

STATE OF MICHIGAN
COURT OF APPEALS

ALLIE REAN PORTER,

Plaintiff-Appellant,

v

DMC HEALTH CARE CENTERS, INC., GRACE
HOSPITAL, and DR. MARY PATTERSON, D.O.,

Defendants-Appellees.

UNPUBLISHED

January 17, 1997

No. 188623

Wayne Circuit Court

LC No. 94-404950 NH

Before: Griffin, P.J., and T. G. Kavanagh* and D. B. Leiber**, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, Allie Rean Porter, appeals as of right the orders of the Wayne Circuit Court dismissing her claims. We affirm.

On July 1, 1991, plaintiff sought medical care and treatment at the Woodland Medical Center for complaints relating to severe pain in her right side. Plaintiff was examined by defendant Dr. Mary Patterson, who continued to treat plaintiff throughout the next six months. Dr. Patterson advised plaintiff to undergo a total abdominal hysterectomy. Dr. Patterson performed the surgery at defendant Grace Hospital. However, the surgery failed to alleviate plaintiff's pain and it was subsequently discovered that her pain was caused by a pinched nerve or a spinal problem. Plaintiff also named DMC Health Care Centers, Inc., as a defendant, arguing that DMC Health Care Centers, Inc., was a parent corporation which should be held liable for the acts of its subsidiaries, which plaintiff asserts include Woodland Medical Center, Inc., Woodland Physicians, P.C., DMC Insurance Co., Ltd., and DMC Centers, Inc. However, defendant DMC Health Care Centers, Inc., contends that the corporations are separate entities and that there is no basis for a parent-subsidary liability theory.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

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

Plaintiff first argues that the trial court erred by quashing service of process on Dr. Patterson. We disagree.

After unsuccessfully attempting to locate Dr. Patterson to serve her with process, plaintiff sought, and was granted, an order for alternative service pursuant to MCR 2.105(I) and MCR 2.106. The order for alternative service allowed service of process to be made on Dr. Patterson by publication in six Arizona newspapers specified in the order. Plaintiff, however, only published notice in five of the six newspapers specified in the order.

If service of process cannot be made as provided in MCR 2.105, the court may permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. MCR 2.105(I). In the instant case, the court determined that such notice could be accomplished by publication in six specified Arizona newspapers. However, Dr. Patterson was neither personally served nor given publication notice as required by the court. Accordingly, we find that the defect in service was substantial rather than technical, and that the trial court properly quashed service of process on Dr. Patterson. *Conrad v Ward*, 33 Mich App 687; 190 NW2d 361 (1971).

Plaintiff next argues that the trial court erred by dismissing Dr. Patterson pursuant to MCR 2.102(E) for failure to serve her with process. Plaintiff argues that she properly served Dr. Patterson by serving Dr. Patterson's liability insurer. We disagree.

In certain circumstances, courts have allowed service of process to be made on a defendant by serving the defendant's liability insurer. See *Hayden v Gokenbach*, 179 Mich App 594; 446 NW2d 332 (1989), modified on other grounds, 435 Mich 856; 456 NW2d 714 (1990); *Kreuger v Williams*, 410 Mich 144; 300 NW2d 910 (1981). However, in the instant case, plaintiff served DMC Health Centers, Inc., rather than Dr. Patterson's liability insurer, DMC Insurance Co., Ltd. Plaintiff has not convinced this Court that DMC Health Care Centers, Inc., should be held liable for the acts of DMC Insurance Co., Ltd. See *Maki v Copper Range Co.*, 121 Mich App 518, 525; 328 NW2d 430 (1982). Furthermore, MCR 2.105(I), which governs substituted service, provides that "[s]ervice of process may not be made under this subrule before entry of the court's order permitting it." MCR 2.105(I)(3). In the instant case, plaintiff never filed a motion requesting that the court allow service on Dr. Patterson by serving her liability insurer. Accordingly, the trial court did not err by dismissing Dr. Patterson pursuant to MCR 2.102(E)(1).

Plaintiff further contends that the trial court erred by dismissing DMC Health Care Centers, Inc., after concluding that it was the wrong defendant. The trial court granted summary disposition pursuant to MCR 2.116(C)(8) with respect to DMC Health Care Centers, Inc., after determining that it was the wrong defendant. Plaintiff then filed a motion for reconsideration, arguing that DMC Health Care Centers, Inc., was, in fact, the correct defendant based on a parent-subsidiary liability theory. We find that the trial court properly granted summary disposition pursuant to MCR 2.116(C)(8) and that the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Generally, absent an abuse of the corporate form, parent and subsidiary corporations are treated as separate and distinct entities. *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547; 537 NW2d 221 (1995). To establish the liability of a parent corporation for the acts of its subsidiary, the plaintiff must prove (1) control by the parent to such a degree that the subsidiary has become its mere instrumentality, (2) fraud or wrong by the parent through its subsidiary, and (3) unjust loss or injury to the claimant. *Maki, supra* at 525. The evidence submitted by plaintiff in support of its motion for reconsideration failed to establish any of the elements set forth in *Maki*. Furthermore, the evidence submitted by defendants established that, at the time of the alleged negligence, there was no parent/subsidiary relationship between DMC Health Care Centers, Inc., and Woodland Medical Group, Inc., Woodland Physicians, P.C., or DMC Centers, Inc. Therefore, the trial court properly determined that DMC Health Care Centers, Inc., was the wrong defendant and dismissed it from the case.

Plaintiff's final argument is that the trial court erred by dismissing Grace Hospital. We disagree. A hospital is not held 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 or her patients. *Grewe v Mt Clemens General Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978). However, an ostensible agency may be found where (1) the person dealing with the agent does so with a reasonable belief in the agent's authority, (2) such belief is generated by some act or neglect of the principal sought to be charged, and (3) the third person relying on the agent's authority is not guilty of negligence. *Id.* Relevant considerations include (1) whether the patient looks to the hospital to provide him with medical treatment, (2) whether the hospital represents to the patient that medical treatment would be afforded by doctors working at the hospital, and (3) whether a doctor/patient relationship existed independent of the hospital setting. *Id.* at 250-251.

Instead of looking for treatment at Grace Hospital, plaintiff testified that she initially sought treatment with the staff gynecologists at a clinic on Eight Mile Road. It was at this clinic where plaintiff first encountered Dr. Patterson, a gynecologist who had taken over for another clinic staffer. Dr. Patterson examined plaintiff at the clinic on Eight Mile and then scheduled plaintiff for surgery at Grace Hospital after she agreed to undergo the procedure. Plaintiff's allegation that her surgery was performed at Grace Hospital because "that's where the doctors work out of for DMC" does not contradict defendant's documentary evidence that Dr. Patterson was not employed by Grace Hospital. Plaintiff failed to present a genuine issue of material fact as to vicarious liability. *Id.* Accordingly, the trial court properly granted summary disposition with respect to plaintiff's claim against Grace Hospital. MCR 2.116(G)(4).

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas Giles Kavanagh
/s/ Dennis B. Leiber