

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARKET DEVELOPMENT CORPORATION,  
SPARTAN STORES, and NATIONAL UNION  
FIRE INSURANCE COMPANY,

UNPUBLISHED  
November 9, 2001

Plaintiffs-Appellees,

v

STATE MUTUAL INSURANCE COMPANY,

No. 225439  
Kent Circuit Court  
LC No. 98-009206-CK

Defendant-Appellant.

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Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition in favor of plaintiffs in this declaratory judgment action. We affirm.

On January 14, 1996, Marjorie Baima slipped and fell on an icy sidewalk at the Three Rivers Shopping Center and injured her elbow. She was in front of a store called Dancers, Inc., which was closed at the time, and was on her way to shop at D & W Food Center, a grocery store next door to Dancers.

Plaintiff Market Development Corporation, a wholly-owned subsidiary of Spartan Stores, Inc., owns the Three Rivers Shopping Center. D & W and Dancers both had leases with Market Development, which required the stores to keep the sidewalks in front of them to be free from ice and snow. The leases also required the stores (tenants) to maintain premises liability insurance and list Market Development as an additional named insured. Dancers had its insurance through defendant State Mutual Insurance Company, and D & W and Spartan Stores had their insurance through plaintiff National Union Fire Insurance Company (NUFIC).

In September 1997, Spartan Stores and NUFIC settled Baima's premises liability claim for \$100,000 and Baima also signed a release. On September 4, 1998, plaintiffs filed their complaint seeking a declaratory judgment and alleging that under the lease between Market Development and Dancers, Dancers agreed to list Market Development as an additional named insured under Dancers' insurance policy for any premises liability action associated with the tenancy. Consequently, Market Development sought to be reimbursed from defendant the amount that was paid to Baima.

Both plaintiffs and defendant filed motions for summary disposition. A hearing was held on November 19, 1999, and the trial court issued its opinion and order on January 25, 2000, granting summary disposition in favor of plaintiffs. The trial court ruled that the insurance policy issued by defendant clearly and unambiguously required defendant to reimburse to Market Development the amount paid to Baima for her premises liability action. As noted by the trial court, the policy states that defendant would pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury, or advertising injury caused by an occurrence. The trial court reasoned that Market Development was an additional named insured under the insurance policy issued by defendant and was legally obligated to pay Baima as a result of an occurrence under the policy; therefore, Market Development was entitled to reimbursement.

Defendant first argues that the trial court erred in granting summary disposition to plaintiffs because the terms of the lease agreement expressly waived any claim for subrogation or recovery. This action, however, is a declaratory judgment action in which plaintiffs seek indemnification. Market Development is not standing in someone else's stead seeking reimbursement for monies paid on that person's behalf. See *Yerkovich v AAA*, 461 Mich 732, 737; 610 NW2d 542 (2000) (subrogation is traditionally defined as the substitution of one person in the place of another with reference to a lawful claim, demand, or right so that the person who is substituted succeeds to the rights of the other). Here, Market Development is asserting its own contractual right as an additional named insured under the insurance policy issued by defendant for Dancers.

Accordingly, this case does not involve a subrogation claim and the subrogation waiver in the lease agreement does not affect plaintiffs' cause of action in any way.

Defendant next argues that the trial court erred in granting summary disposition to plaintiffs because the settlement and release did not extinguish defendant's liability or that of its insureds. We agree with the trial court that the release did extinguish Market Development's liability because the release explicitly released Spartan Stores, Inc. and its "agents, insurers, or assigns from any and all claims" associated with Baima's slip and fall.

Market Development is a wholly owned subsidiary of Spartan Stores, Inc. Evidence submitted by plaintiffs indicated that Market Development has no employees and no payroll, and that "all or almost all" of the directors and officers of Market Development are directors and officers of Spartan Stores, Inc. Further, evidence in the record indicates that Market Development acts as the agent of Spartan Stores, Inc. in owning certain real property, including the Three Rivers Shopping Center. Defendant has not refuted this evidence. As held by our Supreme Court, if a subsidiary is a mere instrumentality of the parent, its separate corporate existence will be disregarded. *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 548; 537 NW2d 221 (1995). Additionally, an agency may arise when there is a manifestation by the principal that the agent may act on the principal's account. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). The test whether an agency has been created is whether the principal has a right to control the actions of the agent. *Id.*

The trial court's conclusion that Market Development is an agent of Spartan Stores, Inc. is supported by the evidence and defendant has not refuted this evidence. Accordingly, the trial court did not err in determining that Market Development was released from liability as an agent

of Spartan Stores, Inc. from any further claims thereby obligating defendant to reimburse Market Development.

Lastly, defendant argues that the trial court erred in granting summary disposition to plaintiffs because a question of fact exists regarding the proportionate fault of the parties. This issue is waived for appellate review because it was not raised in the motion for summary disposition, and as a result, the trial court never ruled on it. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). The only mention of this issue occurred at the hearing on the motion for summary disposition where defendant's counsel stated that if the trial court disagreed with defendant's arguments, then there was a factual issue relating to the proportionate liability of the parties to the underlying suit.

In any event, defendant has merely asserted that there are factual issues regarding the circumstances of Baima's fall and the parties' proportionate fault, but cites no facts or evidence in support of this argument. Because defendant has failed to set forth any evidence to show that a genuine issue of a material fact exists, *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), we need not remand for further proceedings to determine the proportionate fault of the parties as requested by defendant.

Affirmed.

/s/ Hilda R. Gage  
/s/ Kathleen Jansen  
/s/ Peter D. O'Connell