

STATE OF MICHIGAN
COURT OF APPEALS

LEALER JAMES, Personal Representative of the
Estate of SHERITA MICHELLE JAMES,
LEALER JAMES, and KIMBRIA JAMES,

UNPUBLISHED
January 13, 2009

Plaintiffs-Appellants,

v

M. TYRONE CUSHMAN,

No. 282110
Washtenaw Circuit Court
LC No. 06-000828-NO

Defendant-Appellee.

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

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiffs' claims of wrongful death and intentional infliction of emotional distress.¹ We affirm.

Sherita Michelle James, a 33-year-old single mother of four living in Ypsilanti, died on August 13, 2004, after suffering a brain hemorrhage and developing a blood clot. Sherita's oldest daughter, Kimbria, was 16 years old when her mother died. Sherita's mother, Lealer James, lived in Texas at the time of her daughter's death.

Defendant Cushman is a 62-year-old ordained pastor and the general overseer of the National Association of the Church of God. Defendant met Sherita and her daughters in 2000; he counseled Sherita as she separated from her husband and eventually became a father figure to her. Defendant and his wife also provided financial assistance to Sherita and her family, and Sherita and her children regularly visited the Cushmans at their home in Pennsylvania.

¹ Plaintiffs do not challenge the trial court's dismissal of their claims of negligent infliction of emotional distress, theft and larceny, and unjust enrichment in their questions presented to this Court. Therefore, we will not address the trial court's dismissal of these causes of action. MCR 7.212(C)(5); *Joerger v Gordon Food Service, Inc.*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

On August 3, 2004, Sherita began experiencing severe headaches and hypertension. She admitted herself to the University Hospital in Ann Arbor and notified defendant that she was in the hospital. Defendant and his wife immediately traveled from Pennsylvania to Michigan, arriving on August 4, 2004. They brought Kimbria to the hospital with them. According to defendant, when they arrived at the hospital, Sherita was awake and alert. She handed defendant a durable power of attorney form and said that she wanted him to have the power to make medical decisions for her if she was incapacitated. Defendant told her that he would take the form home, review it, and bring it back to the hospital the following day.

Lealer was contacted on August 4. Defendant discussed Sherita's condition with Lealer and offered to pay for her to fly to Michigan. Lealer refused. Instead, she drove to Michigan, arriving on August 8, 2004.

When defendant and his wife returned to the hospital the following morning, they discovered that Sherita had lost consciousness during the night. Because Sherita could not sign the power of attorney form, defendant asked Kimbria to sign Sherita's name to the form and to witness his signature.² After Kimbria and defendant executed the form, defendant gave the form to a doctor. Defendant claimed that he did not know that he could not have Kimbria sign Sherita's power of attorney.

The day after defendant and Kimbria executed the power of attorney, Sherita's doctors informed them that Sherita had suffered a large, deep basal ganglia hemorrhage and had developed a blood clot on the left side of her brain. The doctors then discussed two possible treatment options. First, the doctors could perform surgery on the clot, but they warned that the operation was risky. There was a chance, they explained, that Sherita might die during the surgery, and even if she lived, she would likely be brain-damaged and reduced to living in a vegetative state. Alternatively, the doctors could do nothing. Although there was a chance that Sherita would die without intervention, a possibility also existed that the blood clot would recede and that Sherita could then recover.

Defendant told Sherita's doctors that Sherita had indicated in the past that she would not want to live in a vegetative state, and he decided that Sherita should not have the surgery. Kimbria testified that she wanted the doctors to perform an angiogram on Sherita to determine whether surgery might be helpful, and she claimed that her younger sister, Akeyla N. Dowden, wanted Sherita to have the surgery.³

Defendant gave Sherita's doctors permission to inform Lealer about Sherita's condition, and the doctors called Lealer to discuss Sherita's medical situation. Defendant told Lealer that she could change the course of treatment and opt for surgery when she arrived at the hospital, but

² According to defendant, Kimbria did not object to signing her mother's name on the form. Although Kimbria testified that she was distraught when she signed the power of attorney document, she did not claim that Cushman forced her to sign the document.

³ Both defendant and Sherita's doctor, Hunter Brumblay, claimed that Sherita's daughters agreed with defendant's decision not to authorize the surgery.

he claimed that Lealer told him that she agreed with his decision. Lealer, however, maintained that when she was told about Sherita's medical condition over the phone, she did not clearly understand the nature of Sherita's medical condition and the pros and cons of surgery and "did not agree to anything."

Lealer arrived at the hospital on August 8. Sherita's medical records indicate that when Lealer arrived at the hospital, the doctors discussed Sherita's condition with her and noted that Lealer understood the situation. The records do not indicate that Lealer disputed the decision not to operate. In fact, Sherita's medical records indicate that Lealer agreed with defendant's decision not to operate. Lealer also admitted that she did not try to convince the doctors to do the surgery when she arrived at the hospital; instead, she claimed that the situation was "hopeless" because defendant and the doctors had already decided not to have the surgery, and nobody mentioned surgery to her.

When Lealer arrived at the hospital, she also disputed the validity of defendant's power of attorney. The doctors and a social worker reviewed the power of attorney and determined that because Kimbria, who was underage at the time, had witnessed the document, the power of attorney was invalid. On August 11, Lealer assumed control over medical decisions affecting her daughter. Sherita died on August 13, 2004.

Almost two years later, plaintiffs filed a cause of action against defendant alleging, among other things, wrongful death and intentional infliction of emotional distress. The trial court dismissed plaintiffs' claims pursuant to MCR 2.116(C)(10).

First, plaintiffs argue that the trial court should have denied defendant's motion for summary disposition because defendant failed to follow the procedural requirements of MCR 2.116(C). In particular, plaintiffs claim that defendant failed to "specify the grounds on which" his motion for summary disposition was based, as required by MCR 2.116(C)(10), by failing to specify in the motion that he sought summary disposition pursuant to MCR 2.116(C)(10) and by failing to "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," as required by MCR 2.116(G)(4).

In his motion for summary disposition, defendant did not specify the grounds on which this motion should be granted. However, in the beginning of his argument section of his brief in support of his motion for summary disposition, which he filed with his motion, defendant specified that he was bringing his motion under MCR 2.116(C)(10). In particular, under the first subheading of the argument section labeled "A. Standard of Review," defendant stated, "[Defendant] brings this motion under MCR 2.116(C)(10)." Defendant then presented applicable case law regarding the proper review of a (C)(10) motion for summary disposition. Defendant clearly and explicitly states, at a logical point in his brief, that he requests that review of his motion for summary disposition be granted pursuant to MCR 2.116(C)(10). Further, plaintiffs' attorney admitted in her brief, "[I]t is fairly obvious that the grounds [sic] intended to be alleged by defendant is MCR 2.116(C)(10)" Plaintiffs' request that this Court reverse the trial court's order granting defendant's motion for summary disposition because defendant allegedly failed to identify the specific ground on which he requested summary disposition elevates form over substance, and this Court has been reluctant to deny summary disposition because the motion exalts form over substance. *Johnston v City of Livonia*, 177 Mich App 200,

208; 441 NW2d 41 (1989). Considering that plaintiffs were aware that defendant brought his summary disposition motion pursuant to MCR 2.116(C)(10), we will not reverse the trial court's order granting summary disposition on this ground.

