STATE OF MICHIGAN

COURT OF APPEALS

GINA M. HARRINGTON,

Plaintiff-Appellant/Cross-Appellee,

v

THOMAS CASALE, M.D., F.A.C.S., and GENERAL SURGICAL ASSOCIATES, P.C.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
October 19, 2010

No. 291211
Calhoun Circuit Court
LC No. 2008-003014-NO

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Plaintiff appeals and defendants cross appeal the March 11, 2009, order of the circuit court, which granted defendants summary disposition and dismissed plaintiff's complaint without prejudice. We affirm.

Plaintiff argues that her tort action against defendant Thomas Casale, M.D., F.A.C.S., sounded in ordinary negligence because her claim that Dr. Casale should have removed the entire guide wire from her right breast does not raise questions of medical judgment beyond the realm of common knowledge and experience such that expert testimony is necessary to resolve those questions. The trial court disagreed and, consequently, granted summary disposition in favor of defendants. Plaintiff asserts that the trial court erroneously granted summary disposition. We disagree.

We review a trial court's decision granting summary disposition, as well as the legal question "whether the nature of a claim is ordinary negligence or medical malpractice," de novo. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004); see also *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). The trial court appears to have decided defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(8). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only

where the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*.

Our Supreme Court in *Bryant*, 471 Mich at 422, set forth the appropriate inquiry when deciding whether an action sounds in ordinary negligence or medical malpractice:

> [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.

In this case, the parties dispute whether plaintiff's claims raise questions of medical judgment beyond the realm of common knowledge and experience. Viewing the evidence in a light most favorable to the nonmoving party, we conclude that plaintiff's claims necessarily raise questions involving medical judgment, which are beyond the realm of common knowledge and experience. *Id*.; *Wade*, 439 Mich at 163; *David v Sternberg*, 272 Mich App 377, 384; 726 NW2d 89 (2006). Plaintiff's complaint alleged a failure to respond to plaintiff's pain and bruising, a failure to inquire why plaintiff's pain was moving to different locations in her breast, a failure to recognize that something was wrong during follow-up appointments, and a failure to respond to plaintiff's concerns about the proper removal of the guide wire after surgery. We conclude that plaintiff's complaints relate to Dr. Casale exercising his medical judgment because the complaints involve how Dr. Casale evaluated plaintiff's condition and decided how to treat her. *Id*. In addition, with regard to plaintiff's allegation that Dr. Casale failed to completely remove the guide wire from plaintiff's breast after surgery, we conclude that this claim also sounds in medical malpractice. *Bryant*, 471 Mich at 422. In order to determine whether the care was reasonable under the circumstances in this case, testimony of an expert of a member of the same profession and who practices in the same field as Dr. Casale would be necessary. *Bryant*, 471 Mich at 424. Hence, because plaintiff's allegations in this case raise questions involving medical judgment and thus require expert testimony, her claim sounds in medical malpractice, not ordinary negligence. *Id*. at 422, 424. Viewing the evidence in a light most favorable to the nonmoving party, the trial court correctly concluded that defendants were entitled to judgment as a matter of law. *Wade*, 439 Mich at 163.

Defendants argue on cross appeal that the trial court erred when it did not dismiss plaintiff's complaint with prejudice. According to defendants, MCR 2.203(A) obligated plaintiff to join all claims and theories she had against defendant at the time of the filing of her original cause of action, including her malpractice claims. Her failure to join her malpractice claim with her ordinary negligence claim bars plaintiff from now pursuing her malpractice claim. We disagree.

Whether summary disposition should be granted with prejudice and issues involving the construction of court rules are questions of law, which are reviewed de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526-527; 672 NW2d 181 (2003); *Rinke v Auto Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997).

Pursuant to the plain language of MCR 2.203(A), plaintiff, in this case, must have joined every claim that she had against defendants at the time she served her complaint as long as those claims arose out of the same transaction or occurrence. *ISB Sales Co*, 258 Mich App at 526-527. On August 29, 2008, plaintiff submitted to defendants a notice of intent to file a medical malpractice complaint. Thus, plaintiff, in this case, was prohibited from filing a medical malpractice action until 182 days after she submitted her notice of intent on August 29, 2008, pursuant to MCL 600.2912b(1). Consequently, when plaintiff served defendants with her complaint on October 23, 2008, she did not have a medical malpractice claim that could be asserted against defendants because the 182-day period had not expired. MCR 2.203(A). Accordingly, plaintiff was prevented from joining her medical malpractice claim with her ordinary negligence claim at that time; hence, there was no violation of MCR 2.203(A).

In addition, the general rule is "[w]here a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *Rinke*, 226 Mich App at 439 (quotations omitted). Here, the trial court did not dismiss plaintiff's complaint on the merits because the trial court did not take into account substantive considerations relating to the case, only the fact that plaintiff's complaint should have been brought as a medical malpractice claim and not an ordinary negligence claim, which is a consideration based on procedure. See *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006), aff'd 481 Mich 169 (2008), where the Court refers to whether a claim sounds in ordinary negligence or medical malpractice as being a "procedural label." Moreover, generally, in medical malpractice actions, only when there is a procedural irregularity and the statute of limitations has expired is dismissal with prejudice proper. *Scarsella v Pollak*, 461 Mich 547, 549, 553; 607 NW2d 711 (2000). In this case, the two-year statute of limitations had not expired before plaintiff submitted her notice of intent to defendants, which tolled the statute of limitations. See MCL 600.5846(c); *Waltz v Wyse*, 469 Mich 642, 651; 677 NW2d 813 (2004). Accordingly, the trial court correctly determined that plaintiff's claim should be dismissed without prejudice. *Rinke*, 226 Mich App at 439.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad