Court of Appeals, State of Michigan

ORDER

Peter D. O'Connell
Presiding Judge

Dorothy Creech v W A Foote Memorial Hospital Inc

Kathleen Jansen

Docket No. 237437; 237438; 237439; 237440; 237441; 237442; 237443; 237444; 237445; 237446

Christopher M. Murray
Judges

LC No. 00-005650-NO; 00-005711-NO; 00-005740-NZ; 00-005752-NH; 01-000755-NO

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinions issued June 8, 2004, are hereby AMENDED for the sole purpose of correcting the opinions' heading. The corrected heading for the opinions is attached to this order. In all other respects the opinions remain unchanged.

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 22 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY CREECH,

Plaintiff-Appellee,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

UNPUBLISHED

No. 237437
Jackson Circuit Court
LC No. 00-005650-NO

JAY C. PORTER,

Plaintiff-Appellee,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237438
LC No. 00-005711-NO

SARAH E. WILLIAMS, JOHN WALLACE, and SHARON WALLACE,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237439
LC No. 00-005740-NZ

JERRY RICHARD MOORE, SHEREE MOORE, DENISE REYNOLDS, and GLEN REYNOLDS,

Plaintiffs-Appellees,

v

No. 237440
LC No. 00-005752-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

JAY ANSON, DOUGLAS AYLESWORTH, JANET BEILFUSS, CHARLES BELTZ, THEODORE BREZINSKI, REBECCA BURT, RENE CHAPA, DAVID CLAUCHERTY, MAURINE CORYELL, MARY CRANDALL, DIANE EMERY, LINDA FARLEY, JOLA FARRELL, LESTER FIDLER, MARK E. GORZEN, MARY GREEN, RUTH HALE, SHAWN HAMLIN, BARBARA JEAN HARDEN, HERBERT ISAACS, MARY JACOBSON, PAUL KOZLOWICZ, RAY LEWIS, TERESA MAY, DAVID CLYDE MEISTER, LUCILLE MEYER, KEVIN MILLER, NICHOLAS MILLER, DONALD MOON, RUBY MONTGOMERY, CAROLINE MYERS, ARTHUR NASTALLY, SUSAN PERRY, TERRY PHALEN, RONALD RACER, ROBERT REESE, ROBERT RICHARDSON, VALERIE RODERICK, LUCILLE SEPTA, DANNY SMITH, FRED STEWART, ROBERT THOMAS, ROY LEE THOMASSON, JANET TODD, PATRICIA TREFRY, TONE TRUSTY, KIMBERLY TUCKER, CHARLES WALKER, STEPHANIE WALSH, KATHLEEN WILSON, BERNARD YAGER, SUSAN AYLESWORTH, LINDA BREZINSKI, MRS. CLAUCHERTY, STEVEN D. EMERY, WILLIAM A. FARLEY, JR., SHIRLEY FIDLER, SUE GORZEN, EUGENE GREEN, JOYCE ISAACS, LAWRENCE O. JACOBSON, JOAN KOZLOWICZ, JAMES P. MAY, PHYLLIS A. MEISTER, JAMES MEYER, DEE MOON, EMILY NASTALLY, MARY PHALEN, MARY E. RICHARDSON, JEAN STEWART, PHYLLIS J. THOMAS, SANDRA F. THOMASSON, MARIA TRUSTY, GENE T. TUCKER, KIMBERLY WALKER, JASON WALSH, JACK WHEELER, JOY YAGER, and ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237441
LC No. 01-000755-NO

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

JERRY RICHARD MOORE, SHEREE L. MOORE, DENISE REYNOLDS, GLEN REYNOLDS, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237442
LC No. 00-005752-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

DOROTHY CREECH and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237443
LC No. 00-005650-NO

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

SARAH E. WILLIAMS, JOHN WALLACE, SHARON WALLACE, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237444
LC No. 00-005740-NZ

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

JAY C. PORTER and ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237445
LC No. 00-005711-NO

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

JAY ANSON, DOUGLAS AYLESWORTH, JANET BEILFUSS, CHARLES BELTZ, THEODORE BREZINSKI, REBECCA BURT, RENE CHAPA, DAVID CLAUCHERTY, MAURINE CORYELL, MARY CRANDALL, DIANE EMERY, LINDA FARLEY, JOLA FARRELL, LESTER FIDLER, MARK E. GORZEN, MARY GREEN, RUTH HALE, SHAWN HAMLIN, BARBARA JEAN HARDEN, HERBERT ISAACS, MARY JACOBSON, PAUL KOZLOWICZ, RAY LEWIS, TERESA MAY, DAVID CLYDE MEISTER, LUCILLE MEYER, KEVIN MILLER, NICHOLAS MILLER, DONALD MOON, RUBY MONTGOMERY, CAROLINE MYERS, ARTHUR NASTALLY, SUSAN PERRY, TERRY PHALEN, RONALD RACER, ROBERT REESE, ROBERT RICHARDSON, VALERIE RODERICK, LUCILLE SEPTA, DANNY SMITH, FRED STEWART, ROBERT THOMAS, ROY LEE THOMASSON, JANET TODD, PATRICIA TREFRY, TONE TRUSTY, KIMBERLY TUCKER, CHARLES WALKER, STEPHANIE WALSH, KATHLEEN WILSON, BERNARD YAGER, SUSAN AYLESWORTH, LINDA BREZINSKI, MRS. CLAUCHERTY, STEVEN D. EMERY, WILLIAM A. FARLEY, JR., SHIRLEY FIDLER, SUE GORZEN, EUGENE GREEN, JOYCE ISAACS, LAWRENCE O. JACOBSON, JOAN KOZLOWICZ, JAMES P. MAY, PHYLLIS A. MEISTER, JAMES MEYER, DEE MOON, EMILY NASTALLY, MARY PHALEN, MARY E. RICHARDSON, JEAN STEWART, PHYLLIS J. THOMAS, SANDRA F.