Plaintiffs also claim that defendant failed to identify the issues for which he believed there was no genuine issue of material fact, as required by MCR 2.116(G)(4). Apparently, plaintiffs claim that defendant failed to satisfy the requirements of MCR 2.116(G)(4) because he did not specify the reasons why he moved for summary disposition in either his motion for summary disposition or in the headnotes of his accompanying brief. However, defendant clearly argued why he believed that summary disposition was appropriate in the brief accompanying his motion for summary disposition, and he noted in his motion that his argument could be found in this accompanying brief. It is common practice for attorneys to argue their motions for summary disposition by referring to their accompanying briefs, and plaintiffs fail to provide any authority to support their position that a moving party must identify the issues central to its motion for summary disposition in the motion and not the accompanying brief. Accordingly, plaintiffs' claim of error lacks merit and we will not address it further. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Second, plaintiffs claim that the trial court erred when it granted summary disposition dismissing the wrongful death claim pursuant to MCR 2.116(C)(10).⁴ In particular, plaintiffs argue that the trial court erroneously determined that there was no causal connection between defendant's assumption of power of attorney and Sherita's death. Plaintiffs claim that defendant's decision to assume power of attorney over Sherita and then not to authorize the surgery was the proximate cause of her death. We disagree.

MCL 600.2922(1), which provides a cause of action for wrongful death, states:

Whenever the death of a person . . . shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages

⁴ We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10)." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). We view documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

Therefore, to establish a cause of action for wrongful death, plaintiffs must establish three elements: (1) a death occurred; (2) the death was caused by a wrongful act, neglect, or fault, and (3) if the death had not resulted, the injured party would have been able to maintain an action and recover damages.

The parties do not dispute that defendant's power of attorney over Sherita was invalid. However, we agree with the trial court's conclusion that defendant's actions were not the proximate cause of Sherita's death. Sherita died after suffering a hemorrhage and developing a blood clot in her brain, and defendant's actions in no way caused her medical condition. For this reason alone, defendant's actions were not the proximate cause of Sherita's death.

In addition, the evidence presented to the trial court indicates that even if Lealer's authority to make medical decisions on Sherita's behalf had been recognized, Lealer would not have immediately authorized the surgery.⁵ Lealer admitted that when Sherita's doctors called her, discussed Sherita's condition with her, and presented surgery as an option, she told them not to do anything until she arrived in Michigan. Plaintiffs present no evidence indicating that doctors withheld information from Lealer because they did not think she had power of attorney. Lealer also admitted that when she arrived at the hospital on August 8, she did not inquire about surgery or ask Sherita's doctors to reconsider the decision not to operate on Sherita. Although Lealer claims that she did not fully understand the nature of Sherita's medical condition and the benefits and drawbacks of surgery, her assertions that she would have better understood the situation and would have chosen to operate if defendant had not held himself out as having power of attorney over Sherita are mere speculation. Plaintiffs fail to establish that if Lealer's authority to make medical decision on Sherita's behalf had been recognized and defendant did not act as Sherita's power of attorney, a different outcome would have resulted.

Furthermore, plaintiffs have failed to establish that if defendant had authorized the surgery, Sherita would not have died or been reduced to a vegetative state. When Sherita's doctors discussed Sherita's medical situation with defendant and Sherita's family, they presented two equally bleak options: either the family could agree to a risky surgery, in which a substantial possibility existed that Sherita would die or suffer brain damage so great that she would be reduced to living in a vegetative state, or the family could agree to do nothing and hope that the blood clot would dislodge itself and Sherita would recover. In both situations, a high possibility existed that Sherita would either die or be reduced to a vegetative state, and neither option provided the family with more than a remote hope that Sherita would have a miraculous recovery and fully regain her health and mental capacity. Plaintiffs present no evidence indicating that defendant's decision not to authorize the surgery caused Sherita to receive injuries (namely, a dramatic reduction of her quality of life and, finally, death) that she would not be equally likely to experience had the surgery taken place. Therefore, plaintiffs fail to establish the causation

⁵ Although Sherita's daughters claimed that they wanted doctors to perform an angiogram and have the surgery, plaintiffs provide no authority to indicate that they had authority to make medical decisions on their mother's behalf, even though they were minors at the time, or that defendant, Lealer, or the doctors should have given their preferences weight when deciding whether to operate on Sherita.

element of their wrongful death claim, and the trial court did not err when it dismissed plaintiffs' wrongful death claim pursuant to MCR 2.116(C)(10).

