STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE DILTS, as Next Friend of ANDREW BROUGHTON, a Minor,

Plaintiff-Appellee,

v

RAYMOND S. MAJKRZAK, M.D. and VALLEY OB-GYN CLINIC PC and COVENANT HEALTH CARE, formerly know as, SAGINAW GENERAL HOSPITAL,

Defendants-Appellants,

and

FREDERICK W. FOLTZ, M.D.,

Defendant.

UNPUBLISHED
December 4, 2007

No. 269459
LC No. 04-053553-NH

MICHELLE DILTS, as Next Friend of ANDREW BROUGHTON, a Minor,

Plaintiff-Appellant,

v

FREDERICK W. FOLTZ, M.D.,

Defendant-Appellee.

No. 270546
LC No. 04-053553-NH

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

In Docket No. 269459, plaintiff appeals by leave granted an order granting defendants, Raymond S. Majkrzak, M.D. (Majkrzak), Valley OB-GYN Clinic, PC (Clinic) summary disposition pursuant to MCR 2.116(C)(7), and an order granting defendant Covenant Health Care, formerly known as Saginaw General Hospital (Covenant), summary disposition pursuant to MCR 2.116(C)(10). In Docket No. 270546, plaintiff appeals by leave granted an order granting defendant, Dr. Foltz (Foltz), summary disposition pursuant to MCR 2.116(C)(7). We reverse the circuit court's order granting Majkrzak and Clinic summary disposition but affirm the grant of summary disposition to Covenant in Docket No. 269459. We reverse the circuit court's order granting summary disposition to Foltz in Docket No. 270546.

I Basic Facts and Proceedings

This is a medical malpractice action arising out of Foltz' and Majkrzak's care and treatment of plaintiff Michelle Dilts, who gave birth to Andrew Broughton on February 18, 1994. Foltz and Majkrzak provided care and treatment through Clinic, but Andrew was delivered under their care at Covenant. Andrew suffers from Downs Syndrome, autism and other chronic conditions.

Plaintiff initially filed a notice of intent on February 17, 2004, which named all defendants except Foltz. Plaintiff filed a complaint on August 16, 2004, which named all defendants, including Foltz. Foltz moved for summary disposition, seeking dismissal with prejudice because he was not given the statutorily required notice of intent and the two-year statute of limitations had run. Plaintiff conceded that the complaint must be dismissed, but asserted that dismissal without prejudice was appropriate because the statute of limitations had not run due to Andrew's disability of insanity. On December 8, 2004, the circuit court entered an order dismissing Foltz from the lawsuit without prejudice.

Meanwhile, Foltz moved for reconsideration of the circuit court's decision dismissing plaintiff's claim without prejudice, arguing that dismissal should be with prejudice. While the motion was pending, this Court issued *Vega v Lakeland Hosp*, 267 Mich App 565 (2005), reversed 477 Mich 957; 723 NW2d 912 (2006), which held that the grace period allotted to a plaintiff acting under certain disabilities, including insanity, MCL 600.5851(1), does not apply to a plaintiff asserting a medical malpractice claim pursuant to MCL 600.5851(7). Foltz filed a supplemental brief, alerting the court of the *Vega* decision. The circuit court denied reconsideration, declining to apply *Vega* retroactively.

Plaintiff then filed a notice of intent as to Foltz, and, after waiting the statutory period, filed her complaint on September 29, 2005. Foltz moved for summary disposition, arguing that the complaint was time-barred. On December 15, 2005, the circuit court issued an opinion and order granting Foltz' motion on the basis that plaintiff's original complaint, filed on August 16, 2004, was untimely. The circuit court did not apply *Vega*, but held that §§ 5851(1) and (7) were "clear and unambiguous" and precluded plaintiff's claim. The circuit court subsequently granted summary disposition to Majkrzak and Clinic on the same basis. In short, the circuit court dismissed plaintiff's claim because plaintiff's claim accrued at birth, and plaintiff failed to bring an action before his tenth birthday, as required by MCL 600.5851(7).