THOMASSON, MARIA TRUSTY, GENE T. TUCKER, KIMBERLY WALKER, JASON WALSH, JACK WHEELER, JOY YAGER, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237446
LC No. 01-000755-NO

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

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

STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY CREECH,

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W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

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UNPUBLISHED
June 8, 2004

No. 237437
Jackson Circuit Court
LC No. 00-005650-NH

JAY C. PORTER,

Plaintiff-Appellee,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

No. 237438
LC No. 00-005711-NO

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Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

No. 237439
LC No. 00-005740-NH

JERRY RICHARD MOORE, SHEREE MOORE, DENISE REYNOLDS, and GLEN REYNOLDS,

Plaintiffs-Appellees,

v

No. 237440
LC No. 00-005752-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

JAY ANSON, DOUGLAS AYLESWORTH, JANET BEILFUSS, CHARLES BELTZ, THEODORE BREZINSKI, REBECCA BURT, RENE CHAPA, DAVID CLAUCHERTY, MAURINE CORYELL, MARY CRANDALL, DIANE EMERY, LINDA FARLEY, JOLA FARRELL, LESTER FIDLER, MARK E. GORZEN, MARY GREEN, RUTH HALE, SHAWN HAMLIN, BARBARA JEAN HARDEN, HERBERT ISAACS, MARY JACOBSON, PAUL KOZLOWICZ, RAY LEWIS, TERESA MAY, DAVID CLYDE MEISTER, LUCILLE MEYER, KEVIN MILLER, NICHOLAS MILLER, DONALD MOON, RUBY MONTGOMERY, CAROLINE MYERS, ARTHUR NASTALLY, SUSAN PERRY, TERRY PHALEN, RONALD RACER, ROBERT REESE, ROBERT RICHARDSON, VALERIE RODERICK, LUCILLE SEPTA, DANNY SMITH, FRED STEWART, ROBERT THOMAS, ROY LEE THOMASSON, JANET TODD, PATRICIA TREFRY, TONE TRUSTY, KIMBERLY TUCKER, CHARLES WALKER, STEPHANIE WALSH, KATHLEEN WILSON, BERNARD YAGER, SUSAN AYLESWORTH, LINDA BREZINSKI, MRS. CLAUCHERTY, STEVEN D. EMERY, WILLIAM A. FARLEY, JR., SHIRLEY FIDLER, SUE GORZEN, EUGENE GREEN, JOYCE ISAACS, LAWRENCE O. JACOBSON, JOAN KOZLOWICZ, JAMES P. MAY, PHYLLIS A. MEISTER, JAMES MEYER, DEE MOON, EMILY NASTALLY, MARY PHALEN, MARY E. RICHARDSON, JEAN STEWART, PHYLLIS J. THOMAS, SANDRA F. THOMASSON, MARIA TRUSTY, GENE T. TUCKER, KIMBERLY WALKER, JASON WALSH, JACK WHEELER, JOY YAGER, and

ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237441
LC No. 01-000755-NO

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

JERRY RICHARD MOORE, SHEREE L. MOORE, DENISE REYNOLDS, GLEN REYNOLDS, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237442
LC No. 00-005752-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

DOROTHY CREECH and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

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No. 237443
LC No. 00-005650-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

SARAH E. WILLIAMS, JOHN WALLACE, SHARON WALLACE, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237444

LC No. 00-005740-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

JAY C. PORTER and ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237445
LC No. 00-005711-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

