

STATE OF MICHIGAN  
COURT OF APPEALS

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DOROTHY SMALL,

Plaintiff-Appellant,

v

STEPHEN T. WYSONG, M.D., HEALTHCARE  
MIDWEST, and SOUTH HAVEN COMMUNITY  
HOSPITAL,

Defendants-Appellees.

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UNPUBLISHED

November 13, 2007

No. 275332

Van Buren Circuit Court

LC No. 05-054407-NH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting motions for summary disposition filed by defendants Stephen T. Wysong, M.D., and Healthcare Midwest (hereinafter referred to by the singular "Wysong"), and South Haven Community Hospital (hereinafter "the Hospital") in this medical malpractice case. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On December 12, 2005, plaintiff filed suit alleging that on June 27-28, 2004, she underwent an appendectomy performed by Wysong at the Hospital. After her surgery, a count of surgical sponges showed one sponge to be missing. An x-ray was taken the next day of plaintiff's abdomen, and although the radiological report did not identify any foreign bodies, it did note that the study was "limited by technique and patient motion." The day after that, plaintiff was discharged, with the sponge still missing and no further efforts to find it having been taken. A few days later, plaintiff returned to the hospital, reporting abdominal pain, dizziness, and difficulty breathing. Plaintiff was diagnosed with an infected surgical incision. On July 7, 2004, a debridement of the incision revealed the presence of a surgical sponge. Plaintiff alleged that defendants, including unnamed representatives of the Hospital, breached the applicable standard of care by failing to complete an accurate sponge count, failing to notify Wysong that a sponge was missing, failing to account for the sponge before closing the incision, and failing to take further x-rays after the first x-ray was deemed limited.

Plaintiff's complaint was accompanied by an affidavit of merit signed by Robert Taube, M.D., who is a board-certified general surgeon licensed to practice in Indiana. The affidavit was notarized and a notary seal was affixed, but was not certified by the clerk of a court in the county in which the notary public operated. The trial court granted summary disposition to Wysong and

the Hospital pursuant to MCR 2.116(C)(7) because the absence of a notary's certification on the affidavit, as required by MCL 600.2102(4) and *Apsey v Memorial Hosp (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005), rendered the affidavit insufficient, and it therefore did not toll the statute of limitations. The trial court also granted summary disposition to the Hospital pursuant to MCR 2.116(C)(8). In part, the trial court found that Taube's affidavit of merit failed to meet the requirements of MCL 600.2169 for medical malpractice claims against health professionals other than Wysong because Taube was not qualified to give expert testimony against those other health professionals; however, plaintiff does not appeal that portion of the trial court's decision. The trial court also concluded that plaintiff's complaint sounded in medical malpractice rather than ordinary negligence, and it refused to permit plaintiff to amend the complaint.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id.*, 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.*, 119-120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id.*, 119.

Plaintiff first asserts that the trial court erred in granting summary disposition on the basis of *Apsey, supra*. We agree, and we reverse that portion of the trial court's decision granting defendants' motions for summary disposition on the ground that plaintiff's affidavit of merit did not meet the requirements of MCL 600.2102(4), and therefore was insufficient under MCL 600.2912d. In *Apsey v Memorial Hosp*, 477 Mich 120; 730 NW2d 695 (2007), our Supreme Court reversed this Court's decision in *Apsey, supra*, and held that the methods of validating notarial acts provided for in the Uniform Recognition of Acknowledgments Act (URAA), MCL 565.261 *et seq.*, are alternative to that provided for in the Revised Judicature Act (RJA), MCL 600.101 *et seq.* A party may use the methods provided in either act to validate an affidavit. *Id.* at 127-134. Therefore, plaintiff's out-of-state affidavit, which was signed by a notary public authorized to act in Indiana, may function in Michigan. MCL 565.262(a)(i). Plaintiff's affidavit was valid, and its filing along with the complaint tolled the statute of limitations. See *Scarsella v Pollack*, 461 Mich 547, 552-553; 607 NW2d 711 (2000).

Plaintiff's second assertion on appeal is that the trial court erred in concluding that her claims did not sound in ordinary negligence as well as in medical malpractice, finding that a lay jury could not determine if leaving a surgical sponge in a patient constituted negligence. We agree that the trial court erred.

A medical malpractice claim arises from the course of a professional relationship, and it involves questions of medical judgment beyond the scope of common knowledge and experience. A claim of ordinary negligence raises issues within the common knowledge and experience of a factfinder. In determining whether a claim sounds in medical malpractice or ordinary negligence, a court must consider: (1) whether the claim pertains to an action that occurred in the context of a professional relationship; and (2) whether the claim raises questions of medical judgment that are beyond the realm of common knowledge and experience. If both

questions are answered in the affirmative, the claim sounds in medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc.*, 471 Mich 411, 422; 684 NW2d 864 (2004). If the reasonableness of an action can be evaluated by a jury only after the presentation of expert testimony, the claim sounds in medical malpractice. *Id.* at 423; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999).

The complaint in this case alleges that an appendectomy was performed on plaintiff on June 27-28, 2004, and a final count of sponges after the surgery revealed that one was missing. An x-ray was taken of plaintiff's abdomen, and although it failed to identify any foreign bodies, the radiological report noted that it was "limited by technique and patient motion." Plaintiff was then released the next day, with the missing sponge still unaccounted for and no other steps taken to find it. Plaintiff's complaint is premised on actions that occurred during and after her surgical procedure, seemingly in the course of plaintiff's professional relationship with defendants. However, the trial court erred in finding that the issues raised by plaintiff could not be assessed using only common knowledge and experience. A lay jury can determine whether defendants' actions in this case – in essence, losing a surgical sponge during a surgical procedure and then discharging the patient without finding the sponge first – constitute ordinary negligence.

We reverse the trial court's orders granting summary disposition in defendants' favor, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Alton T. Davis