Finally, plaintiffs argue that the trial court erred when it dismissed Lealer's and Kimbria's individual causes of action for intentional infliction of emotional distress pursuant to MCR 2.116(C)(10). In particular, they argue that defendant's actions, namely, asking Kimbria to forge Sherita's name on the power of attorney form and preventing Lealer from making decisions regarding Sherita's medical care, constituted extreme and outrageous conduct. Again, we disagree. Assuming, without deciding, that Michigan recognizes the tort of intentional infliction of emotional distress, see *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004), we conclude that plaintiffs have failed to establish that defendant's conduct was extreme and outrageous.

[T]his Court has adopted the definition of intentional infliction of emotional distress found in 1 Restatement Torts, 2d, § 46, p 71, which provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." [*Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986).]

The tort of intentional infliction of emotional distress contains four elements: "(1) 'extreme and outrageous conduct'; (2) intent or recklessness; (3) causation; and (4) 'severe emotional distress.'" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905(1985). The *Roberts* Court adopted the following explanation of what constitutes extreme and outrageous conduct:

"Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" [*Id.* at 603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73.]

Plaintiffs have failed to establish that defendant's actions meet the standard of "extreme and outrageous" conduct necessary to establish a claim for intentional infliction of emotional distress. First, defendant's decision to ask Kimbria to sign her mother's name to the power of attorney form and to witness the document did not constitute extreme and outrageous conduct. Plaintiffs did not present any evidence indicating that defendant directly forced Kimbria to forge her mother's name on the document. Defendant made no threats, he did not raise his voice or threaten violence, and by all accounts he asked Kimbria to sign the document in a respectful and civilized manner. Although defendant should not have asked Kimbria to forge her mother's name on a legal document and should have taken more precautions to determine the circumstances under which a power of attorney could be properly executed, he stated that he did not know that his actions were illegal and that he asked Kimbria to sign her mother's name because he wanted to execute Sherita's wishes. Even if defendant's actions were not technically

correct, they are not so outrageous that they establish this element of intentional infliction of emotional distress.⁶

Next, plaintiffs fail to establish that defendant's usurpation of Lealer's right to make medical decisions on Sherita's behalf by acquiring power of attorney was extreme and outrageous under the circumstances. The evidence presented to the trial court indicates that defendant was a father figure to Sherita and provided significant financial and emotional support. Plaintiffs do not present any evidence to directly contradict defendant's claim that Sherita asked him on August 4 to accept the responsibility of power of attorney over her in the event that she was no longer able to make medical decisions and that she handed him the forms necessary to execute the power of attorney. Defendant did not properly execute the power of attorney, but the evidence presented to the trial court indicates that this improper execution was the result of defendant's attempt to execute Sherita's wishes and his failure to recognize his legal missteps. Further, although plaintiffs allege that defendant wanted Sherita to die so he could collect from her life insurance policy, plaintiffs provide no evidence to support their claims; instead, the evidence presented to the trial court indicates that defendant knew that Sherita's life insurance policy had expired. Plaintiffs present no evidence indicating that defendant had a malicious intent in acquiring power of attorney over Sherita. Although defendant's attempts to acquire power of attorney over Sherita were misguided at times, these attempts did not rise to the level of extreme or outrageous conduct necessary to establish this element of the offense.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis

⁶ In addition, Kimbria does not indicate in her affidavit that she suffered severe emotional distress because defendant had her sign the power of attorney. Instead, Kimbria merely maintained that she was young, "under a lot of pressure," and worried about her mother when she signed the document, and noted that she "fe[lt] that [defendant] was wrong to have asked [her] to do this. As a minister and adult he should have know [sic] better."