JAY ANSON, DOUGLAS AYLESWORTH, JANET BEILFUSS, CHARLES BELTZ, THEODORE BREZINSKI, REBECCA BURT, RENE CHAPA, DAVID CLAUCHERTY, MAURINE CORYELL, MARY CRANDALL, DIANE EMERY, LINDA FARLEY, JOLA FARRELL, LESTER FIDLER, MARK E. GORZEN, MARY GREEN, RUTH HALE, SHAWN HAMLIN, BARBARA JEAN HARDEN, HERBERT ISAACS, MARY JACOBSON, PAUL KOZLOWICZ, RAY LEWIS, TERESA MAY, DAVID CLYDE MEISTER, LUCILLE MEYER, KEVIN MILLER, NICHOLAS MILLER, DONALD MOON, RUBY MONTGOMERY, CAROLINE MYERS, ARTHUR NASTALLY, SUSAN PERRY, TERRY PHALEN, RONALD RACER, ROBERT REESE, ROBERT RICHARDSON, VALERIE RODERICK, LUCILLE SEPTA, DANNY SMITH, FRED STEWART, ROBERT THOMAS, ROY LEE THOMASSON, JANET TODD, PATRICIA TREFRY, TONE TRUSTY, KIMBERLY TUCKER, CHARLES WALKER, STEPHANIE WALSH, KATHLEEN WILSON, BERNARD YAGER, SUSAN AYLESWORTH, LINDA BREZINSKI, MRS. CLAUCHERTY, STEVEN D. EMERY, WILLIAM A. FARLEY, JR., SHIRLEY

FIDLER, SUE GORZEN, EUGENE GREEN, JOYCE ISAACS, LAWRENCE O. JACOBSON, JOAN KOZLOWICZ, JAMES P. MAY, PHYLLIS A. MEISTER, JAMES MEYER, DEE MOON, EMILY NASTALLY, MARY PHALEN, MARY E. RICHARDSON, JEAN STEWART, PHYLLIS J. THOMAS, SANDRA F. THOMASSON, MARIA TRUSTY, GENE T. TUCKER, KIMBERLY WALKER, JASON WALSH, JACK WHEELER, JOY YAGER, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237446
LC No. 01-000755-NO

W.A. FOOTE MEMORIAL HOSPITAL, INC. and STERIS CORPORATION,

Defendants-Appellants.

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

PER CURIAM.

Defendant W.A. Foote Memorial Hospital, Inc.[1] appeals as on leave granted from an order denying summary disposition and certifying plaintiffs' lawsuits as a class action. Defendant also appeals from an order expanding the class definition to include plaintiffs' spouses. This Court previously denied leave to appeal. Defendant appealed to the Supreme Court, which remanded the case to be heard as on leave granted. *Creech v W.A. Foote Mem'l Hosp, Inc*, 456 Mich 887; 636 NW2d 138 (2001). Plaintiffs, who underwent endoscopic procedures at defendant hospital, filed suit after learning that the hospital failed to properly disinfect the endoscopes. We affirm in part, vacate in part and remand for further proceedings.

I

This case began as five separate negligence actions, which were consolidated. Plaintiffs sued after defendant informed them by letter that there was a chance that the endoscopes[2] used to

[1] Throughout this opinion the singular use of "defendant" refers to defendant W.A. Foote Memorial Hospital, Inc. Defendant Steris Corporation did not become a party in the present case until after the trial court denied summary disposition.

[2] Endoscopes are inserted through the anus and used to examine the gastrointestinal tract (continued…)

perform their recent endoscopies had not been properly disinfected. According to defendant, it began using a newly purchased Steris System 1 Processor as part of a new method of disinfecting its endoscopes on approximately May 1, 2000. Between May 1, 2000 and September 19, 2000, defendant used the Steris processor to disinfect its endoscopes. Defendant, then, discovered that the required adaptor caps had not been placed over the water and air inlet ports of the Pentax model of endoscope before the scopes were cleaned. Defendant claimed that to that date, Steris had not provided adaptor caps with the Pentax endoscopes.

Defendant, then, consulted with the Center for Disease Control and the Food and Drug Administration to assess the risk that the patients in question had been exposed to communicable diseases such as Hepatitis or HIV. According to defendant, both agencies stated that it was "very, very unlikely that there would be cross-infection between patients using the Steris processing without adaptor caps." Nonetheless, defendant mailed letters to the patients who underwent endoscopies within the questioned timeframe, informing them there was a slight possibility that they had been exposed to a communicable disease. Defendant established a program for the patients to receive free laboratory testing for infection. Approximately seventy patients, in five separate actions,[3] then filed claims through different attorneys, all alleging a class action. None of the claims alleged medical malpractice, but, instead, all based their claims in negligence.

Defendant moved for summary disposition under MCR 2.115, 2.116(C)(8), and 2.116(C)(10) in the four cases that had been filed at that point in time. Defendant claimed that plaintiffs' claims should be dismissed because although they claimed negligence, the claims were actually medical malpractice claims, and plaintiffs failed to file notices of intent or affidavits of merit. Defendant also claimed that plaintiffs' complaints should be stricken because they did not allege specific injuries. Plaintiffs, then, filed motions for class certification. Only two substantive motions for class certification were filed: file no. 00-005650-NO on October 30, 2000 and file no. 00-005752-NH on November 13, 2000. Defendant opposed certifying the class.

The trial court determined that plaintiffs' claims were "strictly negligence" because whether the adaptor caps should have been on was something the jury would be able to understand. The trial court also determined that plaintiffs could proceed with their claims for emotional distress. And, the trial court denied defendant's motion for summary disposition on this count without prejudice, noting that if defendant could prove that there was no chance plaintiffs were exposed to a disease, it would revisit the issue. The trial court also certified the claims as a class action lawsuit and defined the class as the 710 patients who received letters from defendant regarding the improperly sterilized scopes. In its order, the trial court ordered plaintiffs to file a first amended complaint naming the representative plaintiffs and naming Steris Corporation as a defendant. Plaintiffs Jerry Moore, Sheree Moore, Denise Reynolds, and Glen

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(…continued)

internally.

