STATE OF MICHIGAN

COURT OF APPEALS

BOTSFORD GENERAL HOSPITAL and COMMUNITY EMERGENCY MEDICAL SERVICES,

Plaintiffs-Appellants,

v

UNITED AMERICAN HEALTHCARE CORPORATION, GREGORY H. MOSES, JR., WILLIAM E. JACKSON, II, JULIUS V. COMBS, GLORIA LARKINS, WILLIAM B. FITZGERALD, ANITA C. R. GORHAM, and HARCOURT G. HARRIS,

Defendants-Appellees.

UNPUBLISHED
December 2, 2003

No. 241108
Oakland Circuit Court
LC No. 01-033644-CK

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition in favor of defendant, United American Healthcare Corporation (UAH), with regard to various contract and tort claims alleged in plaintiffs' first amended complaint. We affirm.

I. Facts and Proceedings

In May 1998, pursuant to MCL 500.8110, the state insurance commissioner (commissioner) obtained a seizure order in the Ingham Circuit Court against OmniCare Health Plan (OmniCare), a nonprofit health maintenance organization that is subject to state regulation under the Insurance Code of 1956, MCL 500.100 *et seq.*[1] On July 31, 2001, the commissioner

---

[1] Pursuant to MCL 500.8110, the insurance commissioner may file in the circuit court for Ingham county a petition alleging, with respect to a domestic insurer:

> (a) That there exists grounds for justifying a court order for a formal delinquency proceeding against an insurer under this chapter.

(continued…)

obtained a preliminary order of rehabilitation and injunctive relief against OmniCare in order to prepare for formal delinquency proceedings pursuant to MCL 500.8112 and MCL 500.8113.[2] That same day, plaintiff Botsford General Hospital (Botsford Hospital) filed the present action against OmniCare in the Oakland Circuit Court, seeking collection of outstanding amounts owed for medical services provided to OmniCare's enrollees. The complaint included claims for breach of contract, failure to satisfy a settlement agreement, unfair trade practice, and quantum merit or unjust enrichment.

A first amended complaint was subsequently filed adding as a plaintiff Community Emergency Medical Services, a nonprofit corporation associated with Botsford Hospital. , Plaintiffs jointly alleged various contract and tort claims against UAH, the alleged management company for OmniCare, and seven individual defendants, each of whom was alleged to have dual roles as an officer, director, or trustee for OmniCare and UAH. On March 27, 2002, plaintiffs' claims against OmniCare and the individual defendants were dismissed, without prejudice, pursuant to a stipulated order. The trial court thereafter granted UAH's motion for summary disposition as to all eight counts alleged in plaintiffs' first amended complaint. Plaintiffs' motion for reconsideration was also denied.

II. Standard of Review

Plaintiffs argue that the trial court erred by granting summary disposition in favor of UAH with regard to all eight counts in the complaint.[3] We review the trial court's grant of summary disposition de novo to determine if UAH was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Because the trial court's decision reflects that it relied on the pleadings alone in granting UAH's motion for summary disposition, we review the court's decision under MCR 2.116(C)(8). *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based solely on the pleadings. *Maiden, supra* at 119-120; MCR 2.116(G)(5). "A court must accept all factual allegations in the pleadings in support of the claim as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construe those facts in the light most favorable to the nonmoving party." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v*

(…continued)

(b) That the interests of policyholders, creditors, or the public will be endangered by the delay.

(c) The contents of an order considered necessary by the commissioner.

[2] MCL 500.8112 provides that the insurance commissioner may apply by petition . . . for an order authorizing the commissioner to rehabilitate a domestic insurer or an alien insurer domiciled in this state.

[3] Plaintiffs do not address the trial court's denial of their motion for reconsideration under MCR 2.119(F), or present any argument that they should have been afforded an opportunity to amend the first amended complaint under MCR 2.116(I)(5). Accordingly, we do not consider these matters. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Henderson, 465 Mich 124, 130; 631 NW2d 308 (2001). Given this standard, we need not consider the affidavit and other documentary evidence relied on by plaintiffs on appeal. Additionally, we find no merit to plaintiffs' argument that summary disposition was premature due to a lack of discovery. Whether summary disposition is premature because of a lack of discovery is relevant only when summary disposition is granted for failure to factually support a claim under MCR 2.116(C)(10). See *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000); *Mackey v Dep't of Corrections*, 205 Mich App 330, 333-334; 517 NW2d 303 (1994).

