

STATE OF MICHIGAN
COURT OF APPEALS

RIOLA J. BILLOPS, Personal Representative of
the Estate of THEODORE GILBERT, Deceased,

UNPUBLISHED
March 9, 2004

Plaintiff-Appellant,

v

ST. ANNE'S CONVALESCENT CENTER, d/b/a
SHANTA CORPORATION,

No. 243397
Wayne Circuit Court
LC No. 01-130456-NO

Defendant-Appellee.

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendant on plaintiff's complaint alleging negligence resulting in wrongful death and breach of contract. We affirm in part and reverse in part.

Plaintiff's decedent, a 78-year-old woman, was a resident in defendant's nursing home and died while under defendant's care. Plaintiff filed this action, alleging that decedent died as a result of various acts of negligence performed by defendant's staff and that defendant breached its contract to provide adequate care for the decedent. The trial court granted summary disposition to defendant, concluding that, although the complaint claimed to allege ordinary negligence, plaintiff's allegations sounded in medical malpractice and that plaintiff had failed to comply with the procedural requirements related to a medical malpractice claim. The trial court concluded that plaintiff cannot avoid those requirements by framing the complaint as sounding in ordinary negligence or breach of contract.

A plaintiff cannot avoid the procedural requirements attendant to a medical malpractice action merely by couching the claim in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997). The *Dorris* Court explained that:

The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to 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. *Wilson v Stilwell*, 411 Mich 587,

611; 309 NW2d 898 (1981); *McLeod v Plymouth Court Nursing Home*, *supra* at 115.

Count I of plaintiff's complaint, in paragraph 13, alleges the following acts of ordinary negligence:

a. Failure to properly train individuals responsible for transfers, bathing, dressing and other activities of plaintiff to provide adequate handling of plaintiff to prevent injury;

b. Failure to adequately and competently feed and nourish plaintiff to prevent dehydration;

c. Failure to adequately and competently hydrate plaintiff by providing her adequate water to prevent dehydration;

d. Failure to adequately and competently attend to plaintiff in such a manner as to prevent bed/pressure sores from occurring on and about her body;

e. Failure to adequately and competently provide medical attention to plaintiff in that she developed serious infectious conditions;

f. Failure to adequately and competently provide proper hygiene for plaintiff on a regular basis and failed to properly clean and change her after she soiled herself;

g. Failure to adequately and competently keep plaintiff's surroundings clean and sterile as necessary for a patient in plaintiff's medical condition;

h. Failure to adequately and competently change and clean plaintiff's bed linens and clothes as is necessary for a patient in plaintiff's medical condition;

i. Failure to adequately and competently provide proper therapies, including but not limited to physical therapies to control and treat plaintiff's medical conditions;

j. Failure to comply with the requirements of various Michigan statutes, including, but not limited to: MCLA 333.21713; MCLA 333.21715; MCLA 333.21720a; MCLA 333.21711; and MCLA 33.21784 [sic]; and

k. Failure to comply with federal statutes, including, but not limited to Part 482 of Title 42 (42 CFR 483).

l. Any and all other acts of negligence which become apparent through the course of discovery;

m. Any and all other acts of negligence found appropriate by the trier of fact.

Plaintiff essentially alleges in the complaint that, due to the above claimed acts of negligence, the decedent developed pressure sores on her body, which become infected and lead to the decedent's death.

While we agree with the trial court that many of these claims are actually claims of malpractice couched in terms of ordinary negligence, some of plaintiff's claims can reasonably be classified as claims of ordinary negligence and, therefore, should not have been dismissed. Specifically, allegations "b" through "e" and "g" through "i", as well as the first portion of "f", constitute matters of medical judgment and, as such, constitute allegations of medical practice and were properly dismissed. These items required medical attention and physical therapy are matters for medical judgment, not claims of ordinary negligence within the common experience or knowledge of a layman.

But with respect to allegation "a" and the second portion of "f" (cleaning the decedent after she soiled herself), we are satisfied that those claims are ones of ordinary negligence, not medical judgment. We do caution, however, that if plaintiff expands on these arguments to claim a failure to provide special attention in these areas, then plaintiff may be venturing into the area of medical judgment and, thus, beyond the scope of her claims of ordinary negligence.

With respect to claims "j" through "m," at this point they are simply too generalized to adequately classify. To the extent that plaintiff further develops these points as the matter proceeds to trial, the trial court may evaluate the arguments and limit plaintiff to those arguments which do not involve claims of medical judgment and, therefore, malpractice.

In short, while a partial grant of summary disposition in favor of plaintiff was appropriate, the trial court erred by dismissing all of plaintiff's claims. The trial court should only have dismissed those claims which fell within the realm of medical judgment and appropriately limited plaintiff's arguments at trial so as not to expand the remaining claims beyond ordinary negligence into the realm of medical judgment.

Plaintiff also argues that the trial court erred in denying leave to amend the complaint to add a count of medical malpractice. The trial court denied plaintiff's request to amend the complaint to add a claim of medical malpractice on the basis of *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). We agree with the trial court. In *Scarsella*, the Supreme Court held that the period of limitation is not tolled by the filing of a complaint alleging medical malpractice if that complaint is not accompanied by an affidavit of merit. Thus, where a complaint is dismissed for failure to file an affidavit of merit with the complaint, the dismissal is without prejudice and the plaintiff may refile, but only if it is still possible to comply with the applicable period of limitation. *Id.* at 551-552.

In the case at bar, plaintiff states in her brief that the period of limitation for a medical malpractice claim in this case would have expired on August 27, 2001. On that date, plaintiff served on defendant a notice of intent,¹ which of course tolled the period of limitation for a

¹ We also note that defendant argued in the trial court, and to a limited extent continues to argue in this Court, that the fact that plaintiff served a notice of intent in the first place constitutes an
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medical malpractice claim, and shortly thereafter filed her complaint (without an affidavit of merit) alleging ordinary negligence. Plaintiff acknowledges that the tolling period expired on February 26, 2002. Thus, a valid medical malpractice complaint had to have been filed on February 26, 2002, the notice of intent having been served on the last day of the period of limitations for a medical malpractice claim. But plaintiff did not file the motion to amend the complaint until April 30, 2002. Therefore, plaintiff could not comply with the period of limitation for a medical malpractice claim even if the trial court granted leave to amend and, therefore, the trial court properly denied leave to amend.

Plaintiff argues that defendant should be charged with various delays, thus further tolling the period of limitation. We disagree. Plaintiff fails to demonstrate why the motion to amend the complaint, with an affidavit of merit affixed, could not have been filed in a timely manner despite the delays charged to defendant. That is, while the procedural posture of this case may have prevented plaintiff from knowing the court's ruling regarding whether certain allegations had to be pled as a medical malpractice claim rather than as an ordinary negligence claim, it did not prevent plaintiff from timely filing a motion to amend the complaint in anticipation of such a potential ruling. Indeed, just as we treated plaintiff's serving of a notice of intent as merely an action to preserve the right to file a medical malpractice action, plaintiff could have filed the medical malpractice action in tandem with her ordinary negligence action and did not have to wait for the trial court's ruling on the summary disposition motion.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

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acknowledgement that this is a medical malpractice action. We disagree. The mere fact that plaintiff acted to preserve her rights to file a medical malpractice action does not constitute an admission that this is a medical malpractice action. Indeed, the fact that plaintiff filed this action shortly after serving the notice of intent, rather than waiting the statutorily prescribed period, indicates that plaintiff did not consider this to be a malpractice action.