

STATE OF MICHIGAN
COURT OF APPEALS

LAVERNE G. EUBANKS, as Personal
Representative of the Estate of PATRICIA GRAY,

UNPUBLISHED
August 27, 2002

Plaintiff-Appellee,

v

HENRY FORD HOSPITAL a/k/a HENRY FORD
HEALTH SYSTEM,

Nos. 233159, 233417
Wayne Circuit Court
LC No. 00-035125-NO

Defendant-Appellant.

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

In this consolidated appeal, defendant Henry Ford Hospital appeals by leave granted two orders of the circuit court denying defendant's motion to change venue and granting in part defendant's motion for summary disposition, respectively. We affirm in part and remand in part for proceedings consistent with this opinion.

The decedent, Patricia Gray, was on a heart donor/recipient list to receive a heart transplant. On September 19, 1998, a potential heart became available; however, defendant's employees failed to contact Gray in time and the opportunity for the heart was lost. In December 1998, Gray suffered a heart attack and died. Plaintiff Laverne Eubanks, Gray's sister and the personal representative of Gray's estate, filed a complaint against defendant, claiming common-law negligence.

Defendant first argues that the trial court's decision to change venue was clearly erroneous and based on an incorrect determination of "original injury." See MCL 600.1629(1)(a). We agree that the trial court's determination of original injury was clear error but hold that the correct determination supports the trial court's ultimate conclusion.

"This Court reviews a trial court's ruling in response to a motion to change improper venue under the clearly erroneous standard." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000), citing *Shock Bros, Inc v Morbark Industries, Inc*, 411 Mich 696, 698-699; 311 NW2d 722 (1981). A decision is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Massey, supra* at 379.

In a wrongful death action, venue is determined pursuant to the terms of MCL 600.1629, stating, in relevant part:

(1) . . . [I]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:

(a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(i) The defendant resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of a defendant is located in that county.

To determine venue, this statute looks first to the county where the “original injury” occurred. MCL 600.1629(1)(a). “Original injury” is not a defined term. However, in *Karpinsky v St John Hospital-Macomb Center Corp*, 238 Mich App 539, 543-545; 606 NW2d 45 (1999), we concluded that in a wrongful death case, the “original injury” is the injury resulting in death, rather than the death itself. *Id.* at 544. An original injury cannot ordinarily be an ongoing event. *Id.* at 546-547.

The trial court determined that the original injury occurred when defendant called Gray at her home, leaving a message that she lost the opportunity for the heart. Although there was evidence supporting the trial court’s conclusion, we are left with the definite and firm conviction that a mistake was made; therefore, the decision was clearly erroneous. *In re Attorney Fees and Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). Based on the evidence adduced below, we conclude that the original injury eventually causing death was the missed opportunity when the heart was no longer available to Gray. The evidence supports the conclusion that the heart remained available to Gray until approximately 5:00 p.m. because it was not placed with another recipient. In addition, we conclude that the original injury took place at the hospital, located in Wayne County, where the decision was made that the heart was no longer available to Gray. Because the original injury occurred in Wayne County and defendant has a place of business there, venue was proper in Wayne County pursuant to MCL 600.1629(1)(a). Where the trial court reaches the right result, even if for the wrong reason, this Court will not reverse. *Koster v June’s Trucking, Inc*, 244 Mich App 162, 167; 625 NW2d 82 (2000).

Nonetheless, the controlling issue in this case surrounds the trial court’s order partially denying defendant’s motion for summary disposition, brought pursuant to a variety of grounds, and granting plaintiff leave to amend her complaint. Defendant asserts that the court’s decision was improper because plaintiff’s entire claim sounds in medical malpractice and must be dismissed because plaintiff failed to file a notice of intent or affidavit of merit. We agree.

Claimants pursuing medical malpractice claims are required to provide written notice of the claim before filing a complaint, MCL 600.2912b, and to file an affidavit of merit with the complaint, MCL 600.2912d. See also *Nippa v Botsford General Hospital*, ___ Mich App ___, ___ NW2d ___ (Docket No. 229113, decided June 21, 2002), slip op 7 (medical malpractice plaintiff may not avoid expert testimony requirements of MCL 600.2169 by suing hospital entity

and not individual physicians), *lv* pending. The failure to comply with either requirement requires dismissal of the claim without prejudice. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Plaintiff failed to file a notice of intent before filing her complaint and failed to file an affidavit of merit with the complaint.

Plaintiff originally pleaded her claim as one of ordinary negligence, rather than medical malpractice. However, “[a] complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.” *Dorris, supra* at 43, quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997). The determination whether a claim should be treated as a medical malpractice claim or an ordinary negligence claim “depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment.” *Dorris, supra* at 45-46.

In this case, the complaint alleged that the hospital provided Gray a malfunctioning beeper and after the donor heart became available, hospital personnel failed to call all telephone numbers associated with Gray. It further alleged that defendant failed to have a sufficient protocol in place to contact potential heart recipients and that these negligent acts proximately caused Gray’s death. In response to defendant’s motion for summary disposition, the trial court concluded that part of the complaint, related to the existence of protocols, sounded in medical malpractice and allowed plaintiff to amend her complaint to bifurcate the ordinary negligence issues from the medical malpractice issues.

Alleged negligent actions by health professionals or individuals working for health professionals are not necessarily within the providence of “medical malpractice.” See *Weaver v University of Michigan Bd of Regents*, 201 Mich App 239, 242; 506 NW2d 264 (1993); *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368, 370; 146 NW2d 723 (1966). However, even seemingly administrative acts can constitute medical malpractice rather than negligence. See, e.g., *Whitney v Gallagher*, 64 Mich App 46, 50-51; 235 NW2d 57 (1975); *Danner v Holy Cross Hospital*, 189 Mich App 397, 398; 474 NW2d 124 (1991); *Dorris, supra* at 46-47.

Applying the *Dorris* test to the complaint, we conclude that some of plaintiff’s allegations are within the common knowledge and experience of the jury but others are not. See *Dorris, supra* at 45-46. A jury is doubtless competent to determine whether defendant’s employees called all available numbers and whether they took adequate steps to ensure that the beeper was working properly before giving it to Gray. However, as plaintiff acknowledges, expert testimony will probably be required on the issue of probable cause. Moreover, whether defendant set up and followed adequate calling protocols for its heart transplant patients is almost certainly a question of professional medical judgment outside the common knowledge of the jury and requiring expert testimony. *Id.* at 47. We conclude that although there are some questions of ordinary negligence involved, those questions flow from predominating medical malpractice issues and are too intertwined with malpractice theory for a meaningful division. Therefore, the complaint should have been dismissed in its entirety. *Id.*

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell