

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DANIELLE HARLOW,)	
)	
PLAINTIFF)	
)	
v.)	CIVIL No. 04-266-P-H
)	
CHILDREN'S HOSPITAL,)	
)	
DEFENDANT)	

DECISION AND ORDER ON MOTION TO DISMISS

This is a medical malpractice lawsuit against Children’s Hospital (“the Hospital”) of Boston, Massachusetts. In 1993, the plaintiff, then a six-year-old child from Canton, Maine,¹ obtained medical treatment at the Hospital. She claims that her medical treatment was negligent and caused her serious permanent injury. In 1999, she brought this malpractice claim in Maine by filing a required notice of claim, see 24 M.R.S.A. §§ 2853(1), 2903(1)(A), and proceeding before the mandatory screening panel, see id. §§ 2854-58. The panel issued a unanimous decision in October, 2004, that her medical treatment deviated from the applicable standard of care and caused her injury. The plaintiff filed her civil complaint in Maine Superior Court in November, 2004. The Hospital removed the

¹ The admission and consent forms for the medical treatment (included in the state court record (Docket Item 16)) indicate a Canton, Maine, address for the plaintiff at the time of treatment.

case to federal court, basing federal jurisdiction on diversity of citizenship. Next, the Hospital moved to dismiss the case for lack of personal jurisdiction. I **GRANT** the motion.

I. Timeliness and Law of the Case

It was with great reluctance that I first approached the issue of personal jurisdiction at this late stage of the lawsuit. The injury occurred in 1993, the proceedings began in 1999, and now it is 2005. But having examined the state court record, I am less concerned about the date.

The parties were alert to the personal jurisdiction issue from the outset.² When the notice of claim was filed in 1999, the plaintiff named the Hospital and a number of Hospital-affiliated doctors. All the parties asked the panel chair to refer the personal jurisdiction issue to the Superior Court before the panel hearing under 24 M.R.S.A. § 2853(5), and the chair did so. After briefing, Justice Delahanty of the Superior Court in February, 2001, granted a motion to dismiss the defendant doctors for lack of personal jurisdiction, but denied the Hospital's motion, ruling that there was personal jurisdiction over the Hospital. Harlow v. Walsh, Docket No. CV-99-072 (Me. Super. Ct. Feb. 22, 2001) (attached to Def.'s

² Personal jurisdiction would exist in Massachusetts, where the Hospital is located and the treatment occurred. But Maine seems to have been chosen because of its generous statute of limitations. One of the briefs in state court in 2000 stated that the Massachusetts statute of limitations had already barred any lawsuit in Massachusetts before the plaintiff began her Maine proceedings. Mem. of Law Submitted by Defs. Dort S. Bigg and Wiggin & Nourie, P.A., in Support of Personal Jurisdiction Over Defs. Edward P. Walsh *et al.* at 3 (included in the state court record (Docket Item 16)).

Mot. to Dismiss (Docket Item 3)).

Denial of the Hospital's motion to dismiss was not an appealable order. In fact, the Hospital tried to appeal, but the Maine Law Court dismissed the appeal as interlocutory in 2003. Harlow v. Children's Hosp., Docket No. And-03-8 (Me. Jan. 30, 2003) (included in the state court record (Docket Item 16)). Moreover, until the plaintiff filed her complaint in Superior Court in 2004 following the panel decision, there was no pleading that would start the time running on removal proceedings. So the removal is timely, there has been no final decision on personal jurisdiction, and "law of the case," under which a legal ruling generally governs subsequent stages of the same litigation, is the only doctrine that might prevent me from re-examining the state court's personal jurisdiction ruling, see 18B Charles Alan Wright *et al.*, Federal Practice and Procedure, § 4478 (2d ed. 2002) (discussing law of the case).

Refusal to re-examine a ruling because of law of the case is a matter of discretion, especially when considering interlocutory orders such as the state court's denial of the Hospital's motion to dismiss. In re Cabletron Sys., Inc., 311 F.3d 11, 22 n.2 (1st Cir. 2002); see also Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994) (stating that "[i]nterlocutory orders, including denials of motions to dismiss, remain open to trial court consideration, and do not constitute the law of the case," and declaring that law of the case "is neither an absolute bar to reconsideration nor a limitation on a federal court's power"). That

discretion is not restricted by a removal from state to federal court, at least where the issue in question is federal.³ That is the case here, for the question is whether personal jurisdiction over the Hospital comports with the due process clause of the Fourteenth Amendment. Although it is late in the case to re-examine the question, it will be later still on appeal, an avenue open to the Hospital because the personal jurisdiction ruling has never yet been appealable. Although I consider seriously the conclusion of my state court colleague on the issue, if personal jurisdiction does not exist, the time to say so is now, without further expense and delay.

II. Personal Jurisdiction

There are two types of personal jurisdiction: general and specific. General jurisdiction deals with jurisdiction asserted over a defendant in a lawsuit that is not directly related to that defendant's forum-based (here, Maine-based) conduct.

Specific jurisdiction deals with jurisdiction asserted over a defendant when the lawsuit arises directly out of the defendant's forum-based activities. Donatelli v.

³ Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 (6th Cir. 1980) ("law of the case doctrine . . . is discretionary, even when the case is one transferred from state to federal court") (citations omitted); Robinson v. Gorman, 145 F. Supp.2d 201, 204 (D. Conn. 2001) ("The state court's decision as to matters of federal law is not entitled to be treated as law of the case."); FDIC v. First Mortgage Investors, 485 F. Supp. 445, 450 (E.D.Wis. 1980) ("Significantly, the [state] trial court did not enter a final order or judgment in this matter. He could have reexamined his opinion at any time and this power was not lost by the removal of the matter to this tribunal. . . . On matters of federal law . . . this Court is not even bound by the resolution by the state court.") (citations omitted). Wright and Miller counsel a more respectful attitude to state court rulings than some of these quotations suggest. See Wright et al., supra, § 4478.4, at 781-83 ("Remembering that law of the case is not an inexorable command, there is much to be said for deferring to state-court rulings (continued on next page)

Nat'l Hockey League, 893 F.2d 459, 462-63 (1st Cir. 1990). On this motion, the plaintiff does not identify under which type she is proceeding, so I consider both.⁴

I analyze the showing the plaintiff has made under the *prima facie* standard of Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 675 (1st Cir. 1992). Thus, I “consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction.” Id.

The plaintiff asserts the following Maine contacts on the Hospital's part. Although it was the plaintiff, through her parents, who sought out Boston treatment (based upon advice from her Auburn, Maine, doctor), Hospital doctors or staff spoke by telephone with the plaintiff's physicians in Maine before and after the operation in 1993 and sent letters and spoke by telephone to the plaintiff's mother in Maine following the operation.⁵ Pl.'s Opp'n to Def.'s Fed. R. Civ. P. 12(b)(2) Mot. to Dismiss for Lack of Jurisdiction Over the Person (“Pl.'s Opp'n”) (Docket Item 11), Facts in Support of Personal Jurisdiction (“Facts”) at 4, 11, ¶¶ 2, 17. The Hospital agreed to take care of seeking payment from the State of Maine when the plaintiff's mother said that the family would have difficulty

on substantive matters, particularly when state law governs.”).

⁴ In the state court proceeding, she relied on general jurisdiction. Pl.'s Mem. of Law Regarding Personal Jurisdiction at 7 (included in the state court record (Docket Item 16)) (“In the present case, discovery has not established that the plaintiff's claims arose out of the medical defendant's forum based activities. Accordingly, the inquiry under a constitutional analysis should turn on whether there is a basis for the assertion of 'general' jurisdiction.”).

⁵ The plaintiff also states that the Hospital “has sent 'relations specialists' to meet with pediatricians and family practitioners” since 1988. Pl.'s Opp'n, Facts at 7, ¶ 10. There is no indication in the plaintiff's brief or the record citation that these relations specialists ever visited
(continued on next page)

paying for the surgical procedure.⁶ Id. at 5, ¶ 3. The Hospital did obtain Maine Medical Assistance's approval and agreement to pay before proceeding with the operation. Id. at 5-6, ¶ 5. Maine subsequently paid over \$20,000 for the plaintiff's operation and follow-up visits. Id. at 6, ¶ 6. The Hospital had about 100 patients from Maine in each of the years 1998 and 1999, charging the Maine Medical Assistance Program \$2.4 million and \$2.1 million for these patients respectively. Id. at 6-7, ¶ 8. The plaintiff points to Hospital advertising in widely-distributed professional journals, radio and television advertising in Maine, an advertisement in a Maine newspaper, a generally available website, newsletters and brochures sent to pediatricians in Maine and letters to Maine pediatricians on how to refer patients. Id. at 7-11, ¶¶ 9-15. The plaintiff also adds that the Hospital holds itself out to Maine physicians as a regional facility, advertising clinics outside of Boston (although not in Maine) and availability of a Critical Care Transport Team that travels regularly to points throughout New England. See id. at 9-10, ¶ 12.

A. General Jurisdiction

As I said in In re New Motor Vehicles Canadian Exp. Antitrust Litig., 307 F. Supp.2d 145, 150 (D. Me. 2004):

or had any connection with Maine (or even New England).

⁶I do not consider the plaintiff's contention that the Hospital has had an ongoing relationship with the Maine Medical Assistance Program and a Provider ID Number, see Pl.'s Opp'n, Facts at 5 ¶ 4, because the plaintiff does not cite any evidence to support it. See Boit, 967 F.2d at 675. In any event, this fact does not meaningfully affect the personal jurisdiction analysis.

Assertion of general jurisdiction over a defendant requires a court to examine a defendant's contacts with the forum "to determine whether they constitute the kind of continuous and systematic general business contacts" that will satisfy constitutional standards. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 416 (1984). If sufficient contacts do exist, the exercise of jurisdiction must also be reasonable. [United States v. Swiss Am. Bank, Ltd.], 274 F.3d [610, 619 (1st Cir. 2001)] (citing Donatelli, 893 F.2d at 465). But if such contacts do not exist in sufficient abundance, the general jurisdiction inquiry ends. Donatelli, 893 F.2d at 465. The constitutional parameters of general jurisdiction require the contacts to be "continuous" and "substantial" (single or isolated activities are insufficient), and at a level "that a party who enjoys the benefits of conducting business in a particular forum should be willing to bear the correlative burden of submitting to the forum's courts." Id. at 463 (citing Int'l Shoe Co. v State of Washington, 326 U.S. 310, 317-19 (1945)). The Supreme Court has said that these principles are designed to permit people or entities to structure their conduct in such a manner as to gain some assurance that their conduct will not render them liable to suit in a particular jurisdiction. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

I conclude that separately and collectively the Hospital's activities in Maine do not meet the constitutional threshold for general jurisdiction. The Hospital has no place of business in Maine and is not licensed to do business here. Activities such as advertising in Maine, providing information through its website, phone calls, seeking referrals by mail and receiving payments from Maine, without more, do not support general jurisdiction. See, e.g., Helicopteros, 466 U.S. at 416-418 (sending the corporation's CEO to the forum to negotiate a contract, purchasing helicopters, equipment and training services from the forum, accepting checks drawn on a bank located in the forum and sending personnel to the forum for training are not enough); Swiss Am. Bank, 274 F.3d at 619-20

(advertising in the forum, subscribing to two of a forum's credit card companies, entering into a licensing agreement with a forum company, having relationships and accounts with forum banks and entering into contracts with forum companies are insufficient); Noonan v. Winston Co., 135 F.3d 85, 92-93 (1st Cir. 1998) (soliciting business in the forum and visiting the forum to establish business relationships and negotiate orders are insufficient). Inviting patients from the region does not change that conclusion. Patrick v. Mass. Port Auth., 141 F. Supp.2d 180, 184-85 (D.N.H. 2001) (promoting Logan Airport in Boston as "the gateway to New England," use of Logan by significant numbers of New Hampshire residents and accompanying use of a New Hampshire airport as part of a regionalized approach to New England transportation do not create general jurisdiction in New Hampshire).