[3] Apparently, there was also another action filed on behalf of plaintiff Robert Reese, but that case has not been involved in the appellate process.

Reynolds moved the trial court to amend the class definition by adding plaintiffs' spouses. After a hearing, the trial court allowed the requested amendment.

II

Defendant first argues that class certification and expansion of the class to include the patients' spouses was improper. We disagree. This Court will only reverse an order of class certification if the trial court's decision was clearly erroneous. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 556; 492 NW2d 246 (1992). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Under MCR 3.501(A)(1) the following five factors must be satisfied before class certification may be granted:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

"When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true" without examining the merits *Neal v James*, 252 Mich App 12, 16; 651 NW2d 181 (2002), citing *Allen v Chicago*, 828 F Supp 543, 550 (ND Ill, 1993). Plaintiffs have the burden of showing that class certification is proper, *id.*, and must meet all the factors, *A&M Supply v Microsoft*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002). Because Michigan law construing this court rule is sparse, we may consider federal cases construing the similar federal rule, FR Civ P 23, for guidance. *Zine v Chrysler Corp*, 236 Mich App 261, 287 n 12; 600 NW2d 384 (1999).

A. Numerosity

The purpose behind the numerosity requirement, MCR 3.501(A)(1)(a), is judicial efficiency. See *Zine*, *supra*, 236 Mich App at 287-288. The exact number of class members need not be given as long as the court can determine that joinder would be impracticable. *Id.* at 288. Plaintiffs addressed numerosity, in a request for class certification, in file no. 00-005650-NO, as follows:

> According to defendant's own admission and notification, there are 705 other individuals who have been exposed to this improperly sterilized equipment and may have been exposed to dangerous viruses, including hepatitis and HIV. This class is so numerous that joinder of all members is impracticable.

And in file no. 00-005752-NH, plaintiffs alleged numerosity existed as follows:

> Plaintiff has satisfied the numerosity element in that more than seven hundred patients have been subjected to the Defendant's negligence and have been exposed to the risk of having Hepatitis or HIV. Certainly, a class of seven hundred or more people is sufficient to meet this requirement.

This Court has found the numerosity requirement satisfied where plaintiffs identified 350 employees and approximately one hundred job applicants who were adversely affected, and the trial court determined that forty members fell within the class parameters. *Neal, supra* at 16. Therefore the number of plaintiffs in the instant case, over 700 patients examined with potentially contaminated endoscopes and their spouses, appears to satisfy the numerosity requirement.

"Class members must have suffered actual injury to have standing to sue." *Zine, supra* at 287-288. Defendant claims that plaintiffs failed to provide any support for their assertion that the class consisted of over 700 people who received a letters and their spouses because they had not shown that the members had suffered actual injury. Defendant asserted that in this case, "the variability of the types of scopes that are involved, the absence of demonstrable injury, and the variability amongst potential litigants of nature and character of any damages that may otherwise be asserted" prevented a finding of numerosity. All people who received letters and their spouses could have suffered emotional distress, an actual injury, and presumably many of them have undergone and will continue to undergo medical testing, another claimed injury.

Based on the above discussion, accepting plaintiffs allegations made in support of the request for certification as true, we find that the trial court's determination that numerosity existed was not clearly erroneous as we are not left with a firm conviction that a mistake has been committed. See *Neal, supra* at 16; *Walters, supra* at 453; *Mooahesh, supra* at 556.

B. Commonality

The inquiry regarding commonality, MCR 3.501(A)(1)(b), addresses whether resolution of a common issue will advance the litigation. *Zine*, *supra* at 289. It is essential that "'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof.'" *Id.*, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). Not all the questions need be common, as long as there is some common question of law or fact involved. *Grigg v Michigan Nat'l Bank*, 405 Mich 148, 183-184; 274 NW2d 752 (1979). However, the common questions must predominate over individual ones. MCR 3.501(A)(1)(b).

Plaintiffs defined the common questions, in a motion for class certification, for file no. 00-005650-NO, as follows:

1. Whether Defendant owed class members a duty to properly sterilize equipment used during routine procedures such as the endoscopic procedure Plaintiff underwent.

2. Whether the equipment used during the endoscopic procedure was improperly sterilized and therefore contaminated.

3. Whether Defendant breached its duty by failing to properly sterilized [sic] equipment used during the endoscopic procedure.

With regard to file no. 00-005752-NH, plaintiffs provided the following in a motion for class certification:

> Questions of law in fact [sic] are common among all members of the class in that they have all been exposed to the identical acts of negligence of this Defendant and the damages suffered by them are also the same. Specifically, all class members have been exposed to the risk of Hepatitis and HIV and will suffer the same psychological injury and anxiety and similar physical manifestations thereof.

