

STATE OF MICHIGAN
COURT OF APPEALS

DIANNE WALDORF, Personal Representative of the
Estate of JEFFREY WALDORF,

UNPUBLISHED
February 28, 1997

Plaintiff-Appellant,

v

No. 188226
Kalamazoo Circuit Court
LC No. 94-000131-NH

JOHN A. AZEVEDO, M.D. and KALAMAZOO
CARDIOLOGY, P.C.,

Defendants,

and

MADDUR BADARINATH, M.D., RAAKESH
BHAN, M.D., and CRITICAL CARE MEDICINE,
P.C.

Defendant-Appellees.

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiff Dianne Waldorf appeals as of right from an order entered by Kalamazoo Circuit Court Judge J. Richardson Johnson, granting defendants Badarinath, Bhan and Critical Care Medicine, P.C.'s motion for summary disposition pursuant to MCR 2.116(C)(10) in this medical malpractice action.¹ We affirm and adopt and incorporate by reference the trial court's written opinion as our own.

This Court reviews de novo a lower court's ruling on a motion for summary disposition. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 449 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). We examine the pleadings, depositions, affidavits, admissions

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

and other documentary evidence in a light most favorable to the nonmoving party to determine whether the moving party was entitled to judgment as a matter of law. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). In this case, plaintiff asserted a cause of medical malpractice based not on defendants' negligence but instead based upon their alleged vicarious liability for the negligence of Dr. Stephen Peck, a cardiologist called in to consult on the cardiac care for plaintiff's decedent, Jeffrey Waldorf. A physician who requests the assistance of another physician may be held vicariously liable only under theories of agency, concert of action, or negligent selection. *Whitmore v Fabi*, 155 Mich App 333, 338; 399 NW2d 520 (1986). Here, plaintiff alleged vicarious liability based on theories of traditional agency and concert of action.

Under a traditional agency theory, the test to determine if an agency relationship has been created is whether the principal has the right to control the actions of the agent. *Little v Howard Johnson Co*, 183 Mich App 675, 680; 455 NW2d 390 (1990). Here, plaintiff presented evidence to demonstrate that although Drs. Bhan and Badarinath relied on Dr. Peck's advice, defendants occasionally changed the recommended dosage of cardiac medication that Dr. Peck prescribed and retained the ultimate authority to discharge Mr. Waldorf. Plaintiff cites no cases to support the proposition that one doctor's ability to change medication prescribed by another doctor constitutes control over the other doctor, however, and we believe that logic does not support this conclusion. Indeed, Dr. Peck's deposition testimony confirmed that while defendants may have changed these dosages, defendants had no control over the dosages he prescribed or regarding the course of treatment he recommended. Indeed, this evidence fails to establish that defendants exerted control over Dr. Peck's actions, particularly with respect to Peck's failure to prescribe electrophysiological studies or a pacemaker. Rather, it merely raises questions as to whether defendants were negligent in ignoring Dr. Peck's advice before discharging Waldorf, a claim that plaintiff dismissed. Therefore, plaintiff has failed to raise a genuine issue of material fact as to defendants' control over Dr. Peck, and the trial court correctly held, as a matter of law, that defendants could not be held vicariously liable for Dr. Peck's alleged negligence.

Plaintiff's concert of action theory is based on a definition found in the Michigan Supreme Court's decision in *Summers v Hoffman*, 341 Mich 686, 696; 69 NW2d 198 (1955), a case filed to establish the plaintiff's rights in real estate held by the plaintiff and the defendants acting as joint venturers. Under *Summers*, concert of action is in the nature of a joint venture where each participant is deemed to be both an agent for his coadventurer and a principal for himself. *Id.* Plaintiff extrapolates from this definition to assert that Drs. Bhan and Badarinath were vicariously liable for the actions of Dr. Peck because they were jointly employed to work together as a team to treat Mr. Waldorf's cardiac problem. The case law cited by plaintiff describes concert of action as occurring, however, only while physicians are in each others' presence either observing or should have been observing the actions of the other in the exercise of reasonable vigilance. *Rodgers v Canfield*, 272 Mich 562, 564; 262 NW 409 (1935); See also *Orozco v Henry Ford Hospital*, 408 Mich 248, 253-254; 290 NW2d 363 (1980).

Here, plaintiff presented no evidence to establish a genuine issue of material fact that defendants were in the presence of Dr. Peck when he examined Mr. Waldorf, or that defendants owed a duty to

be in his presence in the exercise of reasonable vigilance. As the trial court accurately observed, although doctors from different specialties treating one patient all share the same goal of restoring the patient's health, this common goal does not create concerted action. We also agree with the court that plaintiff's proposed rule of vicarious liability would blur the distinctions between standards of care among specialists: "Cardiologists are specialists subject to their own unique standard of care, and to impute liability on a critical care specialist for failures not specifically within his expected realm of knowledge is a questionable concept." Accordingly, the trial court did not err in granting defendants' motion for summary disposition. *Whitmore, supra* at 339.

Affirmed.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ Michael J. Talbot

¹ The trial court also granted defendants Azevedo and Kalamazoo Cardiology, P.C.'s motion for summary disposition in the same order, but plaintiff does not raise on appeal any issues relating to these defendants.