III. Piercing the Corporate Veil

Plaintiffs first argue that the trial court erred in granting summary disposition of their claim to pierce the corporate veil and hold UAH liable for OmniCare's outstanding debts. We disagree. It is well established in Michigan that separate corporate entities will be respected, absent a substantial abuse of the corporate form. *Vanstelle v Macaskill*, 255 Mich App 1, 12; 662 NW2d 41 (2003). Whether a court of equity may pierce the corporate veil depends on the specific facts of each case. *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 393; 600 NW2d 406 (1999).

Accepting as true plaintiffs' allegation that UAH and OmniCare had a contractual relationship, we nonetheless conclude that plaintiffs failed to plead a basis in equity for piercing the corporate veil under a "de facto" parent/subsidiary theory. The law is clear that in order to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff must allege both the existence of a parent/subsidiary relationship and facts justifying the piercing of the corporate veil. *Seasword v Hilti, Inc*, 449 Mich 542, 548; 537 NW2d 221 (1995). In a parent/subsidiary relationship, the parent, by definition, is able to exert control over a subsidiary based on its ownership. *Maki v Copper Range Co*, 121 Mich App 518, 524; 328 NW2d 430 (1982). Here, the alleged contractual relationship between UAH and OmniCare is insufficient to establish a parent/subsidiary relationship.

Plaintiffs' allegations of a contractual relationship between UAH and OmniCare were also legally insufficient to plead an "alter ego" theory for piercing the corporate veil. Neither the allegations about the common directors and officers of UAH and OmniCare, nor financing and expense matters, were sufficient to establish such unity of interests and ownership that the separateness of UAH and OmniCare should be disregarded. *Pettaway v McConaghy*, 367 Mich 651, 654; 116 NW2d 789 (1962); *Pan Pacific Sash & Door Co v Greendale Park, Inc*, 166 Cal App 2d 652; 333 P2d 802 (1958).

The trial court correctly determined that plaintiffs failed to state a claim, given plaintiffs' failure to allege how OmniCare was a mere instrumentality of UAH. Furthermore, even if the alleged relationship between UAH and OmniCare could be considered sufficient to give rise to a claim for piercing the corporate veil, we would conclude that summary disposition was still warranted because plaintiffs failed to allege facts justifying application of the doctrine so as to hold UAH liable for OmniCare's debts. Although we agree with plaintiffs that the doctrine can be applied to wrongs other than fraud, the absence of any allegation that UAH existed as a device for OmniCare to evade its debts belies plaintiffs' position that the corporate veil should be pierced. *People ex rel Potter v Michigan Bell Telephone Co*, 246 Mich 198, 204; 224 NW 438 (1929). Indeed, piercing the corporate veil to reach UAH's assets might actually foster inequity

by imposing the burden for debts on persons having an interest in UAH, but no personal responsibility for any of the alleged conduct that resulted in the unpaid debts of OmniCare. *Dep't of Consumer & Industry Services, supra* at 394. Further, we are not persuaded that equity would be served by imposing the burden for OmniCare's debts on UAH outside of the rehabilitation proceeding that will determine OmniCare's liability.

Construing the allegations in plaintiffs' first amended complaint in a light most favorable to plaintiffs, factual development could not possibly justify piecing the corporate veil. Rather than being supportive of treating OmniCare as an instrumentality of UAH, the alleged facts about UAH performing its management duties pursuant to its contract with OmniCare can only support an inference that UAH functioned as an agent for OmniCare. Hence, we uphold the trial court's grant of summary disposition in favor of UAH with regard to this claim.

IV. Tortious Interference with Contract

Plaintiffs next argue that the trial court erred in granting summary disposition of their claim for tortious interference with a contract. We disagree. To avoid summary disposition under MCR 2.116(C)(8), plaintiffs were required to allege that UAH did a per se wrongful act, or a lawful act with malice and unjustified in the law for the purpose of invading plaintiffs' contract rights with OmniCare. *CMI Int'l, Inc v Intermet Int'l Corp,* 251 Mich App 125, 131; 649 NW2d 808 (2002). As OmniCare's management agent, UAH was not liable for tortious interference with OmniCare's contracts unless acting solely for its own benefit and with no benefit to OmniCare. *Reed v Michigan Metro Girl Scout Council,* 201 Mich App 10, 13; 506 NW2d 231 (1993).

Count VIII alleged that "UAH, through illegal, unethical and/or fraudulent means, instigated OmniCare to breach the contract with Botsford by directing or causing OmniCare not to pay Botsford, or by mismanaging OmniCare so abominably that OmniCare was not able to pay Botsford and/or by misrepresenting the financial condition of OmniCare." Count VIII further alleged that UAH directed OmniCare to breach a settlement agreement with plaintiffs and "so badly managed OmniCare that it was not able to pay such amounts."

With regard to plaintiffs' misrepresentation theory, plaintiffs' argument on appeal is unclear as to the specific misrepresentation about OmniCare's financial condition underlying their claim. "The mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Service Corp v Rockford Ambulance, Inc,* 204 Mich App 392, 395; 516 NW2d 498 (1994). This Court need not consider an issue that is given only cursory treatment in an appeal brief. *Eldred v Ziny,* 246 Mich App 142, 150; 631 NW2d 748 (2001).

Even if we were to assume a per se wrongful act, plaintiffs failed to state a claim for relief because they did not allege a causal link between UAH's alleged misrepresentation about OmniCare's financial condition and OmniCare's failure to pay either plaintiff. A claim of tortious interference requires some type of inducement or purposeful interference. *Formall, Inc v Community Nat'l Bank,* 166 Mich App 772, 781; 421 NW2d 289 (1988). Thus, even if we viewed plaintiffs' claim as pertaining to OmniCare's future debts, that is, plaintiffs' conduct in providing future medical or ambulatory services on credit for OmniCare based on UAH's alleged misrepresentation about OmniCare's financial condition, plaintiffs failed to state a claim for

tortious interference with a contract. In this regard, we note that the instigation underlying plaintiffs' claim relates to having plaintiffs perform their contractual obligations to provide medical or ambulatory services to OmniCare's enrollees, rather than OmniCare breaching its obligation to pay for the services. The latter breach appears, at best, to be an incidental consequence of an alleged misrepresentation that results from OmniCare incurring more expenses than income to pay them. Regardless of whether such acts could be encompassed within a tortious interference with a contract claim, OmniCare benefits by having medical and ambulatory services provided to its enrollees. Because factual development could not show that UAH was the sole beneficiary of any alleged misrepresentation, plaintiffs' allegations were insufficient to state a claim for tortious interference with a contract. *Reed, supra* at 13.

Nor are we persuaded that plaintiffs stated a claim for tortious interference with a contract based on either the manner in which UAH directed or caused OmniCare to pay creditors or UAH's alleged mismanagement of OmniCare. The alleged violations of the Insurance Code are responsibilities of OmniCare. They are insufficient to establish a per se wrongful act of interference by UAH with regard to OmniCare's contractual obligations to pay its debts. Further, UAH's alleged preferences in determining which of OmniCare's creditors would be paid, construed in a light most favorable to plaintiffs, are insufficient to establish a per se wrongful act. *Formall, Inc, supra* at 780. Even if UAH benefited from payment preferences, the payments also benefited OmniCare by reducing its debts. Hence, the preferences afford no basis for holding UAH liable for tortious interference with a contract. *Reed, supra* at 13.

Finally, plaintiffs have failed to demonstrate that they stated a cause of action grounded on UAH's alleged direction to OmniCare to breach a settlement agreement or its alleged mismanagement of OmniCare such that OmniCare could not pay the settlement amount. The mere persuasion of a person to break a contract may not be wrongful in law or fact. *Wilkinson v Powe*, 300 Mich 275, 282; 1 NW2d 539 (1942). Plaintiffs pleaded neither a per se wrongful act of interference, nor a lawful act with malice and unjustified in the law for the purpose of invading contract rights of either plaintiff. *CMI Int'l, Inc, supra* at 131. Accordingly, the trial court properly granted summary disposition in favor of UAH with regard to plaintiffs' tortious interference with a contract claim.

V. Negligent Performance of Contract and Negligent Management

Plaintiffs next argue that the trial court erred in granting summary disposition of their two counts grounded on UAH's alleged negligent performance of its contract with OmniCare and negligent management of OmniCare. We disagree. The trial court correctly determined that plaintiffs' two counts were substantively the same because the relationship out of which plaintiffs sought to establish a duty owed by UAH to them was UAH's contract with OmniCare. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 691; 594 NW2d 447 (1999). Indeed, the cases on which plaintiffs rely in support of their argument that they stated a cause of action for negligent management involved contractual relationships. See *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), and *Courtright v Design Irrigation, Inc*, 210 Mich App 528; 534 NW2d 181 (1995).

In any event, OmniCare's contract with UAH, like the foreseeability of harm, was only a factor in determining whether UAH was under any obligation to perform its duties as OmniCare's management agent for the benefit of plaintiffs. See *Maiden, supra* at 132;

Buczkowski v McKay, 441 Mich 96; 490 NW2d 330 (1992); *Clark*, *supra* at 261. Duty reflects an expression of the sum total of those considerations that lead the law to say that a plaintiff is entitled to protection. *Buczkowski*, *supra* at 101.

The law has been slow to create liabilities for agents who, in the course of negligently performing duties owed to a principal, harm the economic interests of someone else. See the commentary to Restatement of Agency, 2d, § 357. In the case at bar, plaintiffs did not allege that they were third-party beneficiaries of OmniCare's contract with UAH such that plaintiffs could enforce that contract. Only intended third-party beneficiaries may sue for breach of a contractual promise. MCL 600.1405; *Brunsell v City of Zeeland*, 467 Mich 293; 651 NW2d 388 (2002). Nor does this case involve the type of bailment relationship in *Cargill v Boag Cold Storage Warehouse, Inc*, 71 F3d 545 (CA 6, 1996), which caused the Sixth Circuit Court of Appeals to conclude that a nonparty to the bailment contract was owed a duty of care relative to economic expectations.

Rather, viewed in a light most favorable to plaintiffs, the allegations in their first amended complaint suggest only that plaintiffs might be incidental beneficiaries of UAH's management contract with OmniCare, because UAH's performance of its contractual responsibilities could affect OmniCare's ability to pay creditors. Although it might be foreseeable that the negligent management of a company runs the risk of the company becoming insolvent, this risk exists regardless of who manages OmniCare. OmniCare did not need UAH in order to run its operations in an allegedly negligent manner.

Further, imposing a common-law duty on UAH to perform its contract in a nonnegligent manner for the benefit of creditors, such as plaintiffs, would be unduly burdensome because it would require UAH to answer to a number of incidental beneficiaries of its contract, rather then simply OmniCare. In this regard, we agree with UAH's position that the interests of creditors and OmniCare are not coextensive. Although a creditor's interest would involve having debts timely paid under terms of its particular contract with OmniCare, OmniCare's interests would also require consideration of its enrollees' rights. In light of a creditor's ability to protect its own interests when entering into contracts with OmniCare, subject to any statutory requirements governing the transaction, we conclude that the relationship between plaintiffs and UAH is not such as to impose a duty on UAH to manage OmniCare for plaintiffs' benefit. Shifting the risk that OmniCare would not pay its debts from a creditor to an alleged negligent management company might provide an additional financial resource for paying the debt, but does not provide a sufficient basis under the common law to impose a duty of care on the management company for a creditor's benefit. Hence, the trial court properly granted summary disposition in favor of UAH with regard to the negligent performance of a contract and negligent management counts.

VI. Breach of Contract and Promissory Estoppel

Plaintiffs next challenge the trial court's grant of summary disposition of their claims for breach of contract and promissory estoppel. Because plaintiffs' argument lacks citation to supporting authority, we decline to address this issue. Plaintiffs' attempt to address the authority cited in UAH's appeal brief is inadequate to invoke our review. Reply briefs must be confined to rebuttal of the appellee's arguments. MCR 7.212(G). To properly present the issue on appeal, plaintiffs were required to support their arguments with appropriate authority in their appeal brief. *Check Reporting Services, Inc v Michigan Nat'l Bank, Lansing*, 191 Mich App 614, 628;

478 NW2d 893 (1991). "[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Eldred, supra* at 150.

VII. Fraudulent Misrepesentation and Innocent Misrepresentation

Finally, plaintiffs challenge the trial court's grant of summary disposition of their claims for fraudulent misrepresentation and innocent misrepresentation. We uphold the trial court's decision with regard to the latter claim based on plaintiffs' failure to demonstrate any basis for disturbing the court's ruling that

> plaintiffs failed to address the same. Notwithstanding, there are no allegations that there was misrepresentation of material fact made directly to Plaintiffs by UAH in connection with the making of a contract between them.

Plaintiffs' failure to address a necessary issue, namely, the contract element addressed by the trial court, precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

With regard to plaintiffs' claim of fraudulent misrepresentation, we note that MCR 2.112(B) required that the circumstances constituting fraud be stated with particularity, but that intent or other conditions of mind may be pleaded generally. In construing a similar federal rule for pleadings, the Seventh Circuit Court of Appeals stated:

> Fed R Civ P 9(b) requires the plaintiff to state "with particularity" any "circumstances constituting fraud". Although states of mind may be pleaded generally, the "circumstances" must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story. [*DiLeo v Ernst & Young*, 901 F2d 624, 627 (CA 7, 1990).]