On January 5, 2006, Covenant filed a motion for summary disposition. Covenant argued that Clinic employed Foltz and Majkrzak, and that Foltz or Majkrzak were both independent physicians whose negligence could not be attributed to Covenant. Further, in response to allegations that Covenant employed other health care workers that were negligent, nurses and residents, Covenant maintained that plaintiff failed to specifically identify them in the notice of intent, and that plaintiff's affidavit of merit from a medical doctor, Dr. Berke, plaintiff's expert in Obstetrics and Gynecology, was only directed toward Foltz and Majkrzak. Plaintiff filed a response, arguing that plaintiff reasonably believed that MCL 600.2169 would not apply to establish an expert's qualifications to sign an affidavit of merit as to a nurse. Plaintiff also argued that the affidavit of Dr. Berke was sufficient in regard to the standard of care applicable to residents in training for that specialty. Plaintiff further claimed "[a] pre-existing relationship with an independent physician does not necessarily mean that the physician cannot also be viewed as an ostensible agent of a hospital by the patient."

The circuit court granted summary disposition to Covenant. The circuit court held that Covenant could not be vicariously liable for Foltz' negligence because Foltz was dismissed from the case. The circuit court also held that Covenant could not be vicariously liable for Majkrzak's negligence because plaintiff's interrogatories clearly established that Majkrzak was an employee of Clinic.

Subsequently, this Court granted plaintiff's delayed application for leave to appeal in Docket No. 270546, [*Michele Dilts v Frederick W Fultz MD*, unpublished order of the Court of Appeals, entered July 12, 2006 (Docket No 270546)], and further ordered "this appeal consolidated with the pending claim of appeal in Docket No. 269459." *Id.*

II Timeliness of Claim

Plaintiff argues that the trial court erred in granting Majkrzak, Clinic and Foltz summary disposition because she timely filed her claim.

1. Standard of Review

This Court reviews de novo the circuit court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In doing so, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This Court reviews questions of statutory interpretation de novo. *Burton, supra* at 747.

2. Analysis

MCL 600.5851(1), states in part that:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of old or

insane at the time the claim accrues, the person or those claiming under the person have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

MCL 600.5851(7), states that:

[I]f, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.

In *Vega*, our Supreme Court addressed the operation of MCL 600.5851(7), stating:

> The first sentence of § 5851(7) states that if the medical malpractice claimant was less than eight years old when the claim accrued, the claimant must file a complaint before his tenth birthday or before the period of limitations expires, whichever is later. The medical malpractice claimant in the instant case was 11 years old when the claim accrued, and, thus, the first sentence of § 5851(7) is not applicable. The second sentence of § 5851(7) states that if a medical malpractice claimant was eight years of age or older when the claim accrued, as in this case, the period of limitations set forth in § 5838a applies. *MCL 600.5851(7) does not state anything about when an insane medical malpractice claimant must commence an action.* Therefore, § 5851(7) does not preclude application of the insanity saving provision of § 5851(1). [*Vega, supra*, slip op at pp 4-5 (Emphasis added).].

The Court further stated that,

> if the claimant was four years old when the medical malpractice claim accrued and was insane, the insanity saving provision of § 5851(1) would apply because nothing in § 5851(7) prohibits application of the insanity saving provision of § 5851(1). That is, § 5851(7) does not "otherwise provide[ ]" anything with regard to the insanity saving provision of § 5851(1). Therefore, § 5851(7) does not prohibit application of the insanity saving provision of § 5851(1) to medical malpractice claims. [*Vega, supra*, slip op at p 8.]

Here, Andrew was born with Down Syndrome and claimed to be insane, a claim which defendants do not appear to challenge. Thus, regardless of age limitations contained in MCL 600.5851(7), under *Vega*, MCL 600.5851(7) does not preclude application of the insanity saving provision of MCL 600.5851(1). Accordingly, plaintiff is afforded until "1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run." MCL 600.5851(1). Thus, plaintiff's claim is timely and the circuit court improperly granted summary disposition to Majkrzak, Clinic and Foltz.

II. Dismissal of Covenant

Plaintiff argues that the circuit court improperly granted Covenant summary disposition.

1. Standard of Review

The circuit court considered matters outside the pleadings, and review under MCR 2.116(C)(10) is appropriate. This Court reviews de novo the circuit court's decision on a motion for summary disposition. *Dressel, supra*. In doing so, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley, supra*. Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

2. Analysis

"A hospital may be 1) directly liable for malpractice, through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff, or 2) vicariously liable for the negligence of its agents." *Cox v Board of Hosp Managers for City of Flint*, 467 Mich 1, 11; 651 NW2d 356 (2002).

In regard to Covenant, plaintiff's complaint alleged that:

> 22. [Covenant] . . . , a duly licensed and accredited health care facility, via its agents and employees, when presented with a patient exhibiting the history, signs, symptoms such as those of [plaintiff], owes a duty to timely and properly:
>
> a. Select, employ, train and monitor its employees, servants agents, ostensible agents and/or its staff of physicians, nurses, nurses' aides, technicians and residents, to insure they were competent to perform adequate medical care;
>
> b. Ensure that appropriate polices are adopted and followed, including but not limited to, pursuing patient advocacy by following the chain of command where indicated;
>
> c. Perform and through history and physical examination;
>
> d. Perform appropriate prenatal testing for the presence of ruptured membranes including, but not limited to, nitrazine testing and serial untrasounds for amniotic fluid index;
>
> e. Properly interpret all prenatal testing to immediately detect the presence of ruptured membranes;
>
> f. Recognize the need for continued monitoring and observation;

g. Refer the parties for expert consultation and evaluation including, but not limited to, a perinatologist;

h. Perform and test to reassure fetal well being including, but not limited to, scalp ph and amniofusion;

i. Timely perform an emergent cesarean section

j. Timely and properly perform neonatal resuscitation; and

k. Any and all acts of negligence identified thorough additional discovery

23. [Covenant] did none of these things and, as such, the acts or omissions constitute negligence for [Covenant] is directly liable to the Plaintiff

24. [Covenant] is vicariously liable for the acts or omissions of its agents or employees including, but not limited to, [Foltz] and [Majkrzak, pursuant to the doctrines of Respondent Superior and ostensible agency.

In regard to the claims made in ¶ 22(a) and (b), i.e. negligent supervision, we conclude that plaintiff has abandoned her claim. At the summary disposition hearing, plaintiff counsel did not mention any claim based on negligent supervision. Further, on appeal, plaintiff only argues that "[p]laintiff's complaint states[s] multiple claims against agents/employees of [Covenant]." Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, plaintiff has failed to present any evidence of how Covenant's allegedly negligent supervision of any its agents or employees caused plaintiff harm. Thus, the circuit court properly granted summary disposition to Covenant MCR 2.116(C)(10).

As to Covenant's vicarious liability arising from Majkrzak and Foltz, the circuit court properly granted Covenant summary disposition because plaintiff presented no evidence that Majkrzak or Foltz were agents of Covenant. Plaintiff admits that she had a pre-existing relationship with Clinic and that she believed Clinic would provide a physician to assist in her delivery. However, she nonetheless claims that she "viewed [Covenant] as part of the 'team' treating her and assisting her through her pregnancy and delivery."

In *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 34; 480 NW2d 590 (1991), this Court rejected the proposition that "a hospital is liable for the malpractice of independent contractors merely because the patient "looked to" the hospital at the time of admission or even was treated briefly by an actual nonnegligent agent of the hospital." Applying *Chapa,* Covenant, "as putative principal, must have done something that would create in [plaintiff]'s mind the reasonable belief that [Majkrzak] and [Foltz] were acting on behalf of [Covenant]. *Id*. citing *Grewe v Mount Clemens General Hosp*, 404 Mich 240, 252-253; 273 NW2d 429 (1978) and *Strach v St John Hosp Corp*, 160 Mich App 251, 265, 408 NW2d 441 (1987), quoting 1 Restatement Agency, 2d, § 27, p 103. "The reasonableness of the [plaintiff]'s belief in light of

the representations and actions of the hospital is the 'key test.'" *Id*. While plaintiff may have viewed Covenant as part of her health care team, plaintiff has not alleged that Covenant suggested to plaintiff that Majkrzak or Foltz worked on its behalf. Thus, the circuit court properly granted summary disposition to Covenant in regard to its vicarious liability for the alleged negligence of Majkrzak and Foltz.

As to Covenant's vicarious liability arising from its "employees, servants agents, ostensible agents and/or its staff of physicians, nurses, nurses' aides, technicians and residents," plaintiff's claim also fails. "For a hospital to be held liable on a vicarious liability theory, the jury must be instructed regarding the *specific agents* of the hospital against whom negligence is alleged and the standard of care applicable to each agent." *Cox*, *supra* at 5 (Emphasis added). Here, plaintiff failed to identify any specific individual, besides Majkrzak and Foltz, that may have been negligent. The circuit court properly dismissed Covenant from the instant case.

IV Conclusion

In Docket No. 269459, we reverse the circuit court's order granting Majkrzak and Clinic summary disposition but affirm the circuit court's decision granting summary disposition to Covenant. In Docket No. 270546, we reverse the circuit court's decision granting summary disposition to Foltz.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly