STATE OF MICHIGAN

COURT OF APPEALS

GERALDINE O. DIGIOVANNI and NUNZIO J. DIGIOVANNI, individually, and as husband and wife,

Plaintiffs-Appellants,

v

ST. JOHN HEALTH SYSTEM, a Michigan corporation, ST. JOHN HOSPITAL & MEDICAL CENTER, d/b/a/ ST. JOHN HOSPITAL, a Michigan corporation, CAROLE BUCZKO, R.N., jointly and severally,

Defendants-Appellees,

and

JANE B. DOE,

Defendant.

UNPUBLISHED
October 30, 1998

No. 200398
Wayne Circuit Court
LC No. 96-616347 NO

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal by right an order of the Wayne Circuit Court granting defendants' motion for summary disposition and dismissing their first amended complaint without prejudice. We reverse and remand for further proceedings.

I

While she was a patient at defendant St. John Hospital, plaintiff Geraldine DiGiovanni allegedly suffered a fractured right arm when she was moved from a chair to a bed by two employees of the hospital. Plaintiffs[1] filed suit, naming as defendants St. John Health Systems and St. John Hospital and Medical Center, d/b/a St. John Hospital, as well as two unknown "Jane Doe" hospital employees. Plaintiffs alleged negligence in the fracturing of plaintiff's arm. In lieu of answering the complaint,

defendants St. John moved for summary disposition, contending that plaintiffs' complaint sounded in medical malpractice and therefore was subject to the statutory notice requirement and waiting period applicable to malpractice actions. MCL 600.2912b; MSA 27A.2912(2).[2] Following a hearing on the matter, the trial court granted defendants' motion and dismissed plaintiffs' complaint without prejudice.

Before the order granting summary disposition was entered and without leave of the court, plaintiffs filed a first amended complaint. The first amended complaint purportedly alleged "ordinary" negligence on the part of defendants and identified defendant Carole Buczko, a registered nurse, as one of the employees involved in the accident. The amended complaint generated a second motion to dismiss and/or summary disposition by defendants, who argued that, like plaintiffs' original complaint, the amended complaint sounded in medical malpractice, not ordinary negligence, and that plaintiffs had failed to comply with the statutory pre-suit notice requirements applicable to medical malpractice actions.

Following a hearing on October 29, 1996, the trial court granted defendants' motion and dismissed plaintiffs' first amended complaint without prejudice.[3] In its ruling, the court noted that there are training courses that teach nurses various methods of transporting patients from one location to another for the safety and convenience of the patients and nurses, and that the injury was alleged to have occurred within a medical facility and was caused by persons who were employed as medically trained personnel. The court therefore concluded that the amended complaint stated a claim of medical malpractice and that plaintiffs had failed to comply with the statutory prerequisites for filing a malpractice suit. Plaintiffs now appeal from the order dismissing their first amended complaint.

II

Plaintiffs argue on appeal that their first amended complaint sounds in ordinary negligence, not medical malpractice, and that the trial court therefore erred in dismissing the amended complaint for failure to comply with the notice requirements governing medical malpractice actions. We agree.

At the outset, we note that defendants' second motion to dismiss and/or for summary disposition did not specify the particular subsection of MCR 2.116(C) under which it was brought. See, generally, *Stewart v Isbell*, 155 Mich App 65, 73-74; 399 NW2d 440 (1986); *Dean v Auto Club Ins Ass'n*, 139 Mich App 266, 267-268; 362 NW2d 247 (1984). However, it appears from our review of the record that the trial court granted the motion pursuant to MCR 2.116(C)(8), because the court considered only plaintiffs' first amended complaint and did not refer to the affidavits filed by the parties in conjunction with the motion.[4] See MCR 2.116(G)(5). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is reviewed de novo. *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997). When reviewing a motion decided under MCR 2.116(C)(8), this Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. *Id.* Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Id.*

The gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993); *MacDonald v Barbarotto*, 161 Mich App 542, 547; 441 NW2d 747 (1987). "Malpractice" is negligence in the performance of professional services utilizing the standard of care of the profession. *Nemzin v Sinai Hosp*, 143 Mich App 798, 804; 372 NW2d 667 (1985) (concurring opinion of Gribbs, J.). See also *MacDonald, supra* at 550. In a medical malpractice case, expert testimony is typically required to establish causation, the applicable standard of conduct, and its breach. *Phillips v Mazda Mfg Corp*, 204 Mich App 401; 516 NW2d 502 (1994); *Starr v Providence Hosp*, 109 Mich App 762, 765; 312 NW2d 152 (1981). By contrast, under a theory of ordinary negligence, the jury is competent to decide whether a reasonable person would have done as the defendant did under the circumstances. *Bishop v St. John Hosp*, 140 Mich App 720, 724; 364 NW2d 290 (1984).

A complaint may not avoid application of the procedural requirements of a malpractice action merely by couching its causes of action in terms of ordinary negligence. *Simmons, supra* at 254; *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997). Conversely, as the Michigan courts have recognized, merely because an alleged injury occurs in a hospital setting and licensed health care providers are involved, a suit to recover for that injury is not necessarily a "medical malpractice" action. In support of this latter proposition, plaintiffs cite two cases, *Fogel v Sinai Hosp*, 2 Mich App 99; 138 NW2d 503 (1965), and *Gold v Sinai Hosp*, 5 Mich App 368; 146 NW2d 723 (1966).

In *Fogel*, the plaintiff, a hospital patient, was injured when she fell as she was assisted to the bathroom by a nurse's aide. The plaintiff warned the aide that one aide was not capable alone of helping her get to the bathroom. The aide could not hold her and she fell and fractured her hip. This Court found that the plaintiff could maintain an action against the defendant hospital for ordinary negligence. In *Gold*, the plaintiff, a hospital patient, was injured when she fell as she was assisted onto an examination table by a nurse. This Court found that the case was controlled by *Fogel*, noting,

> Neither *Fogel* nor the instant case present a malpractice question but rather a question of ordinary negligence. Defendant attempted to distinguish the two cases on the theory that *Fogel* involved a nonprofessional nurse's aide, whereas the instant case involves a professional nurse. This is a distinction without a difference. [*Gold, supra* at 370.]

Defendants argue, and the trial court agreed, that both *Fogel* and *Gold* rest on the outdated rule that only a claim of negligence against a *physician* was a claim for malpractice requiring expert testimony. Defendants maintain that this rule was changed by the Legislature when it enacted 1975 PA 142, and amended MCL 600.5838; MSA 27A.5838, the statute of limitations for malpractice, to provide that a claim of malpractice could be brought against any person who "is, or holds himself out to be, a member of a state licensed profession, intern, resident, registered nurse, licensed practical nurse. . . ."[5] See, generally, discussion in *Adkins v Annapolis Hosp*, 420 Mich 87, 90-92; 360 NW2d 150 (1984).

However, the principle that a licensed medical professional or hospital can be sued for ordinary negligence occurring in the performance of certain duties remains viable even after the change in the malpractice statute of limitations. In *Adkins, supra* at 95, n 10, the Michigan Supreme Court, referring to the *Gold* and *Fogel* cases, acknowledged that "[s]ome hospital errors in patient treatment may, of course, be ordinary negligence rather than malpractice." See also, *Wilson v Stilwell,* 411 Mich 587, 611; 309 NW2d 898 (1981); *McLeod, supra* at 115. This Court, albeit typically in the form of factually distinguishing *Gold* and *Fogel*, has likewise continued to recognize that under certain circumstances, if the alleged negligent act or omission of a hospital or its personnel does not require the exercise of expert medical judgment, an action based on ordinary negligence is appropriate. See, e.g., *Bronson v Sisters of Mercy Health Corp,* 175 Mich App 647, 652; 438 NW2d 276 (1989); *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988); *MacDonald, supra* at 549; *Thomas v McPherson Community Health Center,* 155 Mich App 700, 705; 400 NW2d 629 (1986); *Bishop, supra* at 723-724; *Waati v Marquette General Hosp, Inc*, 122 Mich App 44, 49; 329 NW2d 526 (1982); *Warfield v Wyandotte,* 117 Mich App 83, 92; 323 NW2d 603 (1982); *Starr, supra* at 765.[6] Where a dispute exists as to whether the plaintiff's claim sounds in ordinary negligence or malpractice, the dispositive question, as reflected in these cases, is whether the facts set forth issues that are within the common knowledge and experience of the jury or raise a question of medical judgment.

In the instant case, plaintiffs' first amended complaint alleges, in pertinent part, that defendants were negligent in the following respects:

> A. Failing to exercise a high duty of ordinary due care and caution as ordinary individuals for the welfare and safety of said Plaintiff;
>
> B. Failing to take all possible precautions that ordinary individuals would take to avoid injury to said Plaintiff;
>
> C. Failing to conduct themselves as would ordinary individuals in undertaking to assist said Plaintiff;
>
> D. Failing to heed express warnings as would ordinary individuals concerning the age and physical condition of Plaintiff, and;
>
> E. In the commission of other acts of negligence, misconduct and/or omissions as ordinary individuals which are reserved for amendment at the time they are discovered.

The amended complaint does not allege that the physical act of moving plaintiff involved any medical questions or the exercise of professional medical judgment, nor does it assert that plaintiff's underlying medical condition was such that only a person with professional medical training would have been authorized to undertake the act of moving her. We conclude that the factual allegations, when taken as true, present issues within the common knowledge and experience of the jury rather than those of expert medical judgment. *Wilson, supra*; *McLeod, supra*. The injuries allegedly sustained while

plaintiff was being assisted from a chair to a bed closely resemble the facts of *Fogel* and *Gold*. Although defendants did not allow plaintiff to *fall* and sustain injuries, whether one allows a patient to fall during a transfer or instead breaks a patient's arm during a transfer, is a distinction without a difference. We are satisfied that the allegations in the first amended complaint advance a theory of ordinary negligence and that expert testimony as to the standards of due care prevailing among hospitals and the nursing profession in similar situations is not necessary to develop the issue of negligence for the jury. The trial court therefore erred in granting defendants' motion for summary disposition.

Defendants also argue that plaintiffs conceded in their notice of intent to file a claim pursuant to MCL 600.2912b; MSA 27A.2912(2), that there is an objective medical standard of practice which can be applied to determine whether defendants were negligent, and that plaintiffs therefore should be estopped from asserting that their claim is one of ordinary negligence. In their notice of intent, plaintiffs asserted that defendant Buczko owed a duty to utilize proper transfer techniques to avoid injury to the patient, provide proper care and treatment of the patient to avoid injury, and transfer the patient only in the manner instructed and taught by qualified and trained personnel to prevent injury to the patient and utilize the least amount of physical force to achieve the desired patient transfer without injury to the patient. Defendants contend that if they had a duty to transfer the plaintiff only in the manner instructed and taught by qualified and trained personnel, they should not be held liable without expert testimony as to the manner of transferring a patient as instructed and taught by such personnel.

We agree with plaintiffs that the notice of intent does not serve as a concession that their claim is one involving malpractice. The notice of intent was served after the trial court dismissed plaintiffs' original complaint. Plaintiffs' counsel filed the notice of intent because the medical malpractice statute of limitation was about to run. Had the trial court denied defendants' second motion for summary disposition on the basis that plaintiffs' cause of action sounded in ordinary negligence, a notice of intent would not have been necessary. See *McLeod, supra* (allowing the plaintiff to withdraw a notice of intent setting forth a theory of recovery based on medical malpractice where the plaintiff initially chose to proceed on a theory of ordinary negligence and derived no benefit from her subsequent attempt to rely on a medical malpractice theory of recovery). Defendants' argument is without merit.

Therefore, we conclude that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and dismissing plaintiffs' first amended complaint without prejudice. Plaintiffs were not required to comply with the notice requirements of MCL 600.2912b; MSA 27A.2912(2), applicable to "action[s] alleging medical malpractice." However, in concluding that plaintiffs can proceed under a theory of ordinary negligence, we note that plaintiffs must abide by the consequences of their election of this theory. See *Bishop, supra* at 723-725. In particular, under a theory of ordinary negligence, expert testimony is not admissible regarding the standard of care of a reasonable person. As we stated in *Bishop, supra* at 724-725:

> Under a theory of ordinary negligence, the jury is competent to decide what a reasonable person would do under the circumstances, and, therefore, the testimony of plaintiffs' expert witness would have been inadmissible.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] Nunzio DiGiovanni, spouse of Geraldine DiGiovanni, joined in the suit alleging loss of society and consortium.

[2] MCL 600.2912b; MSA 27A.2912(2) provides in relevant part:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

This Court has held that dismissal without prejudice is the appropriate remedy when a plaintiff files a medical malpractice suit prematurely in violation of this statutory provision. See *Neal v Oakwood Hosp Corp*, 226 Mich App 701; 575 NW2d 68 (1997).

[3] The lower court in dismissing plaintiffs' first amended complaint in effect ruled that granting leave to permit its filing would be futile.

[4] Defendants produced an affidavit signed by defendant Buczko, to the effect that she was engaged in a professional activity when she assisted plaintiff from her chair to her bed. Plaintiffs countered with the affidavit of plaintiff Nunzio J. DiGiovanni, who attested that he had no specialized training and engaged in the same type of activity as defendant Buczko on a daily basis without injuring his spouse. The affidavits appear to be inadmissible. As this Court noted in *SSC Associates v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1992), "[t]he affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion. . . . Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence."

[5] The statute has since been amended by 1986 PA 178, which deleted, in pertinent part, the listing of health professions following the language "of a state licensed profession."

[6] In *McLeod, supra*, the federal court determined that under Michigan law, the plaintiff, a nursing home resident who fell and fractured her hip when she attempted to get into her wheelchair, alleged a theory of ordinary negligence where her complaint stated that defendant breached its duty of reasonable care by leaving her wheelchair unlocked and/or unstable for sitting down or getting up. Those cases presenting a question of medical judgment have been distinguished from *Fogel* and *Gold*. See, e.g., *Wilson, supra*; *Waati, supra* (rejecting plaintiffs' assertion that expert testimony was not required

because issues of ordinary negligence were presented where the plaintiff, a seizure patient, was left unattended with the hospital bed's side rails down, by finding that whether a seizure patient required constant medical attention or restraints was an issue of medical management to be established by expert testimony); *Starr, supra* (distinguishing *Fogel* and *Gold* on the basis that issues regarding the degree of supervision necessary in a special care unit and the type of restraints that should have been used on an elderly patient involved professional judgments which are beyond the common knowledge and experience of laymen); *MacDonald, supra* (determining that plaintiff's cause of action which was couched in terms of ordinary negligence was based in malpractice where the plaintiff alleged that the defendant's negligence occurred as a result of a failure to exercise a sufficient degree of professional skill in identifying the plaintiff's medical condition); and *Bishop, supra* (finding that the trial court properly refused to instruct the jury regarding ordinary negligence after the plaintiff chose to proceed under a malpractice theory where the plaintiff, a hospital patient, fell when a nurse's aide helped her out of bed and positioned her behind a walker to assist her in walking to the bathroom and where expert testimony was presented by plaintiff on the subject of the proper method of assisting a person using a walker).