by plaintiff that Dr. Boorstein was an agent of Botsford General Hospital, Botsford General Hospital may not be held vicariously liable for his actions. *Id.* at 33-34. Further, the hospital did not generate such a belief by some act or neglect. *Id.* The trial court properly granted summary disposition in favor of Botsford General Hospital.

Plaintiff next argues that the trial court abused its discretion in permitting defendant to move for summary disposition after the dispositive motion cut-off date. We disagree. The decision to extend a summary disposition scheduling order is reviewed for an abuse of discretion. MCR 2.401; *EDI Holdings LSC v Leer Corp*, 469 Mich 1021; 678 NW2d 440 (2004).

It is within a judge's discretion to "enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case." *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997), quoting MCR 2.401(B). Where there has been a valid exercise of discretion, appellate review is highly limited. *Wendel v Swanberg*, 384 Mich 468, 475; 185 NW2d 348 (1971). A trial court's ruling will not be set aside unless there has been a clear abuse of discretion. *Glasher v Griffin*, 102 Mich App 445, 448; 301 NW2d 889 (1980). An abuse of discretion involves much more than a difference in judicial opinion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999); *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc, supra* at 227-228, quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

In this case, on April 21, 2001, the trial court issued a scheduling order setting the motion cut-off date for October 25, 2001. On August 29, 2002, the trial court signed a stipulated order for substitution of counsel for Botsford General Hospital. On August 29, 2002, Botsford General Hospital filed a motion to extend dispositive motion and motion in limine cut-off dates due to the substitution in counsel. On September 11, 2002, a hearing on the motion was held and the court granted the motion to extend dispositive motions and motions in limine. On September 23, 2002, the trial court entered an order extending the dispositive motion and motion in limine cut-off date for fourteen days past the order date. The trial court may have extended the dispositive motion date to allow the substituted counsel time to prepare and to file any pretrial motions. The subject matter of the summary disposition motion may have been brought up at trial, with the outcome being the same. By allowing the substituted counsel time to file a dispositive motion,

the trial court prevented the same outcome after a costly and time-consuming trial. It was not an abuse of discretion for the trial court to extend the dispositive motion date.

Affirmed.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

/s/ Michael J. Talbot