This case is distinguishable from Kenerson v. Stevenson, 604 F. Supp. 792, 795-96 (D. Me. 1985), in which Judge Carter found general jurisdiction in Maine over a New Hampshire hospital (located near Maine's border) that treated a Maine resident who died while being transported from the defendant hospital to a Maine hospital for further treatment. In finding jurisdiction, Judge Carter relied heavily on the New Hampshire hospital's Maine patients, who comprised between seven percent and eight and one half percent of its in-patient caseload and between seven percent and thirteen percent of its out-patient caseload in a period before the alleged malpractice. Id. at 795. In contrast, in 1998 and 1999, inpatients

referred from Maine were only about one half of one percent of Children's Hospital's total inpatient caseload. See Pl.'s Opp'n, Facts at 6, 8, ¶¶ 8, 12. Judge Carter also looked to the New Hampshire hospital's regional emergency transportation protocol, which included emergency transfer of patients to a Maine hospital. Kenerson, 604 F. Supp. at 795. The plaintiff here points to Children's Hospital's marketing of a Critical Care Transport Team that "travels regularly to points throughout New England." Pl.'s Opp'n, Facts at 8, ¶ 12. But despite the opportunity for discovery in state court, she does not assert or present evidence to show that this advertised service took place, or whether or how often it occurred in Maine. Although both Children's Hospital and the defendant hospital in Kenerson sought and received payments from the State of Maine, see Kenerson, 604 F. Supp. at 795; Pl.'s Opp'n, Facts at 5-7, ¶¶ 5-6, 8, this contact, without contacts similar to the others shown in Kenerson, is not sufficient to establish general jurisdiction.

B. Specific Jurisdiction

Specific jurisdiction requires a three-part inquiry:

First, an inquiring court must ask whether the claim that undergirds the litigation directly relates to or arises out of the defendant's contacts with the forum. Second, the court must ask whether those contacts constitute purposeful availment of the benefits and protections afforded by the forum's laws. Third, if the proponent's case clears the first two hurdles, the court then must analyze the overall reasonableness of an exercise of jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.

Swiss Am. Bank, 274 F.3d at 620-21 (quoting Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999)).

I will assume that a medical malpractice claim for negligent treatment can be said to arise out of or relate to the Hospital's solicitation of Maine doctors to send patients for treatment. Unfortunately for the plaintiff, most of her evidence of the Hospital's efforts along these lines deals with events that occurred *after* the alleged malpractice in 1993. The only contacts preceding the event are the financial relationship with Maine Medical Assistance, a phone call and letter between the plaintiff's Maine doctor and the Hospital, and the Hospital's undertaking to seek payment for her operation from Maine Medical Assistance. See Pl.'s Opp'n, Facts at 4-6, 11 ¶¶ 2-3, 5, 17. All the rest—for example, the website, the newspaper and television advertising, the brochures and professional journals—came later, see id. at 7-11, ¶¶ 9-15, and therefore cannot be used for the specific jurisdiction analysis. See Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H., 295 F.3d 59, 66 (1st Cir. 2002) (stating “that for purposes of specific jurisdiction, contacts should be judged when the cause of action arose”) (citing General Motors Corp. v. Ignacio Lopez de Arriortua, 948 F. Supp. 656, 663 (E.D. Mich. 1996) (“Under the majority view, for the purpose of determining limited personal jurisdiction, minimum contacts are measured at the time the underlying acts took place.”)). Given the Hospital's limited contacts that occurred before the plaintiff's operation, I conclude that she cannot meet the first

two requirements for specific jurisdiction. Her claim does not directly relate to or arise out of Hospital contacts with Maine, and the Hospital did not purposefully avail itself of Maine's legal protections and benefits.

I therefore **GRANT** the Hospital's motion to dismiss for lack of personal jurisdiction.

SO ORDERED.

DATED THIS 24TH DAY OF MARCH, 2005

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:04cv266 (DBH)**

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