STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY VIA and JOHN VIA, Plaintiffs-Appellants/Cross-Appellees, v GENTIVA HEALTH SERVICES, INC., f/k/a OLSTEN HEALTH SERVICES, Defendant-Appellee/Cross-Appellant.	UNPUBLISHED February 24, 2004 No. 244604 Macomb Circuit Court LC No. 2002-000942-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's grant of summary disposition to defendant under MCR 2.116(C)(10), in this action alleging negligence arising from a contract[1] between defendant Gentiva and Berlex Laboratories, not a party to this suit. Defendant cross-appeals the circuit court's denial of its earlier motion for summary disposition, which it had brought on different grounds. We affirm the circuit court's grant of summary disposition to defendant. Given that disposition, we need not address defendant's cross-appeal.

I

Plaintiffs do not challenge the facts as stated in the circuit court's final opinion and order:

> Plaintiffs allege that defendant breached its duty to plaintiff Shirley Via by failing to inform her of potential side effects concurrent with the administration of the chemical Betaseron, failure to monitor plaintiff's condition and failure to advise plaintiff to seek appropriate medical care. Plaintiff was diagnosed with multiple sclerosis in 1986. In 1998, plaintiff learned of a chemical designed to alleviate some of the symptoms associated with the disease. Plaintiff began self-administration of the chemical in January, 1999, and as a result, allegedly

[1] Plaintiff John Via alleged loss of consortium.

developed skin necrosis at two sites on her body. Plaintiff filed a complaint against defendant on February 26, 2002.

Plaintiffs' complaint alleged that defendant Gentiva owed plaintiff Shirley Via (plaintiff) a duty "to fully inform her of the potential consequences" of Betaseron injections; "to closely monitor the reactions to the injections and to provide advice to the Plaintiff in such a manner as to prevent the formation of necrotic tissue and the subsequent damage," and "to provide a product that was safe, suitable for its intended purpose and non-defective." The record is clear that plaintiff's neurologist, Dr. Hidalgo, monitored plaintiff Shirley Via's treatment and prescribed Betaseron to her in the first instance. In connection with defendant's motion for summary disposition, plaintiffs argued that defendant Gentiva should have contacted Shirley Via before she began injecting Betaseron on or around January 1, 1999. The record before the circuit court showed that Dr. Hidalgo's office authorized Gentiva to train plaintiff Shirley Via by a fax dated January 14, 1999, which date fell after she began injecting Betaseron.

II

Plaintiffs first contend that the circuit court incorrectly determined that no further facts could be discovered regarding the contract between defendant Gentiva and Berlex. Plaintiffs contend that the circuit court granted defendant's motion 1) before plaintiff's treater, Dr. Cesar Hidalgo, was deposed, and that Dr. Hidalgo maintained that he had conformed to the proper procedures for contacting defendant (to authorize defendant to provide training to plaintiff); and 2) before defendant produced a copy of the contract between it and Berlex, which plaintiffs argue they needed to determine defendant's liability stemming from that contract.

This Court reviews de novo the circuit court's grant of summary disposition. *Smith v Globe Life Ins*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The circuit court must view the pleadings and documentary evidence submitted in the light most favorable to the non-movant. *Id.* "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party. . . must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Smith, supra* quoting *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Plaintiffs' argument is cursory,[2] does not address the basis of the circuit court's decision, and does not properly represent the circuit court's ruling. The circuit court's opinion and order granting summary disposition[3] makes clear that it accepted as true the facts as alleged by

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[2] Plaintiffs' appellate brief devotes less than two pages to this issue. Plaintiffs do not state whether they brought to the circuit court's attention that defendant had not produced the contract while defendant's motion was pending, nor do they state whether they filed a motion to compel the contract's production.

[3] The circuit court granted defendant's motion on proximate cause grounds:

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Defendant first argues that plaintiff is unable to establish any causal relationship between any action or inaction on defendant's part and the injury allegedly sustained by plaintiff. In response, plaintiff failed to squarely address this argument; in essence, plaintiff's response asserts defendant had a contractual duty with Berlex to perform and provide training, they undertook that duty, and failed in its performance by not properly contacting plaintiff.

At issue is whether plaintiff has created a triable issue of fact regarding defendant's liability in tort for plaintiff's injuries in order to survive a (C)(10) action [sic motion], particularly where the alleged breach of duty may be characterized as a breach of contract between defendant and Berlex.

* * *

In the instant case, defendant allegedly agreed to provide plaintiff with services under a contract defendant had with Berlex. Defendant allegedly failed to fully perform according to the terms of its promise, and/or failed to properly perform, i.e., failed to arrange training, failed to monitor plaintiff's progress, and failed to advise plaintiff to seek appropriate medical care when her alleged injuries were recognized. . . .

[M]aterial documentation presented by the parties indicates that at the time plaintiff began injecting herself with the chemical, she was well versed in its potential side effects, **was very clear on the injection procedure**, and had had numerous telephonic conversations with defendant clinic's professional staff regarding the preparation and procedures related to the proper usage of the chemical. Plaintiff testified that she had received informative pamphlets, she read them and thoroughly understood them: plaintiff additionally viewed on at least one occasion, a video designed to aid patients in self-administration. Plaintiff further testified that the first time she self-injected, she had talked to a nurse who walked her through the process. Plaintiff stated that the first injection, in the thigh area, went fine but for a resulting "little redness" at the site. Plaintiff testified that she only injected herself in the thigh area twice, the area of the resulting alleged necrosis, and thereafter chose spots on her body which contained more fat. . . These areas did not develop necrosis. Plaintiff further testified that she was well aware of the risks associated with the chemical, and that she knew injection site reactions were common. The literature accompanying the product, which plaintiff stated she had thoroughly read and understood, clearly stated in more than one section "Serious adverse reactions associated with the use of Betaseron have been reported including depression and injection site necrosis."

Being well aware of this, the Court is advised that nevertheless, plaintiff continued to self-inject even though she developed injuries to her thighs. Plaintiff chose to continue despite developing necrosis, thus subjecting herself to potential further injury. Plaintiff testified that the reasons she did not consult with her

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plaintiff, including that defendant had agreed to provide plaintiff with services under a contract it had with Berlex, i.e., had a duty to plaintiff Shirley Via. The basis of the court's grant of summary disposition to defendant was proximate cause. *The extent of* defendant's liability under the contract played no role in the proximate cause determination. Therefore, even if a copy of the contract had been produced to plaintiffs, summary disposition would have been granted on the basis of proximate cause.[4]

Plaintiffs fail to argue or explain how the circuit court's proximate cause determination would have differed had Dr. Hidalgo, plaintiff's neurologist, been deposed before the circuit court granted summary disposition. The factual statement in plaintiffs' appellate brief states regarding Dr. Hidalgo that defendant contacted him and obtained the proper orders for proceeding with plaintiff Shirley Via's training. The brief later states that Dr. Hidalgo "maintained that he had conformed to the proper procedures for contact to Defendant."

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> primary physician was because "Pathway" [M.S. Pathways was a patient support program run by Berlex that instructed on Betaseron's use] told her not to call her doctor "every time I would call them." This indicates that plaintiff had frequent contact with some facility who continued to advise her while she remained on the chemical. The record contains numerous detailed telephone logs indicating the many contacts plaintiff had with defendant's staff, in which advice for proper injection was imparted to plaintiff; the logs additionally note that plaintiff verbalized understanding of the directions.
>
> The Court is satisfied that while reasonable factfinders could find defendant had failed to inform plaintiff of the potential for the formation of necrotic tissue, nevertheless as plaintiff was admittedly already well aware of the possible adverse side effects this knowledge precludes liability. Further, the Court is also satisfied that no question remains but that defendant did monitor plaintiff's condition so as to preclude the formation of the damages as indicated by the numerous phone contacts and plaintiff's own testimony. The potential for the development of necrosis existed regardless of frequent or infrequent monitoring as long as plaintiff was self-injecting. Plaintiff was also aware of the proper procedure to minimize risk, and it appears she followed the procedure with or without monitoring by defendant's professionals. Finally, reasonable factfinders could not disagree that despite defendant's alleged advice not to contact her physician, a reasonable person would have done so regardless in the event of a serious injury. It is clear, however, that contacting her physician would not have changed the situation as subsequent to the thigh injuries, plaintiff continued to inject herself many times in other areas of her body with no resulting injury. Therefore, the Court is convinced that no genuine issues of fact remain with respect to any material facts, and defendant is entitled to judgment as a matter of law.

