

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

REBECCA BENSON,

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C.A. No: K13C-03-042 (RBY)

\_\_\_\_\_ Plaintiff,

:

:

v.

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:

EDWIN M. MOW, D.P.M., and  
BAYHEALTH MEDICAL CENTER,  
INC.,

:

:

:

:

Defendants.

:

*Submitted: October 24, 2013*

*Decided: December 31, 2013*

*Upon Consideration of Defendant Bayhealth Medical Center, Inc.'s  
Motion to Dismiss*

**DENIED**

*Upon Consideration of Plaintiff's Motion for Leave to File First  
Amended Complaint*

**GRANTED**

**ORDER**

H. Cabbage Brown, Jr., Esquire, Brown Shiels & Beauregard, LLC, Dover, Delaware  
for Plaintiff.

James E. Drnec, Esquire, and Melony R. Anderson, Esquire, Balick & Balick, LLC,  
Wilmington, Delaware for Defendant Bayhealth Medical Center, Inc.

Young, J.

### **SUMMARY**

Pursuant to Del. Super. Ct. Civ. R. 12 (b)(6), Defendant Bayhealth Medical Center, Inc. (“Bayhealth” or “Movant”) moves the Court to dismiss the Original Complaint filed by Rebecca Benson (“Plaintiff”) relative to the claims against Bayhealth on the ground that it fails to state a claim against Bayhealth upon which relief may be granted. While the present Complaint allegations fail, as Movant asserts, to state a claim against Bayhealth, Plaintiff moves the Court for Leave to File an Amended Complaint addressing the deficiencies that Bayhealth raises concerning the Original Complaint. If the requested amendment is permitted, the Court must then decide whether the Plaintiff’s new allegations, that the doctor and other employees who performed the surgery were agents of Bayhealth, can survive Bayhealth’s Motion to Dismiss. In the interests of justice, recognizing the strong policy favoring a decision on the merits on the claim, Plaintiff’s Motion to Amend is **GRANTED**. Based on the allegation that Edwin M. Mow, D.P.M. (“Dr. Mow”) was assisted by several Bayhealth employees during the allegedly negligent surgery, discovery may establish agency, enabling the Plaintiff to recover under a reasonably conceivable set of circumstances. The issue of whether an agency relationship exists between a doctor and a hospital is typically a question of fact for a jury to decide. Therefore, Bayhealth’s Motion to Dismiss is **DENIED**.

### **STATUS OF THE CASE AND STATEMENT OF FACTS**

Plaintiff filed her Original Complaint against Dr. Mow and Bayhealth on March 31, 2013. The Original Complaint alleges that Dr. Mow negligently performed surgery on Plaintiff in March 2011. According to the Original

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Complaint, Dr. Mow is employed at Mow Foot and Ankle Center in Milford, Delaware. Plaintiff's surgery was performed at Bayhealth's Milford Memorial Hospital. On July 12, 2013, Bayhealth filed the instant Motion to Dismiss. On July 26, 2013, the Plaintiff filed a Response to Bayhealth's Motion to Dismiss and a Motion for Leave to File First Amended Complaint. On September 10, Bayhealth filed its Opposition to Plaintiff's Motion for Leave to File Amended Complaint.

Dr. Mow, a licensed podiatrist, operated a medical office located in Milford, Delaware, where he specialized in the diagnosis and treatment of foot injuries. On March 31, 2011, Plaintiff underwent surgery performed by Dr. Mow to correct two conditions: 1) a symptomatic and high degree of right foot halloax valgus deformity with a high degree of metatarsal primus varus, deformity of the first metatarsal; and 2) a symptomatic and rigidly contracted, painful right second hammer toe deformity. The procedures were performed by Dr. Mow at Bayhealth Medical Center, Milford Memorial Hospital.

The surgery to correct the second hammer toe deformity was not successful. After this surgery, Plaintiff continued to suffer pain and visible deformity of the toe. Plaintiff's Original Complaint alleges that Dr. Mow failed to address or respond to Plaintiff's injury adequately, which prolonged her recovery and subjected her to additional months of pain and suffering. After following instructions by Dr. Mow to no avail over the course of five months, on September 12, 2011, Plaintiff went to Dr. Harry S. Tam ("Dr. Tam") of Dover Podiatric Medicine. On October 23, 2011, Dr. Tam performed a second surgery for Plaintiff, a revisional bunion and extensor tendon repair of the right foot, which was

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allegedly designed to correct the problem that was not adequately addressed by Dr. Mow previously.

### **STANDARD OF REVIEW**

“A motion to dismiss under [Superior Court Civil] Rule 12(b)(6) presents the question of ‘whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.’”<sup>1</sup> “When considering a motion to dismiss, the Court must read the complaint generously, accept all well-[pled] allegations as true, and construe them in a light most favorable to the plaintiff.”<sup>2</sup> “A complaint is ‘well-plead’ if it puts the opposing party on notice of the claim being brought against it. Dismissal is warranted only when ‘under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.’”<sup>3</sup>

### **DISCUSSION**

In the Plaintiff’s Original Complaint, there are no allegations that Bayhealth or its employees acted negligently, causing injury to the Plaintiff. The Original Complaint only contains two allegations that mention Bayhealth, both of which refer merely to Bayhealth as the location where the allegedly negligent procedure was performed. Further, the Original Complaint does not contain any allegation that Dr. Mow was acting as an agent or apparent agent of Bayhealth at the time of

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<sup>1</sup> *Precision Air, Inc v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

<sup>2</sup> *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

<sup>3</sup> *Boyce Thompson Inst. for Plant Research v. MedImmune, Inc.*, 2009 WL 1482237, at \*4 (Del. Super. Ct. May 19, 2009).

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the allegedly negligent procedure. Instead, the Original Complaint alleges that Dr. Mow is employed at Mow Foot and Ankle Center, and that he was “acting within the scope of his employment by Mow Foot and Ankle Center throughout his treatment and care of Ms. Benson.”<sup>4</sup>

However, Plaintiff’s Proposed Amended Complaint alleges that Plaintiff followed the instructions of Dr. Mow and the alleged employee agents of Bayhealth. In addition, the Proposed Amended Complaint alleges that Dr. Mow is in fact an employee of Bayhealth, not an independent contractor. In order to show that a physician is an apparent or actual agent of a hospital, a plaintiff must show that the hospital exercised control over some manner of the physician’s work.<sup>5</sup> Therefore, the issue here is whether Plaintiff can show that Bayhealth exercised some degree of control over Dr. Mow’s work as a physician.

The Plaintiff’s Proposed Amended Complaint claims to address the deficiencies attacked in Defendant’s Motion to Dismiss. Delaware Courts have generally adhered to the principle that leave to amend pleadings should liberally be given.<sup>6</sup> Denying leave to amend pleadings has been limited where amendments to the pleadings would cause serious prejudice to a party opposing the motion<sup>7</sup>,

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<sup>4</sup> Exhibit A at paragraph 11.

<sup>5</sup> See, e.g., *Dunn v. Atlantic Surgical Associates, LLC*, C.A. No. 05C-02-041 WLW, 2007 WL 1784093, at \*1 (Del. Super. Ct. Apr. 27, 2007) (Exhibit “C”); *Fulton v. Quinn*, 1993 WL 19674, at \*3 (Del. Super. Ct. Jan. 12, 1993) (Exhibit “D”).

<sup>6</sup> *Gott v. Newark Motors, Inc.*, *Del. Supr.*, 267 A.2d 596 (1970).

<sup>7</sup> *Bowl-Mor Co., Inc. v. Brunswick Corp.* *Del. Ch.*, 297 A.2d 61.

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and where amendments have substantially changed the cause of action.<sup>8</sup> Granting Plaintiff leave to file an amended complaint would not cause prejudice to the Defendant, since this is the Plaintiff's first request to amend the complaint and discovery has not begun in this case. Plaintiff's Amended Complaint alleges that Dr. Mow was assisted by Defendant Bayhealth's agents, such as registered nurses, a radiologist, anesthesiologist, and other medical staff in order to show that Bayhealth exercised a degree of control over Dr. Mow. While the Plaintiff may need to develop this allegation farther and with more particularity, it is still possible that the Plaintiff can establish agency and recover under a reasonably conceivable set of circumstances. Furthermore, the Court has traditionally held that the issue of whether any agency relationship existed between a doctor and a hospital is a question of fact for the jury to decide.<sup>9</sup>

### CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **DENIED**. Plaintiff's Motion for Leave to File First Amended Complaint is **GRANTED**, providing Plaintiff until the close of business on January 21<sup>st</sup>, 2014 to complete filing of her Amended Complaint.

**IT IS SO ORDERED.**

/s/ Robert B. Young  
J.

RBY/lmc

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<sup>8</sup> *E.K. Gevser Co. V. Blue Rock Shopping Ctr. Inc. Del. Super.*, 229 A.2d 499.

<sup>9</sup> *Murphy v. Bayhealth Medical Center, et al*, January 9, 2006 (Del. Superior).

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