Here, plaintiffs alleged the following in support of their count for fraud:

> 144. Plaintiffs reallege all preceding paragraphs.
>
> 145. UAH made several material representations about the financial condition and viability of OmniCare, as described in detail above.
>
> 146. UAH's representations were false, and were made willfully, with the intent that Plaintiffs rely on them.
>
> 147. Plaintiffs reasonably relied on such misrepresentations.
>
> 148. As a result of Plaintiffs' reliance on the false representations, Plaintiffs proximately suffered damages in an amount in excess of $1.5 million.

Because the circumstances constituting the alleged fraud are not pleaded with particularly and may only be determined by looking to other allegations in the complaint, we have limited our review to the specific argument presented by plaintiffs in opposing UAH's motion for summary disposition and, in particular, plaintiffs' reliance on allegations reflected in ¶¶ 46-47 of

the complaint, concerning a May 12, 1998, press release stating that "all providers of care will continue to be paid for their services" and another May 12, 1998, public statement that "OmniCare Health Plan is not in receivership." We decline to address plaintiffs' arguments concerning other alleged misrepresentations, given plaintiffs failure to demonstrate that they presented these arguments below in opposition to UAH's motion for summary disposition. *Driver v Hanley (After Remand)*, 226 Mich App 558, 563-564; 575 NW2d 31 (1997).

Concerning whether plaintiffs stated a claim for fraudulent misrepresentation based on UAH's alleged statement in a May 12, 1998, press release that "all providers will continue to be paid for their services," we agree with the trial court that the statement relates to a future promise. An action for fraud must be predicated upon a statement of past or existing fact. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993). "Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Although the trial court did not specially address UAH's alleged May 12, 1998, public statement, "OmniCare Health Plan is not in receivership," we conclude that the court still reached the right result. In this regard, the mere fact that the statement was allegedly made to the public, rather than directly to plaintiffs, is not dispositive of whether a claim was stated. While we agree with UAH that fraud may not be based on misrepresentations to a third party, *Int'l Brotherhood of Electrical Workers, Local 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995), there are circumstances in which published statements in newspapers may constitute actionable fraud. See *LeRoy Construction Co v McCann*, 356 Mich 305, 308; 96 NW2d 757 (1959) (newspaper advertisement may constitute fraud). We also note that UAH's status as OmniCare's management agent would not shield UAH from a fraud action. An agent is not exempt from fraud committed on behalf of a principal. *Int'l Union United Automobile Workers of America v Wood*, 337 Mich 8, 14; 59 NW2d 60 (1953); see also Restatement of Agency, 2d, § 348.

Nonetheless, plaintiffs failed to allege a false statement of fact, only that the statement "OmniCare was not in receivership" was, at best, misleading because the commissioner had a seizure order. In this regard, the parties on appeal disagree whether a seizure order may constitute a receivership. Substantively, plaintiffs' alleged fraud claim concerns the legal import of a seizure order under the Insurance Code's provisions governing delinquency proceedings, rather than a fact. "Receiver" is accorded special meaning under the Insurance Code as a "receiver, liquidator, rehabilitator, or conservator as the context requires." MCL 500.8103(k). A "delinquency proceeding" itself means

> a proceeding instituted against an insured for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insured, *and a summary proceeding under section 8109 or 8110*. "Formal delinquency proceeding" means any liquidation or rehabilitation proceeding. [MCL 500.8103(c) (emphasis added).]

Thus, a trial court grants a seizure order as part of a summary proceeding. MCL 500.8110. Although MCL 500.8110 permits ex parte seizure orders for the commissioner to take possession and control of property, the duration of the order is limited to such time as the court considers necessary for the commissioner to ascertain the condition of the insurer. MCL

500.8110 does not use "receiver" language when stating the commissioner's authorized conduct. Whether an insured subject to a seizure order may nevertheless be viewed as functioning in a receivership is, thus, a matter of law, rather than fact. The "fact" is the seizure order itself or its contents.

In general, a claim of fraud or misrepresentation relating to a point of law is allowed only where a plaintiff has the right to rely on legal advice. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 465; 646 NW2d 455 (2002). An opinion rendered based upon underlying, disclosed facts may be actionable if the disclosed facts were false. See *City Nat'l Bank of Detroit v Rodgers & Morgenstein*, 155 Mich App 318, 323-325; 399 NW2d 505 (1986).

Because plaintiffs' claim, as alleged, involves an undisclosed fact, namely, the seizure order itself or its contents, it is thus properly analyzed under the standards for silent fraud, a cause of action that requires a duty of disclosure. *M & D, Inc v McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). Examined in this context, the trial court reached the correct result in granting UAH's motion for summary disposition. Plaintiffs have not demonstrated that they stated a valid claim for fraud based on UAH's alleged public statement "OmniCare is not in receivership."

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad