STATE OF MICHIGAN

COURT OF APPEALS

DEBRA JEAN STEELE,

Plaintiff-Appellant,

v

ST. LAWRENCE HOSPITAL AND HEALTHCARE SERVICES, SPARROW HEALTH SYSTEMS, and RALPH MICHAEL KELLY, M.D.,

Defendants-Appellees.

UNPUBLISHED
April 16, 2009

No. 283899
Ingham Circuit Court
LC No. 07-000066-NZ

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motions for summary disposition. Plaintiff's complaint alleged three counts against defendant Dr. Ralph Michael Kelly: (1) negligence, gross negligence, and excessive use of force, (2) assault and battery, and (3) intentional infliction of emotional distress. Plaintiff claimed the other defendants were vicariously liable under the doctrine of respondeat superior. The trial court ruled that plaintiff's claims arose out of a professional relationship and sounded in medical malpractice. Because plaintiff had not complied with the requisite procedural requirements for a medical malpractice claim, the court granted summary disposition as to plaintiff's claims of assault and battery, negligence, gross negligence and unauthorized use of excessive force. The trial court also ruled Michigan law did not recognize plaintiff's claim of intentional infliction of emotional distress. Finally, the trial court ruled that because the claims against Dr. Kelly failed, plaintiff's vicariously liability claims against the other defendants also must be dismissed. We affirm.

Plaintiff's claims arise out of a physical examination Dr. Kelly performed while plaintiff was a voluntary patient in St. Lawrence Hospital's psychiatric ward. Plaintiff signed a voluntary admission form by which she consented and authorized the hospital to provide treatment. After plaintiff's admission to the hospital, her treating psychiatrist requested a consultation by Dr. Kelly due to plaintiff's elevated blood pressure. Dr. Kelly, a board-certified internist, testified in his discovery deposition that he could not remember any details of his examination of plaintiff; however, he testified that when he saw a psychiatric ward patient, he routinely performed a complete physical examination, which would include a breast examination for female patients. His consultation report for plaintiff reflects a complete physical examination that included breast examination. Long-time psychiatric ward nurse Mary Gundry testified she was familiar with Dr.

Kelly's routine and confirmed his practice was to always perform a complete physical examination, including breast examination of female patients.

In her discovery deposition, plaintiff testified she never told Dr. Kelly that she did not want him to perform a breast exam. But she did testify that she had told Dr. Kelly she recently had a breast examination and did not understand the need for one. Plaintiff indicated Dr. Kelly told her "he was very thorough." Plaintiff testified she was compliant because she was told when admitted to the hospital to "do everything you are told to do." Plaintiff also testified that the technique Dr. Kelly used in performing the breast exam was different from her past experience, comparing it to "milking a cow."

The day after Dr. Kelly examined plaintiff, she filed a hand-written Recipient Rights Complaint with the Department of Community Health. She described her complaint that "I feel I was touched inappropriately during an exam. [It was a] violation of sexual dignity." In the narrative of her complaint, plaintiff reported the exam of her breasts "seemed strange to me with the motions he used touching me." Further, she noted no other female was present in the examination room. In addition, plaintiff "strongly question[ed] why my breasts were even examined during an assessment to check my blood pressure." Plaintiff expressed concern "she may have [been] taken advantage of because of where [she] was in the hospital."

The Department of Community Health investigated plaintiff's complaint. The DCH investigator consulted with the Office of the Attorney General and retained an expert to review the investigative file. According to the investigator's memorandum closing the investigation, the retained expert opined that Dr. Kelly's conduct did not fall below the minimal standard of care. Further, the expert opined that Dr. Kelly "performed a complete physical examination according to internal medicine standards." In addition, the assistant attorney general who reviewed the case believed on the basis of her past experience with other cases that failing to have a chaperone present during a physical exam that included breast examination did not violate the minimal standard of care. Consequently, the DCH closed its investigation without further action.

As noted already, plaintiff filed her complaint in this case alleging negligence, gross negligence, excessive use of force, assault and battery, intentional infliction of emotional distress, and vicarious liability of the corporate defendants for defendant Dr. Kelly's actions. After discovery, defendants moved for summary disposition under MCR 2.116(C)(10) and MCR 2.116(C)(8). The trial court, relying on *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004), and *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), accepted defendants' arguments that plaintiff was attempting to avoid the statutory prerequisites of a medical malpractice claim. The trial court reasoned that plaintiff's claims pertained to actions that occurred in a professional relationship and raised questions of medical judgment beyond common knowledge and experience. In addition, the trial court ruled plaintiff's claim for intentional infliction of emotional distress was not recognized under Michigan law, citing *Smith v Calvary Christian Church*, 462 Mich 679, 679; 614 NW2d 590 (2000) (WEAVER, C.J., concurring). Finally, the trial court ruled that because plaintiff had not properly pleaded her tort claims against Dr. Kelly, her vicarious liability claims against the other defendants must also fail. Consequently, the trial court granted all defendants summary disposition.

On appeal, plaintiff contends the trial court erred because she has alleged intentional torts, sexual assault and battery, which claims are within the common knowledge and experience of ordinary people. Plaintiff also argues that Dr. Kelly's conduct was outrageous; therefore, the facts support her claim for intentional infliction of emotional distress. We disagree.

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When considering a motion under MCR 2.116(C)(10), the trial court and this Court must view the proffered evidence in the light most favorable to the party opposing the motion. *Id*. at 120. A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

Summary disposition of a claim may also be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A (C)(8) motion tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, *supra* at 119. A motion under MCR 2.116(C)(8) may be granted only when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id*.

The trial court's analysis is generally correct, but we disagree with its conclusion that Michigan does not recognize the tort claim of intentional infliction of emotional distress. Although our Supreme Court has not formally recognized the existence of the tort of intentional infliction of emotional distress in Michigan, this Court has "explicitly adopted the definition found in the Restatement Torts, 2d, § 46, pp 71-72." *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 350; 351 NW2d 563 (1984); see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). Nevertheless, this Court will not reverse the trial court when it reaches the correct result, even if for the wrong reason. *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

In *Gregory v Heritage Hospital*, dec'd sub nom *Dorris, supra*, the Court addressed whether the plaintiff's claim that the hospital's failure to properly supervise and monitor the patients under its psychiatric care was a medical malpractice claim requiring notice of intent to sue and an affidavit of merit or was, instead, an ordinary negligence claim. *Id*. at 31, 43. The Court observed that a complaining party could not avoid the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence. *Id*. at 43. In reaching the conclusion that the plaintiff's claim was one of malpractice, the Court quoted *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652, 438 NW2d 276 (1989) that "'[t]he key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship.'" *Dorris*, *supra* at 45. Further, the Court reasoned that whether a claim was one of medical malpractice or one of ordinary negligence "depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Id*. at 46. The claims in *Gregory* involved "questions of professional medical management and not issues

of ordinary negligence that can be judged by the common knowledge and experience of a jury." *Id*. at 47. Thus, our Supreme Court held the trial court had erred by not dismissing the plaintiff's complaint because she had not complied with medical malpractice procedural requirements. *Id*.

The Court followed *Dorris-Gregory*, *supra* at 45-46, opining in *Bryant*, *supra*, that a medical malpractice claim is distinguished by two defining characteristics: (1) "medical malpractice can occur only within the course of a professional relationship," and (2) "claims of medical malpractice necessarily raise questions involving medical judgment." *Id*. at 422 (internal punctuation and citation omitted). Thus,

> . . . a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Bryant*, *supra* at 422.]

We agree with the trial court that the undisputed facts here establish that plaintiff's claims pertain to actions that occurred within the course of a professional relationship and raise questions of medical judgment beyond the realm of common knowledge and experience. Consequently, the trial court correctly granted defendants summary disposition on the basis of plaintiff's failure to comply with the procedural and substantive prerequisites for bringing a medical malpractice action unless a different analysis is required because plaintiff has framed her claims as intentional torts. *Bryant*, *supra* at 422; *Dorris-Gregory*, *supra* at 45-47.

Plaintiff contends the *Bryant* analysis does not apply to her claims because she alleges the intentional torts of sexual assault and battery are claims within the common knowledge and experience of ordinary people. She relies on *Zsigo v Hurley Medical Center*, 475 Mich 215; 716 NW2d 220 (2006), and *Salinas v Genesys Health System*, 263 Mich App 315; 688 NW2d 112 (2004). Plaintiff's reliance on these two cases is misplaced. Each case declined to recognize an exception to the general rule "that liability cannot be imposed against an employer for torts intentionally committed by an employee that are outside the scope of the employment." *Id*. at 318-319; see also *Zsigo*, *supra* at 217-218, 231. Consequently, neither case addresses the legal issue of whether the plaintiff's claim sounded in malpractice or some other tort. Although each case involved allegations of sexual assault on a female patient by a hospital employee, the underlying facts of each case indicate the assault did not arise out of a professional relationship between the perpetrator and the plaintiff. In *Zsigo*, the perpetrator was a male nurse's assistant (aide) who was assigned to clean the room where the plaintiff was located. *Zsigo*, *supra* at 218. In *Salinas*, the perpetrator was a male nurse whose employment permitted him to "be alone and unsupervised with [the plaintiff] at the time and place of the assault." *Salinas*, *supra* at 321. Thus, both *Salinas* and *Zsigo* are factually distinguishable from the present case and do not address the legal question of whether the *Bryant* analysis applies to alleged intentional torts.

Plaintiff also relies on two unpublished opinions in support of her arguments. Unpublished opinions of this Court are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), but may have value to the extent they are persuasive. In this case we do not find them persuasive or applicable.

Defendants also cite unpublished opinions of this Court for the proposition that the analysis of *Bryant* and *Dorris-Gregory* does apply to allegations of intentional torts. Defendants cite *Brown v Henry Ford Health Systems*, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2007 (Docket No. 273441); *Mitchell-Crenshaw v Joe*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 20076 (Docket No. 263057) (applying the *Bryant* analysis to claims of false imprisonment, battery, and intentional infliction of emotional distress); and *Dixon v Ambani*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2005 (Docket No. 256292) (applying the *Bryant* analysis to claims of fraud and intentional infliction of emotional distress). We find these cases persuasive. As noted by the *Brown* Court, the *Bryant* analysis must be applied to the facts alleged in the plaintiff's claim - - not the label she attaches to them. And, as observed by the Court in *Dixon*, "'[I]t is well established that the gravamen of an action is determined by reading the claim as a whole, and looking beyond the procedural labels to determine the exact nature of the claim.'" *Dixon, supra*, 2005 Mich App Lexis 2915, *3, quoting *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (internal punctuation omitted). Here, it is undisputed plaintiffs claims arise out of a professional relationship. Also, the essence of plaintiff's claim is that examination of her breasts was medically unnecessary and improperly performed. But such claims raise questions of medical judgment and the applicable standard of care beyond the common knowledge and experience of ordinary people. Consequently, defendants were properly granted summary disposition as to all plaintiff's tort claims because she failed to comply with the procedural requisites of a medical malpractice claim. *Bryant, supra* at 422; *Dorris, supra* at 45-47.

In addition, plaintiff's intentional tort claims must fail because the undisputed facts establish that she consented to medical treatment when she admitted herself to the hospital. Further, no reasonable juror could conclude from the undisputed facts that plaintiff withdrew her voluntary consent to treatment during Dr. Kelly's physical examination. This Court held in *Werth v Taylor*, 190 Mich App 141; 475 NW2d 426 (1991) with respect to a claim of assault and battery during the course of medical treatment that "[w]ithout contemporaneous refusal of treatment by a fully informed, competent adult patient, no action lies for battery." *Id*. at 150. This is so because "[u]nder tort law principles, a person who consents to another's conduct cannot bring a tort claim for the harm that follows from that conduct." *Smith, supra* at 689. Consequently, under general tort principles, plaintiff's intentional tort claims fail because the undisputed facts establish she consented to medical treatment and never withdrew her consent.

We affirm. As the prevailing party defendant may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey