

STATE OF MICHIGAN
COURT OF APPEALS

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

Plaintiff-Appellant,

v

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

Defendant-Appellee.

UNPUBLISHED
March 9, 2004

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

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

GAGE, J. (*concurring in part and dissenting in part*).

The majority concludes that only some of plaintiff's claims sound in medical malpractice while the remainder of plaintiff's claims sound in ordinary negligence. Because I conclude that *all* of plaintiff's claims sound in medical malpractice, I respectfully dissent from the majority opinion in so far as it reverses part of the trial court's order granting summary disposition.

The key to a medical malpractice claim is whether it alleges that the negligence occurred within the course of a professional relationship. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999), quoting *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647; 438 NW2d 276 (1989). 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." *Dorris, supra* at 46.

The majority concludes that the following allegations in plaintiff's complaint *may be* allegations of ordinary negligence as opposed to medical malpractice:

- 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;
- f. . . . failed to properly clean and change her after she soiled herself;

j. Failure to comply with the requirements of various Michigan statutes, including, but no 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.

I disagree that these allegations sound in ordinary negligence. According to the majority opinion, the “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” and the “failure to adequately and competently provide proper hygiene for plaintiff on a regular basis” are allegations sounding in medical malpractice, but the failure to properly train its staff to provide proper handling of the decedent and the failure to properly clean and change the decedent are matters of ordinary negligence. These findings appear to me to be contradictory.¹ Because I find all of plaintiff’s allegations to sound in medical malpractice, I would affirm in all respects the trial court’s grant of summary disposition to defendant.

At the outset, I note that paragraph 12 of plaintiff’s complaint states that by accepting the decedent as a resident and patient in its nursing facility, “defendant undertook a duty to adequately and competently provide proper attention for all of her medical and personal needs.” Paragraph 13 states “Defendant nursing home breached its duty with to [sic] respect providing adequate and competent attention to plaintiff’s decedent’s medical and personal needs . . .” Accordingly, all plaintiff’s allegations stem from the professional relationship between the parties and defendant’s provision of medical care and attention to the decedent. Even though plaintiff argues that all of the allegations allege ordinary negligence because plaintiff uses the term “negligence,” plaintiff’s allegations actually allege medical malpractice and should be analyzed as such.

Allegation “a” alleges that defendant failed to properly train its staff to provide adequate handling of the decedent to prevent injury. As the majority points out, plaintiff essentially alleges that due to defendant’s “acts of negligence,” the decedent developed pressure sores on

¹ Providing proper hygiene would consist of properly cleaning and changing the patient. Thus, it is contradictory to say that the failure to provide proper hygiene is malpractice but the failure to properly clean and change the patient is not malpractice when it relates to the patient getting bedsores and subsequent infection. Further, while it may seem common sense that a person must be cleaned after she soils herself, as stated later in this dissent, if the person is more susceptible to infection, the proper method of cleaning her so as to prevent future infection requires medical judgment.

her body that became infected and led to the decedent's death. Plaintiff claims that the allegations involve adequate custodial care and do not impugn the exercise of medical judgment. However, I conclude that this failure to train allegation is one of medical malpractice because the ordinary layman does not know the type of training that is required to care for a bedridden patient. In order to prove causation, expert testimony is necessary to explain what bedsores are, what causes the breakdown of the skin, and how infection occurs. The providing of professional medical care and treatment by a health facility includes the adequate supervision and maintenance of the facility's staff. See *Dorris, supra* at 45, quoting *Bronson, supra*. Allegations concerning staffing decisions and patient monitoring may involve questions of professional medical management and not issues of ordinary negligence. See *Doris, supra*. Adequate supervision in the instant case includes the proper training of the staff concerning the hygienic care of the patient so as to prevent sores and infection that could lead to death. Whether defendant properly trained its staff with regard to the proper hygienic care of a patient like the decedent,² and whether improper training led to the decedent's death, requires expert testimony, as it is an issue that involves medical judgment, and thus, is an issue of medical malpractice.

Similarly, the second part of allegation "f" involves the proper hygienic care of the decedent after she soiled herself. The second part of "f" cannot be analyzed without considering the first part of the allegation, which is the "failure to adequately and competently provide proper hygiene for plaintiff on a regular basis." The second part of "f" stems from the first part and the two parts must be read in conjunction. The decedent was at risk of getting bedsores and she required special care. Plaintiff argues that it is well known by nursing homes and their staffs that in order to prevent bedsores, all of the things alleged in the complaint must be done for a patient on a regular basis. This statement supports the conclusion that plaintiff's claims require expert testimony concerning professional judgment.³ In this context, this claim is not within the common experience and knowledge of an ordinary layman. Again, because of the decedent's situation, the determination whether defendant provided the decedent with the proper hygienic care and whether improper care caused the decedent's death constitutes a matter of medical judgment requiring expert testimony. The majority cautioned that if plaintiff expanded on this argument to claim a failure to provide special attention, plaintiff might be venturing into the area of medical judgment.⁴ I believe plaintiff has already ventured into that area.

With respect to plaintiff's remaining allegations "j" through "m", the majority concludes that the allegations are simply too generalized to adequately classify. I agree that the allegations

² This may include, how to bathe the patient, how and when to turn the patient, and whether any medications should be applied.

³ The breakdown of the epidermis, the proper positioning of an elderly patient, the fragility of the bones when osteoporosis is present – these are matters that are not within the general knowledge of the ordinary layperson, but instead require expert testimony.

⁴ As an aside, I note that plaintiff did allege in the complaint that the decedent was susceptible to dangerous infections and defendant breached its duty with respect to providing adequate and competent attention to the decedent's medical and personal needs. Thus, essentially, it can be said that because the decedent was more susceptible to infections, she required special attention.

are generalized, but I disagree that plaintiff should be allowed to proceed on these allegations. These remaining claims derive from plaintiff's other allegations, as such, they too allege medical malpractice and must be dismissed. With regard to defendant's alleged failure to comply with the requirements of various state and federal statutes, these claims arise out of the professional relationship between the parties and relate to defendant's alleged failure to properly provide medical care to the decedent. Thus, these allegations sound in medical malpractice. Plaintiff cannot couch the allegations in such general terms as to claim the allegations concern mere ordinary negligence. A plaintiff's theory must be pleaded with specificity so as to reasonably inform the adverse party of the nature of the claims the adverse party is called on to defend. See MCR 2.111(B)(1). Even as generally pleaded, the allegations sound in medical malpractice.

With regard to allegations "l" and "m," I reiterate that a plaintiff's theory must be pleaded with specificity. The majority gives plaintiff the opportunity to generally allege "other acts of negligence" without specifying those acts, and directs that the trial court may limit plaintiff to arguments that do not involve claims of medical judgment. To the extent that plaintiff's claims are reduced to two such allegations, plaintiff cannot be permitted to simply allege "acts of negligence" in the complaint and then be allowed to elaborate on the claim somewhere down the line at trial. Plaintiff must allege her theory with sufficient specificity. Because the allegations derive from the rest, even as generally stated, they allege medical malpractice.

In this case, I conclude that all of plaintiff's allegations sound in medical malpractice. Accordingly, I would affirm the trial court's grant of summary disposition to defendant.

/s/ Hilda R. Gage