

## **CRAIG V OAKWOOD HOSPITAL, ET AL:** **BUYER BEWARE WHEN PURCHASING A MEDICAL PRACTICE**

On February 1, 2002, the Michigan Court of Appeals handed down a decision with potentially far-reaching implications on the sale and purchase of medical practices, and the liabilities attendant to such transactions. This article discusses the Court's decision in Craig v Oakwood Hospital, et al, Michigan Ct. of Appeals No. 206642 (February 1, 2002),<sup>1</sup> its potential impact on sales of medical practices, and the ways a purchaser of a medical practice can minimize its potential exposure to medical malpractice claims.

### **The Facts**

Plaintiff Antonio Craig was born on July 16, 1980 at Oakwood Hospital. Plaintiff suffered from cerebral palsy and severe mental retardation. Craig's birth was attended to by Drs. Ajit Kittur and Elias Gennaoui. The doctors were employed by Defendant Associated Physicians, P.C. ("Associated Physicians"). In 1986, the shareholders of Associated Physicians converted the professional corporation into a business corporation, Associated Physicians Medical Center, Inc. ("Associated Medical Center"). Henry Ford Hospital ("Henry Ford") subsequently purchased all of the shares of Associated Medical Center. The shareholders of Associated Medical Center formed a new professional corporation, APMC, P.C., ("APMC") and entered into a services agreement with Associated Medical Center. Henry Ford subsequently dissolved Associated Medical Center in 1993.

In 1994, Craig commenced a medical malpractice action, and named Henry Ford as a defendant, arguing it was the successor of Associate Physicians. Following trial, Craig received a verdict against the defendants, including Henry Ford.

### **The Court's Analysis**

On appeal, Henry Ford challenged the trial court's ruling on the issue of successor liability on two grounds. The first was the trial court's error in applying the doctrine of successor liability announced in Turner v Bituminous Casualty Co,<sup>2</sup> a products liability case, to a medical malpractice action. The Turner Court established that successor liability may be imposed where the result of the transaction amounts to a *de facto* merger, and concluded that the plaintiff in that case had made a prima facie case for a *de facto* merger based upon the following circumstances:

1. There was continuity of the selling corporation's business, including the retention of key employees, the selling corporation's assets, the selling corporation operations, and the selling corporation's name;
2. The selling corporation ceased its operation, liquidated, and was dissolved shortly after being purchased;
3. The purchasing corporation assumed those liabilities of the selling corporation necessary for the purchasing corporation to continue operating the business of the selling corporation; and

4. The purchasing corporation held itself out as a continuation of the selling corporation.<sup>3</sup>

The Court of Appeals concluded that the doctrine could be applied to medical malpractice cases. It noted that the doctrine had been considered and applied in other Michigan cases, and found no basis for limiting its applications solely to products liability cases.<sup>4</sup>

The Court of Appeals then considered, and rejected, Henry Ford's argument that successor liability could not be imposed because Henry Ford had no knowledge of Craig's claim when it acquired Associated Physicians. The Court of Appeals reasoned that several requests by attorneys for Craig's medical records were sufficient to put Henry Ford on notice that litigation might arise with respect to Craig's medical treatment.

Equally unavailing was Henry Ford's argument that, since Craig had an adequate legal remedy against other defendants, successor liability was not appropriate. The court rationalized that if the doctrine was not applied, Associated Physicians' demise in 1986 would leave Craig without an entity to sue under the theory of respondeat superior.

Unable to avoid application of Turner, Henry Ford then argued that Craig had failed to establish the links necessary to establish successor liability. It first argued that APMC, and not Associated Medical Center, was the successor of Associated Physicians. The Court of Appeals rejected this for several reasons:

1. The articles of Associated Physicians indicated it was being converted to a business corporation;
2. The articles of Associated Physicians stated that its new name would be Associated Medical Center;
3. Associated Medical Center retained the corporate identification number of Associated Physicians; and
4. Citing the factors discussed in Turner, the Court of Appeals noted that Associated Medical Center carried on the same business, with the same physicians, at the same location as Associated Physicians.<sup>5</sup>

The Court of Appeals also looked at the lack of continuity between Associated Physicians and APMC. The Court cited the addition of other physician shareholders to APMC and the fact that APMC did not own the clinic where Associated Physicians operated its business.<sup>6</sup>

Henry Ford's final argument was that Associated Medical Center's dissolution in 1993 broke the link between Associated Physicians and Henry Ford. The Court, however, determined that this dissolution amounted to a *de facto* merger under Turner. The Court reasoned that Associated Medical Center ceased operations and

dissolved, yet Henry Ford continued to operate a medical clinic at the site of the now-dissolved Associated Medical Center.<sup>7</sup>

### **The Impact of *Craig* on Medical Practice Acquisitions**

While one may debate whether the Court of Appeals reached the correct result, there seems little question that the Craig decision represents a potentially significant increase in liability to purchasers of medical practices. Maintaining the continuity of the medical practice pre- and post- acquisition (by retaining the same medical providers, the facilities, etc.) is often of primary consideration when a purchaser acquires a medical practice. As a result, it increases the likelihood that these types of transactions will be treated as *de facto* mergers for successor liability purposes. In light of Craig, structuring the transaction as an asset purchase to avoid the seller's malpractice claims is not enough if post-transaction business operations represent a continuation of the seller's business.

There are, however, some steps a purchaser may take to limit its exposure to the malpractice claims of the seller. A purchaser is well-served to conduct more extensive due diligence to ascertain the existence of potential claims, such as identifying those patients whose medical records have been requested either by the patient or an attorney. This would allow the purchaser to better analyze its risk, and to structure the transaction to account for such risk. Another option is insuring over the risk with insurance (although this would be contingent on the particular circumstances of the transaction, including the claims history of the selling corporation, the underwriter's requirements, etc.). Finally, the purchaser may want the seller (or its shareholders) to indemnify against such claims (although this will raise practical problems).

Addressing potential malpractice claims has always been an issue whenever the purchase of a medical practice is contemplated. Craig illustrates the importance of evaluating the risk posed by these claims and the courts' willingness to impose liability on a purchaser, and adds a new dimension to the phrase "buyer beware."

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<sup>1</sup> 2002 WL 169241. At the time this article was written, neither the pagination for the Westlaw citation nor the citation for the Northwest Reporters was available. Judge Cooper, who dissented on an unrelated issue, authored the opinion with respect to successor liability.

<sup>2</sup> 397 Mich 406, 244 NW2d 873 (1976).

<sup>3</sup> 244 NW2d at 883-884.

<sup>4</sup> 2002 WL at \_\_\_\_.

<sup>5</sup> 2002 WL at \_\_\_\_.

<sup>6</sup> 2002 WL at \_\_\_\_.

<sup>7</sup> 2002 WL at \_\_\_\_.

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