The question whether defendant was negligent in its disinfecting process is certainly a question common to all plaintiffs. Certainly, there are other questions that will be unique to each plaintiff, including whether that plaintiff was actually treated with the Pentax endoscope and whether that patient (or that patient's spouse) contracted a disease. The potential class members have a general causation question in common even with the expansion allowing the spouses. Yet, there is going to be factual variation among the claimants. But "some factual variation among the class grievances will not defeat a class action." *Rosario v Livaditis*, 963 F2d 1013, 1017 (CA 7 1992). We find that there is some factual variation in the present case and more variation with the inclusion of spouses, but, accepting plaintiff's allegation in support of the class action as true, the trial court did not clearly err in its determination that common questions predominate over questions only affecting individual members. See *Neal, supra* at 16; *Mooahesh, supra* at 556.

C. Typicality

The representative plaintiffs' claims will be typical, MCR 3.501(A)(1)(c), of the proposed class members' claims if the claims "'have the same essential characteristics.'" *Neal, supra* at 21, quoting *Allen, supra* at 553. Like commonality, some factual differences are permitted as long as the representative's claims "'arise from the same event or practice or course of conduct that gives rise to the claims of the other class members'" and is based on the same legal theory. *Id.*, quoting *Allen, supra* at 553. Typical does not mean identical. *Eisenberg v Gagnon*, 766 F2d 770, 786 (CA3 1985). In fact, "atypical elements of a claim may often be adequately treated by judicious severance or use of subclasses or other separate treatment of individual issues." *Id*. Regarding typicality, plaintiffs stated in its motion for class certification, file No. 00-005650-NO, that the "claims of Plaintiff are typical of the claims of the class." With regard to plaintiffs' motion for class certification, for file no. 00-005752-NH, the following was provided:

> Certainly, the claims of negligence of the party representative are not only typical but identical of those of the class. As stated above, the exact claims of negligence and the damages suffered by the Mr. Moore [sic] and the class members are the same as will the proofs that will be presented to support this case.

Courts have found that class action litigation is preferable for claims of injuries resulting from "a single disaster or a single course of conduct." See *Craft v Vanderbilt University*, 174 FRD 396, 402 (MD Tenn 1996), modified 18 F Supp 786 (MD Tenn, 1998)*;* see also *In re American Medical Systems, Inc*, 75 F3d 1069, 1084 (CA 6, 1996). In *Craft, supra*, the plaintiffs, pregnant women, were unknowingly radiated as part of an experiment conducted by the defendant hospital. *Craft, supra* at 400-401. The court found that the representatives' claims were typical because the women and their children were all exposed to radiation and shared the allegation of "violation of bodily integrity." *Id.* at 404-405. The court was untroubled by the fact that "the proof on issues of actual damages arising from past illnesses or increased risk of future ailments" would differ among the class members. *Id.* at 405.

In another case approved for class action, the court considered the plaintiffs' product liability claim regarding unreasonably dangerous bone screws that were implanted into the plaintiffs' spines. *Fanning v AcroMed Corp*, 176 FRD 158 (ED Pa 1997). The court found that the representative plaintiffs' principal theory that the product was unreasonably dangerous was typical of the entire class, which was certified for settlement purposes as all persons who received the bone screw and their relatives. *Id.* at 175, 187.

In *Hum v Dericks*, 162 FRD 628, 638 (D Hawaii 1995), a case regarding defective ligaments that were implanted into patients, the court found typicality even though it warned that the representative's claims may turn out to be atypical of the class's. *Id.* The court determined that Hum's injuries may have resulted from negligent placement of an artificial ligament, rather than the ligament itself. *Id.* However, the court stated, "This issue notwithstanding, the court finds at this stage of the proceedings that Hum is sufficiently typical to satisfy the low standard of Rule 23(a)(4)." *Id.* The court emphasized that the merits of the case were not to be considered at that juncture. *Id.*

Because of the particular circumstances of this case, we find that the trial court's finding of typicality was not clearly erroneous, *Mooahesh, supra* at 556, when accepting as true plaintiffs' allegations in support of typicality, *Neal, supra* at 16, the class members' injuries stemmed from the same course of conduct. See *Craft, supra*, 174 FRD at 404; *Hum, supra*, 162 FRD at 638; *American Medical, supra*, 75 F3d at 1094.

D. Representative Protection of Class Interests

The fourth requirement for class certification is that "the representative parties will fairly and adequately assert and protect the interests of the class." MCR 3.501(A)(1)(2). To assess whether this requirement is met, this Court uses a two-part inquiry: "First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests." *Neal, supra* at 22.

The named counsel appears to be sufficiently qualified upon a review of the affidavits, and it does not appear that the trial court clearly erred in appointing counsel. See *Mooahesh, supra* at 556. Further, plaintiffs in its motions for class certification claimed, "Plaintiff and her counsel will fairly and adequately protect the interests of the class" (file no. 00-005650-NO), and "There is no question that based upon the facts and circumstances of this case that Mr. Moore will fairly and adequately assert and protect the interests of the class" (file no. 00-005752-NH). Facially, with regard to the second requirement, accepting plaintiffs' allegations in support of the representatives being adequate as true, it appears the trial court did not clearly err in determining the members did not have antagonistic or conflicting interests. See *Neal, supra* at 16, 22; *Mooahesh, supra* at 556.

Based on the above, the trial court's determination that the representative parties will adequately assert and protect the interests of the class was not clearly erroneous. See *Mooahesh, supra* at 556.

E. Class Action Superior Method of Adjudicating

Lastly, plaintiffs had to show that "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." MCR 3.501(A)(1)(e). MCR 3.501(A)(2), sets forth the following relevant inquires with respect to convenient administration of justice:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudication with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the

prosecution or defense of separate actions.

MCR 3.501(A)(2) mandates that the trial court consider the listed factors among other things when determining superiority. The trial court did not specifically address any of the factors in MCR 3.501(A)(2). However, arguments with respect to most of the factors were presented to the trial court, and the court certified the class. Findings and conclusions need not be recited when a court rules on a motion unless required by another rule. *Michigan Nat'l Bank v Metro Inst Food Service, Inc*, 198 Mich App 236, 241-242; 497 NW2d 225 (1993). The trial court determined that a class action was a superior method of adjudicating the instant case.

With respect to the superiority requirement, our Supreme Court has stated:

> The "convenient administration of justice" criteria does not preclude maintenance of a class action where the individual claims differ slightly with regard to such specifics as the time, place, and exact nature of the injury. No two claims are likely to be exactly similar. Almost all claims will involve disparate issues of law and fact to some degree. The relevant concern here is whether the issues are so disparate as to make a class action unmanageable. [*Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 418-419; 415 NW2d 206 (1987) (decided under GCR 1963, 208).][4]

The trial court indicated that cases would continue to trickle in and the only meaningful way of adjudicating the case was through class action. And the trial court acknowledged that there might be different aspects of the case, but found that these could be handled by different representatives for each class, and noted that some of the members might be quickly eliminated if they could not show actual injury. Therefore, the trial court did not consider the issues so disparate that the suit would be unmanageable as a class action. *Id.* at 418-419.

The trial court did not clearly err in finding that the superiority requirement was met where although defendant would not be prevented by one judgment from complying with another there was no communal interest that would prevent nonparties from protecting their interests; plaintiffs acknowledged that the action was inappropriate for equitable and declaratory relief; the filing of five separate suits demonstrated that litigation expenses and issue complexity did not preclude individual suits; the court determined that the only meaningful way to adjudicate was through class action; ten percent of the proposed class was in favor of a class action and none of the proposed class opposed it; and plaintiffs alleged that the damages award justified the expense and effort of a class action. We are not left with a definite and firm conviction that the trial court committed a mistake with respect to its finding that a class action was a superior method for adjudicating plaintiffs' claims. *Walters, supra* at 456.

F. Physician-Patient Privilege Issue

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[4] The "convenient administration of justice" standard is the same under GCR 1963, 208 and MCR 3.501(A)(1)(e). *Dix, supra* at 414 n 6.

The trial court did not address the issue regarding the physician-patient privilege. Although the topic was raised several times during oral argument on the motion to certify the class, and the motion to amend the class, the trial court specifically declined to rule on the matter. Counsel for the parties stated they would try to work the issue out among themselves. Ultimately, the trial court opted to await this Court's decision on the matter that was already pending appeal before delving into the privilege issue. Generally, an issue is not properly preserved if it is not raised before, addressed, and decided by the trial court. *Brown v Loveman*, 260 Mich App 576, 599; ___ NW2d ___ (2004). Even if raised at trial, an appellate court need not consider an issue if it was never reached by the jury. *Lynd v Chocolay Twp*, 153 Mich App 188, 198; 395 NW2d 281 (1986). Nor do we render advisory opinions on issues unnecessary to the resolution of the appeal. *People v Wilcox*, 183 Mich App 616, 620; 456 NW2d 421 (1990). But this Court may review unpreserved claims where "consideration of the issue is necessary to a proper determination of the case." *Providence Hosp v Labor Fund*, 162 Mich App 191, 195; 412 NW2d 690 (1987); see also *Brown*, *supra*. In its order remanding to this Court for consideration "as on leave granted," the Supreme Court did not specifically direct this Court to address the privilege issue.

We address this unpreserved issue only to the extent consideration of the issue is necessary to a determination of whether class certification was proper. *Providence Hosp*, *supra* at 195. The physician-patient privilege provides in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. [MCL 600.2157.]

"The purpose of the [physician-patient] privilege is to protect the doctor-patient relationship and ensure that communications between the two are confidential." *Herald Co Inc v Ann Arbor Public Schools*, 224 Mich App 266, 276; 568 NW2d 411 (1997). Only the patient can waive the privilege. *Id.*

MCR 3.501(C) outlines the procedure for notifying class members. While giving notice is mandatory, MCR 3.501(C)(1), the court has discretion regarding the manner in which notice is given, MCR 3.501(C)(4)(a). For instance, notice can be given by individual written notice, newspaper or magazine publication, television or radio media, posting, or "distribution through a trade or professional association, union, or public interest group." MCR 3.501(C)(4)(b). The trial court determines the method, and in doing so must consider:

> (i) the extent and nature of the class,
>
> (ii) the relief requested,
>
> (iii) the cost of notifying the members,
>
> (iv) the resources of the plaintiff, and

(v) the possible prejudice to be suffered by members of the class or by others if notice is not received. [MCR 3.501(C)(4)(b).]

We believe that the trial court can instruct the parties to notify the class in a manner that does not violate physician-patient privilege. For example, considering the nature of the class, patients with a right to privacy regarding their medical treatment, it is possible the court could instruct defendant to notify the class members itself, and the court could seal the notices. A court from a sister state, in addressing a physician-patient privilege situation, provided the following:

> [W]e do not believe that the physician-patient privilege is violated by the disclosure of the names and addresses of the members of the class for the purpose of giving notice of the commencement of the action. To the extent indicated, however, we modify the order of Special Term to protect the confidentiality of their identities (other than plaintiff's) from disclosure except for purposes of providing notice of this proceeding. [*Schreibman v Linn*, 69 AD2d 800, 800; 415 NYS2d 430 (NY App 1979).]

That court also ordered that the list of names and addresses be provided only to the plaintiff's attorneys, used only for notifying the class, and be sealed after filing. *Id.* In another case, from a federal district court, the following solution was proposed in dealing with a similar type situation:

> At argument, counsel for [the plaintiff] referred to the difficulty involved in discovering the identities of potential class members, whose medical records are confidential. However, this is not a difficulty which the procedures created for class actions were designed to remedy. [The plaintiff] could make a motion for the appointment of a special master or invoke another procedure whereby potential class members might be notified without undue intrusion into confidential medical records. [*Hum, supra*, 162 FRD at 634.]

The above mentioned cases are not binding, and it is recognized that Michigan's physician-patient privilege is controlled by the scope of the statute, not the common law. See *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 33; 594 NW2d 445 (1999). However, these above noted cases do provide instances where alternatives exist for notification purposes, as they do under MCR 3.501(C), and further provide examples of how it is possible to notify plaintiffs without violating similar physician-patient privilege provisions.

We find, in the present case, that the trial court can direct the parties to notify potential plaintiffs' in a manner that does not violate the physician-patient privilege. It is possible to notify the class members without violating the physician-patient privilege and, thus, this issue does not adversely affect our finding that the trial court did not clearly err in its determinations

regarding class certification. We leave it to the trial court to, specifically, determine how to address this unpreserved physician-patient privilege issue.[5]

G. Class Action Certification

We find that, accepting plaintiffs' allegations in support of a class action as true, the trial court did not clearly error in certifying plaintiffs' lawsuit as a class action, nor did it clearly err in expanding the class to include spouses. See *Neal, supra* at 16; *Walters, supra* 456; *Mooahesh, supra* at 556. We further find that the unpreserved physician-patient privilege issue does not adversely affect the trial court's certification of the class as it is possible to notify plaintiffs without violating the physician-patient privilege.

III

Defendant raises three separate claims with respect to summary disposition. A trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) is reviewed de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). MCR 2.116(C)(8) tests the "legal sufficiency of the complaint" and permits dismissal of a claim where the opposing party has failed to state a claim on which relief can be granted. *Maiden, supra* at 119; MCR 2.116(C)(8). Only the pleadings are examined; documentary evidence is not considered. *Id.* Where the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery," the motion should be granted. *Id.* A motion pursuant to MCR 2.116(C)(10) is also reviewed de novo. *Weymers v Khera*, 454 Mich 639, 646-647; 563 NW2d 647 (1997).

The trial court determined that the claims were "strictly negligence" and not medical malpractice claims because whether the caps should have been on was something the jury would be able to understand. Specifically, the trial court stated:

> I think with regards to the sterilization equipment whether caps are put on or not per a manufacturer's designation are something certainly within the common knowledge of a jury. If it's not properly connected as Foote is asserting it wasn't properly connected that's not saying it was a medical judgment it's a failure of somebody not doing what they should have been doing or a failure to get the caps from the manufacturer. I don't know whose fault it is, it may not have been Foote's fault it may have been the manufacturer's fault that led to the

[5] A possibility is that if letters are used to notify the patients, perhaps defendant could include a waiver form and indicate that if the patients do not opt out of the suit pursuant to MCR 3.501(A)(3) ("[c]lass members shall have the right to be excluded from the action"), their relevant medical records will be subject to review. MCR 3.501(A)(3) states that people who do not opt out are class members and also permits the court to "order them made parties to the action." Thus, if the individual does not opt out, technically, the individual is a party and information is discoverable. *Dorris, supra* at 26. Alternatively, there are likely ways that notice could be broadcast or published. As noted, we leave this determination to the trial court.