[4] Defendant's motion was brought under MCR 2.116(C)(8) and (C)(10). The circuit court denied the motion under MCR 2.116(C)(8), its opinion stating that "plaintiff has properly pleaded sufficient facts to sustain a cause of action in tort for negligent performance of a contract."

Defendant Gentiva contended below that it had no record of ever having received Dr. Hidalgo's order, and thus it was without authority to render any type of service to plaintiff Shirley Via. Even had Dr. Hidalgo been deposed before the court granted defendant's motion and even had he testified that he gave defendant authority to train plaintiff Shirley Via before she began injecting Betaseron, the court's ruling on proximate cause would have been unaffected. As stated above, the circuit court accepted as true that defendant had a duty to plaintiff under its contract with Berlex *at the time plaintiff self-injected Betaseron* in her thighs. The issue whether defendant received Dr. Hidalgo's authorization to proceed with plaintiff's training before plaintiff self-injected the Betaseron in her thighs was of no consequence to the circuit court's ruling.

Similarly, the question whether defendant had the duty in the first instance to contact plaintiff (rather than the other way around) and failed to do so, played no role in the circuit court's determination to dismiss on proximate cause grounds. The court concluded based on documentary evidence submitted in connection with defendant's second motion that plaintiff Shirley Via was well versed in both Betaseron's potential side effects and the self-injection procedure *before* she began self-injecting the chemical. Plaintiffs' appellate brief does not argue this determination was incorrect. We have reviewed the record and there is no evidence that plaintiff Shirley Via used anything but proper technique in her self-injections. She testified at deposition that she was never confused about self-injection and only called Pathways the first time she injected herself because they told her to call so they could walk her through the process.

We find no error.

III

Plaintiffs next argue that the circuit court erred in granting summary disposition before discovery was complete. Generally, summary disposition under MCR 2.116(C)(10) is premature if granted before discovery on a disputed issue is complete. *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). However, the nonmoving party must demonstrate by independent evidence that a genuine issue of material fact exist in order to rely on this ground in opposing summary disposition. *Village of Diamondale v Grable*, 240 Mich App 553, 557; 618 NW2d 23 (2000).

Plaintiffs' entire argument in this regard is:

> It is a well established standard in Michigan that summary disposition should not be granted until discovery is completed. (See Standard of Review). In this instance, even Plaintiff's own treator's testimony was not taken into consideration prior to the Opinion and Order granting summary disposition to Defendant.
>
> For that matter, Defendant's own expert, Dr. Mikol, who was not deposed, stated in his affidavit "use of proper injection techniques may help to lessen the chances of a reaction." (See Affidavit, Daniel D. Mikol June 27, 2002, Exhibit E)
>
> Additionally, Defendant's other expert, Dr. Elias [,] stated exactly the same. ("Although uses of proper injection techniques may help to lessen the chances of a reaction." (See Affidavit, June 3, 2002, Exhibit F).

> It is quite clear that Plaintiff was not afforded an opportunity to continue her investigation of her claim and was prematurely cut off by the Trial Court.

Plaintiffs' argument does not address the basis of the circuit court's decision and fails for the same reason their first argument fails—the court's dismissal on grounds of proximate cause would not have been altered had Dr. Hidalgo been deposed. Further, the fact that defendant's experts stated in affidavits that proper injection techniques may help lessen the chance of an adverse physical reaction does nothing to assist plaintiffs on appeal given that plaintiff Shirley Via was well aware of the possible adverse side effects of Betaseron before she began self-injecting the chemical. As noted above, the record is devoid of evidence that Shirley Via used anything but proper self-injection technique.

We affirm the circuit court's grant of defendant's second motion for summary disposition. Given that disposition, we need not reach defendant's cross-appeal.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski