

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UNPUBLISHED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.

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

I agree with the majority's opinion regarding whether plaintiff's affidavit of merit met the requirements of MCL 600.2102(4) and its conclusion that it did, meaning that the trial court's order granting summary disposition to defendant Wysong should be reversed. I disagree with the majority's conclusion that plaintiff's claims regarding the lost sponge constitute ordinary negligence claims rather than medical malpractice claims, and I would affirm the grant of summary disposition of claims against other, unnamed health professionals because they were not supported by a valid affidavit of merit.<sup>1</sup>

At first blush, plaintiff's claim that losing a surgical sponge and discharging a patient without finding the sponge seems to be one of ordinary negligence. However, the claim actually raises questions of medical judgment that are beyond the realm of common knowledge and experience. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). The complaint alleges that defendants understood that a sponge was missing following the surgery and that an x-ray was taken to determine whether it remained in the patient's abdomen. That x-ray failed to identify any foreign bodies and plaintiff was discharged. Whether defendants' approach in this regard was appropriate raises all sorts of questions of medical judgment including whether the x-ray taken was a sufficient precautionary measure in response

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<sup>1</sup> In addition, I note the majority opinion's acknowledgement that plaintiff failed to appeal the portion of the trial court's decision regarding other health professionals and would affirm for that reason as well.

to the missing sponge, whether the fact that the radiological report noted that it was “limited by technique and patient motion” suggests that x-ray procedures were not appropriately followed, and whether, prior to discharging plaintiff in light of these facts and circumstances, some other medical procedure should have been performed. The American College of Surgeons’ “Statement on the Prevention of Retained Foreign Bodies After Surgery” indicates that adherence to standard protocols is necessary to prevent an incident such as occurred in this case. Medical judgment must be exercised to ensure that a treatment protocol is followed and to determine what steps to take when a problem is discovered.

Because the reasonableness of the actions the other unnamed health professionals took can be evaluated by the fact finder only after the presentation of expert testimony on these and similar questions, plaintiff’s claims sound in medical malpractice. *Id.* at 423; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999). Plaintiff’s claims were unsupported by any affidavit of merit pertaining to those defendants. To the extent that the trial court granted summary disposition to those defendants, I would affirm.

/s/ Richard A. Bandstra