> questionable sterilization. But no matter whose fault it is somebody's negligent with regard to not having those caps covering that water port and the inner inlet port so the proper sterilization took place. So the caps weren't on it's a pure matter of pure negligence and as far as I'm concerned it doesn't provide fact of medical judgment [sic]. The fact that Foote may take the manufacturer's recommendations and put the name Foote on it doesn't make it into medical judgment. And again, it's no different than if they put water in instead of a sterilization fluid. If someone negligently put in one instead of the other its negligence it's not a matter of medical judgment.

The trial court also held that plaintiffs could proceed with their claims for emotional distress, and reasoned that the insertion of improperly sterilized endoscopes was a physical injury, which, in turn, caused compensable emotional distress. Thus, the trial court denied defendant's motion for summary disposition on this count without prejudice, but noted that if defendant could establish that there was no chance plaintiffs were exposed to a disease, it would revisit the issue.

Defendant claims that summary disposition should have been granted pursuant to MCR 2.116(C)(8) and (10) because plaintiffs' claims were, in substance, allegations of malpractice, and plaintiffs did not file notices of intent or provide affidavits of merit required under the Revised Judicature Act, MCL 600.101, *et seq.*, before filing suit. Upon review de novo, we vacate the trial court's finding that plaintiffs' claim was one for strictly negligence rather than for medical practice as this determination was not proper under MCR 2.116(C)(8) because the allegations could support either and further discovery is needed to properly make the determination. Beyond vacating this finding, at this point, we affirm the trial court's denial of summary disposition.

Defendant contends that plaintiffs' claim is one for medical malpractice and that plaintiffs cannot circumvent the medical malpractice requirements by filing a negligence claim. If plaintiffs' claim is in actuality a medical malpractice claim, the proper remedy for failure to provide notice of intent to sue or file an affidavit of merit is dismissal without prejudice. *Dorris, supra* at 47. Whether a claim must meet procedural requirements for medical malpractice depends on whether the issues are "within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Dorris, supra* at 46. Common knowledge is defined as a "fact that is so generally known that a court may accept it as true without proof." Black's Law Dictionary (7th ed). An ordinary person does not have the knowledge to determine whether a medical service meets the "standard of practice in the community" without expert testimony. *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 492; 668 NW2d 402 (2003). Moreover, "[i]f a claim arises out of 'professional judgment' or a 'professional relationship,' then it involves malpractice, not ordinary negligence." *Stover v Garfield,* 247 Mich App 456, 463-464; 637 NW2d 221 (2001), reversed on other grounds 466 Mich 887 (2002); see also *Simmons v Apex Drug Stores,* 201 Mich App 250, 253; 506 NW2d 562 (1993), citing *Bronson v Sisters of Mercy Health Corp,* 175 Mich App 647, 652; 438 NW2d 276 (1989) (key to malpractice is whether negligence occurred during the professional relationship).

We find that the trial court did not have a sufficient record to determine whether the claim was based on medical malpractice or negligence. Further discovery regarding the placement of the caps on Pentax endoscopes may establish that the claims in question are

actually medical malpractice claims rather than negligence claims. Because the patient plaintiffs' alleged that he or she sought the medical procedure, there seems a question could exist whether the claims arise out of a professional relationship. *Stover, supra* at 463-464. And, further discovery will allow the trial court to make a proper determination as to whether the placement of caps on the Pentax endoscopes raises "questions involving medical judgment." *Dorris, supra* at 46. Upon review de novo, we affirm the trial court's denial of defendant's motion for summary disposition, but vacate its finding that plaintiffs' claims were strictly negligence claims. We further note that issuance of this opinion does not preclude a motion for or grant of summary disposition in the future based on MCR 2.116(C)(10). If the trial court determines, upon further discovery, that plaintiffs' claim is actually one for medical malpractice, because plaintiffs failed to provide notice of intent or file affidavits of merit, their claims should be dismissed. *Dorris, supra* at 47.[6]

IV

We find that the trial court did not clearly err in certifying or extending the class action definition and affirm the trial court in this regard. In addition, we affirm the trial court's denial of defendant's motion for summary disposition, which we note should not preclude a motion for summary disposition pursuant to MCR 2.116(C)(10) after discovery. We vacate the trial court's finding that plaintiffs' claims were strictly negligence claims rather than medical malpractice claims as further discovery could establish that the claims are medical malpractice claims.

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

/s/ Kathleen Jansen

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[6] We note that defendant's remaining issues are not properly before us yet, but, again, do not preclude a future grant of summary disposition under MCR 2.116(C)(10) following discovery. Defendant claims that the trial court should have granted summary disposition where plaintiffs failed to allege an injury other than emotional distress. Our review of the record indicates that each plaintiff pleaded each element of negligence. Summary disposition is generally not proper pursuant to MCR 2.116(C)(10) where discovery has not started. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). Defendant also argues that plaintiffs' claims should be dismissed pursuant to MCL 600.2912a, because plaintiffs cannot claim a "potential future injury" that has not occurred. Because this issue was not raised before the trial court, we decline to address it on appeal. *Booth Newspapers, Inc, v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).