

Court of Appeals, State of Michigan

ORDER

Dorothy Creech v W A Foote Memorial Hospital Inc

Peter D. O'Connell
Presiding Judge

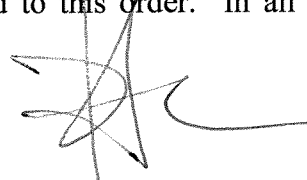
Docket No. 237437; 237438; 237439; 237440; 237441; 237442;
237443; 237444; 237445; 237446

Kathleen Jansen

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

Christopher M. Murray
Judges

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



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

JUL 22 2004

Date


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UNPUBLISHED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,

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

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237441
LC No. 01-000755-NO

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

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237442
LC No. 00-005752-NH

DOROTHY CREECH and ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

No. 237443
LC No. 00-005650-NO

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

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237444
LC No. 00-005740-NZ

JAY C. PORTER and ALL OTHER SIMILARLY
SITUATED,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237445

LC No. 00-005711-NO

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

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237446

LC No. 01-000755-NO

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

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY CREECH,

Plaintiff-Appellee,

v

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

Defendants-Appellants.

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

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

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

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

Defendants-Appellants.

No. 237440

LC No. 00-005752-NH

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

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

Defendants-Appellants.

No. 237441
LC No. 01-000755-NO

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

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

No. 237442
LC No. 00-005752-NH

DOROTHY CREECH and ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

No. 237443
LC No. 00-005650-NH

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

Plaintiffs-Appellees,

v

No. 237444

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.

MURRAY, J. (*concurring in part, dissenting in part*)

I concur in the majority's conclusion that the trial court erred in making any legal conclusion on the pleadings alone regarding whether the claims were for medical malpractice or negligence. After discovery on the material facts, the trial court will likely be in a much better position to resolve that important issue. However, I disagree in part with the remainder of the majority opinion because the trial court should have ruled as a matter of law that plaintiffs cannot recover emotional distress or similar damages for the fear that they may have been exposed to HIV, hepatitis B or C, or other communicable disease. With respect to this type of damage, which seems to be the main element of damage alleged, the trial court should have granted defendant hospital's motion for summary disposition. I also concur that the trial court did not clearly err in granting class certification for plaintiffs, but I do believe that inclusion of spouses in a class was clear error. Each plaintiff's particular relationship with their spouses involve different factors (dating back many years in some cases) that are particular to each defendant's marriage, and preclude a finding of commonality or typicality.

This case involves plaintiffs' attempts to recover specific damages from defendants because an allegedly improperly sterilized endoscope was utilized on them by the hospital. However, many of the plaintiffs did not allege they were actually exposed to the HIV virus, or any other disease as a result of the tainted equipment; instead, most of their damage allegations are based on the emotional distress they allegedly suffered from the fear of contracting or possible exposure to such diseases and the physical injury allegedly suffered when the

improperly sterilized scope was inserted into them. Because the law does not allow for the recovery of such speculative damages, the trial court should have dismissed that portion of plaintiffs' damage claims.

In order to establish a prima facie case of negligence, plaintiffs must allege and prove the following four elements: (1) a duty owed by defendants to plaintiffs, (2) a breach of that duty, (3) causation, and (4) damages. *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). For their damages, all plaintiffs except Plaintiff Creech alleged that they suffered severe emotional distress, anxiety, mental anguish, etc., from the *fear* of possibly contracting a disease (most notably HIV and hepatitis B and C), and a physical injury from the insertion of an improperly sterilized endoscope.¹ Defendants argued to the trial court, and continue to argue on appeal, that such damages are unrecoverable as a matter of law. Defendants are correct.

In *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986), our Supreme Court addressed, inter alia, whether a failure to file an asbestosis lawsuit within the statute of limitations barred a claim for cancer that subsequently developed from the same asbestos exposure. *Larson, supra* at 304. In that case, two of the plaintiffs (Glazier and Revard) developed asbestosis from an asbestos exposure, but eventually died of cancer that possibly resulted from the same exposure to asbestos that caused the asbestosis. These two plaintiffs' estates did not timely file with respect to the asbestosis, and since the cancer allegedly developed from the same asbestos exposure, the trial court dismissed both claims as untimely.

A majority of the Supreme Court, speaking through Chief Justice Williams, held that the plaintiffs should not be barred from bringing suit based upon the cancer that subsequently developed because "in order to recover damages on the basis of future consequences, it is necessary for a plaintiff to demonstrate with 'reasonable certainty' that the future consequences will occur." *Id.* at 317, citing *Prince v Lott*, 369 Mich 606, 609; 120 NW2d 780 (1963). In other words, a plaintiff would be precluded from recovering damages for future consequences unless there was a reasonable certainty that those consequences would occur.

Assuming the plaintiffs had timely filed their cases over the asbestosis, the Court concluded that the plaintiffs would have, at the time, only been left to speculate on whether they would actually develop cancer in the future. As a result, plaintiffs would not have been able to properly maintain a lawsuit at that time based on the mere possibility that they might develop cancer in the future:

If Glazier or Revard had brought suit within three years of the discovery of asbestosis and attempted to recover for the likelihood of developing cancer in the future, either would have been unable to prove with "reasonable certainty" that he would develop cancer. It has been estimated that approximately fifteen percent of people with asbestosis later develop pleural mesothelioma. Pierce [v Johns-Manville Sales Corp, 296 Md 656, 659 n 2; 464 A2d 1020 (1983)], citing Selikoff, Churg & Hammond, Relation between exposure to asbestos and

¹ Plaintiff Creech's complaint is very rudimentary, alleging only that she suffered "damages."

mesothelioma, 272 New England J Med 560, 662 (1965). Similarly, it is difficult to quantify the additional risk of lung cancer posed by the asbestos exposure when, as in this case, the victim smoked cigarettes and cigarettes alone are a well-documented cause of lung cancer. *Therefore, it is “highly likely” that in a suit brought for asbestosis “Johns-Manville would have successfully defended on the ground that the chance that [the defendant] would develop lung cancer was too speculative to support a damage award.”* *Pierce, supra* at 666. Even if this evidence were considered, the award would probably be an amount commensurate with the probability that the plaintiff would contract cancer, rather than full damages. See, e.g., *Eagle-Picher [Industries, Inc v Cox*, 481 So 2d 517, 522; (Fla App, 1985)]. So for Glazier and Revard this is not only their first suit, but their first opportunity to obtain full and adequate compensation. [*Larson, supra* at 317-318 (emphasis added).]

In reaching this conclusion, the Court noted how allowing plaintiffs to sue once they have cancer would promote efficiency in the judicial system by precluding plaintiffs from protracting “the suits which are brought for as long as possible in order to see if more serious consequences develop.” *Id.* at 318. Although the Court noted it was dealing with the unique circumstances of asbestos litigation, *id.* at 319-320, the Court’s decision is valuable guidance on the claims presented here, where a plaintiff does not allege actual injury because there was no exposure to or contract of any disease. See *Stites v Sundstrand Heat Transfer, Inc*, 660 F Supp 1516, 1524 (WD Mich, 1987).

No Michigan decision has addressed the particular facts presented in this case. However, the Illinois Court of Appeals dealt with a remarkably similar case in *Natale v Gottlieb Mem Hosp*, 314 Ill App 3d 885; 733 NE2d 380 (2000). In that case, the defendant utilized an improperly disinfected endoscope on the plaintiff. Once the defendant discovered the mistake, it notified all patients upon whom the scope was utilized. *Id.* at 886-887. The defendant informed these patients, including the plaintiff, that no other patients appeared to have HIV or any other infection, and that the risk that any transmission had occurred was very small. *Id.* at 887. All patients were offered free blood testing, and the plaintiff subsequently tested negative for hepatitis and HIV. *Id.*

After numerous court proceedings, the plaintiff filed an amended complaint alleging, in part, that he suffered emotional distress damages as a result of a possible exposure to infection. The trial court dismissed that claim, concluding that the plaintiff had no evidence that he was actually exposed to an infectious disease. *Id.* at 887-888. The court affirmed, holding that under the Illinois Supreme Court’s decision in *Majca v Beekil*, 183 Ill 2d 407; 701 NE2d 1084 (1998), which held that absent proof of actual exposure to a disease, the fear of contracting a disease is too speculative, the plaintiff could not properly establish emotional distress absent proof of actual exposure:

Here, plaintiff was told that he underwent a colonoscopy with a scope which was not disinfected per Gottlieb’s protocol. Plaintiff was advised that the risk of infection was slight, that he should live his life as if infected until testing proved otherwise. Since all test results were negative, plaintiff has failed to show any evidence of actual exposure to HIV or any other infectious disease. With no

evidence of actual exposure, summary judgment was properly granted. [*Natale, supra* at 889.]

The majority of courts from our sister states that have decided this issue have similarly held that emotional distress damages cannot be recovered absent either an actual exposure, or medical or scientific evidence establishing a substantial likelihood of exposure. See, e.g., *Pettigrew v Putterman*, 331 Ill App 3d 633; 771 NE2d 1008 (2002); *Roes v FHP, Inc*, 91 Hawaii 470; 985 P2d 661, 666-667 (1999), and cases cited therein; *South Central Reg Med Ctr v Pickering*, 749 So 2d 95, 99-100 (Miss, 1999), and cases cited therein. As at least two cases have concluded, “[t]o allow recovery for emotional injuries and mental anguish, without any proof whatsoever that [the plaintiff] was actually exposed to HIV . . . is per se unreasonable.” *Russaw v Martin*, 221 Ga App 683, 686; 472 SE2d 508 (1996). See, also, *Brzoska v Olson*, 668 A2d 1355, 1363 (Del, 1995).

In this case, to the extent plaintiffs have alleged that they have suffered emotional distress or other similar damage because of the possible risk of exposure to either HIV, hepatitis B or C, or any other infectious disease, they have not stated a viable claim for damages. Indeed, most of their damage allegations are framed in the “fear” category, i.e., that they are fearful that they might contract a disease in the future. In fact, one form of requested damage is for “medical monitoring,” which although not a recognized form of damage, *Meyerhoff v Turner Construction Co*, 456 Mich 933; 575 NW2d 550 (1998), reveals that plaintiffs need to monitor their condition to see *if* they eventually show signs of contracting a disease.

In light of these allegations, the trial court should have dismissed plaintiffs’ damage allegations of emotional distress and other similar damages based upon the fear of having been exposed to HIV, hepatitis B or C, or other such disease.

/s/ Christopher M. Murray