

Negligence Law Section

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“Establishing Corporate and Institutional Liability with Agency Principles and Equitable Doctrines”

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At a Glance:

1. While Michigan law generally respects the shield of corporate liability, there are circumstances where an entity or individual can be held accountable for the acts of an individual wrongdoer or separate entity.
2. Michigan has a robust body of agency law which includes actual agency based on control, and apparent agency based on whether a putative agent reasonably appears to be acting on behalf of the principal.
3. In addition to legal principles under agency law, the equitable remedy of piercing the corporate veil may be available to prevent or remedy fraud or injustice.

Introduction

Michigan generally respects the shield or “veil” of liability and asset protection afforded by incorporation. Michigan courts likewise usually recognize and enforce the distinction between separate corporate entitiesⁱ. These protections may extend to a corporate entity, to corporate officers, and to shareholders. However, where use of the corporate form furthers an injustice, a number of legal and equitable doctrines are available which may allow the corporation, shareholder, and/or officer to be held accountable for tortious conduct. This article aims to provide an overview of these principlesⁱⁱ.

Agency Principles

Whether in tort or contract actions, agency principles are available as an important legal tool to hold an entity or individual vicariously liable for the acts of another. The litmus test of whether

an actual agency exists is whether the principal has a right to control the actions of the agentⁱⁱⁱ. Importantly, the test is not dependent on whether actual control is or was exerted, but rather it is, “the right to interfere that makes the difference between an independent contractor and a servant or agent.”^{iv} As explained by the Court of Appeals, while “*it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability...the control must relate to the method of the work being done.*”^v

Determination of whether an individual is an agent of another must be based on the particular facts of each case.^{vi} Where there is a factual dispute, the Michigan Supreme Court has instructed that this determination is one for the factfinder: “where there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes an issue of fact.”^{vii} A principal may be vicariously liable to a third party for harms inflicted by an agent even though the principal did not participate by act or omission in the agent's tort.^{viii}

Michigan law has long recognized a subset of agency relationship which is alternately called apparent agency, agency by estoppel, or ostensible agency.^{ix} This doctrine holds a principal liable for the acts of another (such as an independent contractor) where the principal holds out the negligent actor as acting on its behalf, even if the actor does not qualify as an actual agent:

Not only may a principal be estopped in some circumstances from disputing the scope of the authority of one who admittedly is his agent, but it is also established that, in a proper case, one person may be estopped from denying that another is his agent. Thus, an agency by estoppel is established where it is shown that the principal held the agent out as being authorized, and a third person, relying thereon, acted in good faith upon such representation.^x

Apparent agency is often alleged in medical malpractice cases, where the seminal case is *Grewe v Mt Clemens General Hospital*.^{xi} The *Grewe* court acknowledged that in general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and who merely used the hospital's facilities to render treatment to his or her own patients. However, “if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found.” This is because, the Court found, “the relationship between a physician and a hospital may well be that of an independent contractor . . . not subject to the direct control of the hospital. However, that is not of critical importance to the patient who is the ultimate victim of the physician's malpractice.”^{xii}

To establish a claim of ostensible agency under *Grewe*, a plaintiff must show:

1. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one;
2. This belief must be generated by some act or neglect of the principal sought to be charged; and
3. The third person relying on the agent's apparent authority must not be guilty of negligence.

Reaffirming *Grewe* and overruling a number of conflicting court of appeals decisions, the Michigan Supreme Court recently held in *Markel v William Beaumont Hospital*^{xiii} that “when a patient presents from treatment at a hospital emergency room and is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital’s agent is reasonable unless the hospital does something to dispel that belief.” The *Markel* Court also affirmed that whom a deceased patient was looking to for treatment and the reasonableness of belief could be based on circumstantial evidence.

Joint Venture Liability

In addition to vicarious liability under agency law, separate or distinct corporate entities may be held liable under a joint venture theory. A joint venture is ordinarily an association to carry out a single business enterprise for a profit.^{xiv} Notably, in evaluating “profit,” the Court of Appeals has held that a “strictly financial profit is not always necessary” for a joint venture. A joint venture can be found in non-commercial endeavors where the “profit” is joint benefit or a furtherance of mission.^{xv} The existence of a joint venture may be implied or inferred from the conduct of the parties or from acts and circumstances that make it appear that they are participants in a joint venture.^{xvi}

Invoking the Court’s Equitable Power to Pierce the Corporate Veil

In addition to the legal doctrines available through agency law, equitable doctrines can be used to prevent injustice or abuse of the corporate form. As the Michigan Supreme Court explained, the “‘corporate veil’ may be equitably pierced where an otherwise separate corporate existence has been used to ‘subvert justice or cause a result that [is] contrary to some other clearly overriding public policy^{xvii}.’” “When this [corporate] fiction is invoked to subvert justice, it is ignored by the courts^{xviii}.” A breach of contract constitutes a “fraud or wrong” that justifies piercing the corporate veil under Michigan law^{xix}. Michigan Courts have further explained that piercing the corporate veil to prevent injustice is an equitable remedy, but that such a remedy should be used “sparingly” and is not a separate cause of action.^{xx}

While there is no bright line rule for determining when the corporate veil should be equitably pierced, Michigan Courts have developed a three-pronged test to analyze these cases^{xxi}:

- (1) The corporate entity to be pierced must have been used as a mere instrumentality of another individual or entity;
- (2) The corporate entity must have been used to commit a wrong or fraud;
- (3) There plaintiff has suffered been an unjust injury or loss.

The “mere instrumentality” prong is often the key factor and focuses on the extent to which a corporate entity is controlled by its owner or a separate body. As the Michigan Supreme Court held almost a century ago, “[w]here a corporation is so organized and controlled, and its affairs

so conducted, as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored.”^{xxii}

Michigan Courts have also recognized that piercing the corporate veil may be equitable where there is a controlling parent-subsidary relationship between corporations^{xxiii}. As with agency, this equitable principle is often founded on the right of control. In a parent-subsidary relationship, “the parent, as owner of all or most of the subsidiary’s stock, is able to exert control over the subsidiary.”^{xxiv} In the “context of tort liability, relevant factors in showing that a subsidiary is a “mere instrumentality” of its parent corporation might be that, “the parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent’s exclusive distributing arm, or the parent’s revenues are entirely derived from sales by the subsidiary^{xxv}.”

Where applicable, Michigan courts may also consider the so-called, “*Glenn* factors” in assessing whether to impose liability.^{xxvi} These factors include undercapitalization of the company, the maintenance of separate books, the separation of corporate and individual finances, the use of the corporation to support fraud or illegality, the honoring of corporate formalities, and whether the company is a mere shell.^{xxvii} Notably, a plaintiff does not need to pierce the corporate veil to hold corporate officials liable for their own tortious conduct^{xxviii}.

Conclusion

While not applicable in every case, where the facts and law justify these legal and equitable principles can be important tools for establishing corporate or shareholder liability. A solid understanding of these principles can assist litigators prosecuting or defending claims in litigation, and likewise transactional lawyer advising their clients in the conduct of their business operations.

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- i *Gallagher v Persha*, 315 Mich App 647, 653; 891 NW2d 505 (2016).
- ii The scope and depth of this article is necessarily truncated. For a more detailed discussion, see ICLE treatises Torts: Michigan Law and Practice and Advising Closely Held Businesses in Michigan. The authors extend a special thank you to ICLE Lead Staff Attorney Rebekah Page-Gourley for her tireless efforts.
- iii *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).
- iv *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967).
- v *Laster v Henry Ford Health Sys*, 316 Mich App 726, 734-736; 892 NW2d 442 (2016).
- vi *Sliter v Cobb*, 388 Mich 202; 200 NW2d 67 (1972).
- vii *St. Clair Intermediate School District v IEA/MEA*, 458 Mich 540, 556; 581 NW2d 707 (1988).
- viii *Caldwell v Cleveland-Cliffs Iron Co*, 111 Mich App 721, 731; 315 NW2d 186 (1981).
- ix *Howard v Park*, 37 Mich App 496, 499; 195 NW2d 39 (1972).
- x *Id.*
- xi *Grewe v Mt Clemens General Hospital*, 404 Mich 240; 273 NW2d 429 (1978).
- xii *Id* at 250-252.
- xiii *Markel v William Beaumont Hosp*, 510 Mich 1071; 982 NW2d 151 (2022).
- xiv *Berger v Mead*, 127 Mich App 209; 338 NW2d 919 (1983).
- xv *Berger* at 215, fn 4, citing *Summers v Hoffman*, 341 Mich 686; 69 NW2d 198 (1055), and *Moore v Hillsdale County Telephone Co*, 171 Mich 388, 398; 137 NW 241 (1912).
- xvi *Id* at 218. See also *Kingsley Associates, Inc, v Moll Plasti Crafters, Inc*, 65 F3d 498 (6th Cir 1995) (applying Michigan law) and *Featherston v Steinhoff*, 226 Mich App 584; 575 NW2d 6 (1997).
- xvii *Wells v Firestone Tire and Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984).
- xviii *Id.*
- xix *Gallagher v Persha*, 315 Mich App 647; 891 NW2d 505 (2016).
- xx *Id* at 664-666.
- xxi *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996).
- xxii *People ex rel Potter v Mich Bell Tel Co*, 246 Mich 198; 224 NW 438 (1929).
- xxiii *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635; 802 NW2d 717 (2010).
- xxiv *Maki v Copper Range Co*, 121 Mich App 518, 524; 328 NW2d 430 (1982).
- xxv *Dutton Partners, LLC*, 290 Mich App at 643, citing *Seasword v Hilti, Inc*, 449 Mich 542, 548 n10; 537 NW2d 221 (1995).
- xxvi *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 702; 854 NW2d 509 (2014).
- xxvii *Id.*
- xxviii *Department of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 17-18; 779 NW2d 237 (2010).