

STATE OF MICHIGAN
COURT OF APPEALS

LEONORA MCIVER,

Plaintiff-Appellant,

v

ST. JOHN MACOMB OAKLAND HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

October 2, 2012

No. 303090

Oakland Circuit Court

LC No. 2010-111263-NO

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

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

I concur in that portion of the majority’s opinion that affirms the circuit court’s dismissal of plaintiff’s breach of contract claim and portions (although unidentified) of her negligence claim. In my view, however, the entirety of plaintiff’s negligence claim sounds in professional malpractice, and I therefore would find that the trial court properly dismissed plaintiff’s negligence claim in its entirety. Accordingly, I respectfully dissent from the majority’s reversal of the circuit court’s dismissal “of the single ordinary negligence claim set forth in the complaint,” and in its remand for further proceedings.

Acknowledging that plaintiff’s claims arose in the course of a professional relationship, the majority properly cites to *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004), as raising a second level of inquiry, i.e., “whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury’s common knowledge and experience.” *Id.* at 423. If the former, the claims sounds in medical malpractice; if the latter, it sounds in ordinary negligence.

Where the majority errs, in my view, is in parsing plaintiff’s negligence claim into supposedly severable components. Specifically, the majority concludes:

The narrow allegation that McIver was left alone in the bathroom after being seated on an unsafe chair placed on a wet floor sets forth a claim within the realm of a jury’s common knowledge and experience. Laypersons are capable of understanding these simple facts. No expert testimony is necessary to establish that it is unreasonable to direct a patient to sit in an unstable chair located on a wet floor, particularly a patient suffering from dementia and unsteadiness. Nor do we detect any scientific or technical basis for expert testimony, given these

allegations. Accordingly, McIver's negligence claim relating to her placement in the chair sounds in ordinary negligence. The balance of her other negligence claims, however, sound in medical malpractice and the circuit court properly dismissed them. [*Ante* at ___.]

It is important to evaluate this conclusion of the majority in the context of both plaintiff's complaint and plaintiff's appeal. It is well-settled that, when evaluating whether a claim sounds in ordinary negligence or in medical malpractice, we must disregard the label a plaintiff has applied to her claims and consider the gravamen of the action by reading the claim *as a whole*. *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006), *aff'd* 481 Mich 169 (2008) (emphasis added). The entire text of the "ordinary negligence" claim set forth in plaintiff's complaint reads as follows:

General Allegations

5. Plaintiff incorporates by reference, all prior allegations, as though set forth herein.¹

6. Plaintiff suffers from multiple sclerosis, and, from time to time, has required hospitalization for manifesting conditions, involving fainting and episodes of unresponsiveness.

7. On or about March 13, 2008, Plaintiff was presented to St. John Macomb-Oakland Hospital, Oakland Center, having been found on the floor, unresponsive, in the waiting room of her physician, and was admitted for treatment being placed on a mechanical ventilator.

8. Defendant was familiar with Plaintiff, noting that "She is well-known to us from previous admissions and has multiple sclerosis with severe debility on that basis and history of a seizure disorder."

9. Defendant assigned an employee to act as a "sitter", a nonmedical task of being present to assist Plaintiff in any normal daily activities while at the hospital.

10. On or about March 23, 2008, Plaintiff was in her hospital room and there was no sitter despite her need to bathe herself, but being unable to stand, she rang for assistance.

11. An employee of Defendant placed a chair in the bathroom, in front of the sink, and left Plaintiff unattended to sit in the chair.

¹ The incorporated preliminary allegations merely identify the parties and establish jurisdiction.

12. Plaintiff started to sit down when the chair flipped over throwing Plaintiff to the floor.

13. Plaintiff awakened on the floor with a deep laceration to her left forehead necessitating several stitches and producing considerable pain, discomfort and permanent scarring.

COUNT I
(Negligence)

14. Plaintiff incorporates by reference, all prior allegations, as though set forth herein.

15. On March 23, 2008, Plaintiff was a patient at Defendant's facility, a hospital operating under licensure from the State of Michigan when she was thrown from a chair, striking her head, cutting her forehead and suffering from temporary and permanent injuries.

16. Defendant owed Plaintiff certain general and specific duties, including, but not limited to:

- A) Duty to exercise reasonable and ordinary care for the Plaintiff's safety as the Plaintiff's known condition required;
- B) Duty to maintain premises in a reasonably safe manner;
- C) Duty to warn of unsafe conditions, including wet floors;
- D) Duty to adequately assist Plaintiff with basic needs;
- E) Duty to adequately supervise Plaintiff;
- F) Duty to furnish hospital room with safe and approved furniture, including chairs with non-slip contact surfaces with the floor;

17. Plaintiff's fall and injuries were proximately caused by the carelessness and negligence of Defendant, or agents of Defendant, in the breach of aforesaid duties owed to Plaintiff by Defendant when leaving Plaintiff unattended to sit down in a chair on a wet floor in the bathroom under the exclusive control of Defendant.

18. As a direct and proximate result of the negligence of Defendant as set forth above, Plaintiff was caused to sustain substantial bodily harm, permanent scarring, pain and suffering, has incurred substantial doctor and medical bills, and will be prevented from attending to her daily activities now and in the future, and will be compelled to expend large sums of money for additional medical and nursing care, all to Plaintiff's damage in a sum in excess of \$250,000.00.

WHEREFORE, Plaintiff requests judgment against Defendant for damages, together with attorney fees and costs of suit, and such other and further relief as the court may deem proper.

Given that these are the totality of plaintiff's negligence allegations, the majority errs, in my opinion, in crafting for plaintiff a claim that is not even alleged in her complaint. Plaintiff's negligence claim makes no allegation, in fact, of any "unsafe chair," but only of "a chair." Moreover, it makes no direct factual allegation of a wet floor, but only raises the specter of a supposedly "wet" floor in describing her allegations as to "duty" and "proximate cause." The majority's assertion that "McIver's complaint avers that she later fell from a chair that had been placed on a wet floor in front of the sink in her hospital bathroom," is simply incorrect.²

A review of plaintiff's complaint further reveals that plaintiff's negligence claim is inextricably premised upon defendant having been placed on notice that plaintiff suffered from multiple sclerosis, a condition that sometimes manifested itself by "fainting and episodes of unresponsiveness." Plaintiff makes no effort in her complaint to establish an ordinary negligence claim independent of her underlying medical condition; to the contrary, plaintiff's negligence claim is expressly and entirely based upon, and interwoven with, her underlying medical condition. Similarly, plaintiff's argument on appeal is not that she could prove ordinary negligence without reference to her underlying medical condition; rather, plaintiff argues that defendant was negligent *because* it was aware of her underlying medical condition. Plaintiff thus frames the question before this Court on appeal as follows:

I. WHETHER WHERE HOSPITAL STAFF IS [sic] MADE AWARE OF PRIOR RECENT INCIDENTS OF FALLING AND BEING INJURED WHEN LEFT ALONE IN THE HOSPITAL, DESPITE AND REGARDLESS [of] RISK ASSESSMENT PROTOCOL, AND WHERE STAFF LEAVE PLAINTIFF ALONE AND SHE THEN FALLS, STRIKING HER HEAD, AND SUSTAINING INJURY, THE CLAIM SOUNDS IN ORDINARY NEGLIGENCE AND NOT MEDICAL MALPRACTICE?

Further, in arguing that question in her brief on appeal, plaintiff nowhere contends, as the majority posits, that there was an "unsafe chair" or a "wet floor." She merely argues that "[a]n employee of Defendant placed a chair in the bathroom, in front of the sink, and left Plaintiff unattended to sit in the chair." Plaintiff's theory of liability is not, therefore, that there was an "unsafe chair" or a "wet floor," but rather that *due to plaintiff's underlying medical condition*, it was negligence to leave plaintiff unattended at all.

² The majority also errs in citing to paragraph 23 of plaintiff's complaint as somehow "pertinent" to plaintiff's negligence claim. *Ante* at ___ and ___ n 2. That paragraph, which indeed alleges that "Defendant created an unsafe condition from its maintenance schedule and use of chairs that place patients at risk of injury and in not assisting and supervising Plaintiff during bathing," is found nowhere in plaintiff's "negligence" count, but rather appears in plaintiff's "breach of contract" count, which the majority agrees was properly dismissed. Since plaintiff has not challenged on her appeal the dismissal of her contract claim, that claim has been abandoned. *Ante* at ___ n 1, citing *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). Regardless, however, paragraph 23 is in no way "pertinent" to the negligence claim, and in any event, it also contains no allegation of an "unsafe" chair or a "wet floor."

Therefore, in my view, the majority errs in going beyond the complaint, the question presented, and the argument on appeal, to fashion for plaintiff an ordinary negligence claim that is not only different from that alleged and argued, but that seemingly is not tied to any consideration of plaintiff's underlying condition. In doing so, the majority crafts a claim that is inconsistent with the plaintiff's own allegations and argument.³

But simply put, even apart from the majority's expansion of plaintiff's claim beyond that stated in the complaint and beyond that presented on appeal, an evaluation of whether defendant was negligent in supposedly placing plaintiff "in an unstable chair located on a wet floor" depends – even in plaintiff's own estimation – on an assessment of defendant's conduct *given plaintiff's known medical condition*.

The majority implicitly acknowledges this fact, stating: "McIver's care providers were aware of vulnerabilities that exposed her to an imminent risk of harm. Despite their knowledge that McIver suffered from debilitation and dementia and had a history of falls, hospital personnel allegedly left her unattended on a chair situated on a wet floor." *Ante* at __. Therefore, even while ostensibly separating out an ordinary negligence claim as independently actionable (of any medical malpractice), the majority recognizes (without acknowledging the necessary consequence) that the ordinary negligence claim remains inextricably tied to an assessment of plaintiff's underlying medical condition.

Given that it admittedly was the very "vulnerabilities" and "history" deriving from plaintiff's medical condition that gave rise to the alleged "risk of harm" to plaintiff, the evaluation of plaintiff's negligence claim, in my opinion, necessarily raises "questions of medical judgment requiring expert testimony," *Bryant*, 471 Mich at 423, and therefore sounds exclusively in medical malpractice. The majority, in fact, agrees that "nursing assessments and the selection of fall precautions require professional judgments. Whether or not a sitter's services are necessary also constitutes a professional judgment." *Ante* at __.⁴

³ The majority also errs, in my view, in re-casting the focus of plaintiff's claim on issues (an unalleged "unsafe chair" and a supposed "wet floor") that are nowhere referenced within the Question Presented on this appeal, and that thus should not even be considered. An appellant must identify the issues in her brief in the statement of questions presented. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Ordinarily, we will not consider an issue that is not properly set forth in the statement of questions presented. *City of Lansing v Hartsuff*, 213 Mich App 338, 352; 539 NW2d 781 (1995). In this case, it may have been appropriate for plaintiff not to have set forth these issues in the Question Presented, because plaintiff did not argue these issues on appeal. What is inappropriate is for the majority to have recast plaintiff's claim not only beyond plaintiff's complaint and argument on appeal, but beyond the question that plaintiff chose to frame for appeal.

⁴ The record reflects that defendant's staff was aware of plaintiff's diagnosis of multiple sclerosis and that plaintiff was at risk of fainting, unresponsiveness, seizures, and respiratory failure. During plaintiff's hospitalization, defendant's physicians regularly evaluated plaintiff. The

The concurrence nonetheless posits that medical judgment would not be required to assess McIver's need for a sitter, if her debilitating condition was "apparent" or "observable" to her care providers. *Ante* at ___. But such a *non-medical* judgment (whether made by medical or non-medical personnel) necessarily would call into question defendant's prior *medical* judgment that McIver no longer needed a sitter. Moreover, the concurrence simultaneously argues both that McIver's medical condition was "irrelevant" to her claim, *ante* at ___, and that it is a "necessary component" that will "inform the jury's determination." *Ante* at ___. The concurrence (and the majority) simply cannot have it both ways. Since plaintiff's claim depends upon an assessment of whether defendant took appropriate precautions *in light of* plaintiff's underlying medical condition, there can be no independently actionable "ordinary negligence" claim; rather, plaintiff's claim sounds only in medical malpractice.

Bryant does not compel a different conclusion. In *Bryant*, 471 Mich at 429, our Supreme Court held that the claim that the defendant nursing home "failed to recognize that [the plaintiff's] bedding arrangements posed a risk of asphyxiation" sounded in medical malpractice.⁵ The Court noted that the "restraining mechanisms appropriate for a given patient depend upon that patient's medical history." *Id.* Consequently, "[i]n order to determine . . . whether defendant has been negligent in assessing the risk posed by [the patient's] bedding arrangement, the fact-finder must rely on expert testimony." *Id.* at 429-30.

physicians initially ordered that defendant be restrained by a lap belt and have a person sitting by her bedside (a sitter). An Acute Safety Restraint Order was issued to this effect on March 16, 2008; several such orders were issued during plaintiff's hospitalization, indicating that the continued need for such procedures was continually evaluated by defendant's staff. Ultimately, plaintiff's sitter was discontinued by her treating physician, in an order dated March 23, 2008. Charles W. Thomas, a registered nurse and employee of defendant, stated by affidavit that nurses use their professional medical judgment to provide each patient with a safe environment, to periodically perform assessments of patients, including "fall risk assessments," and put in place those methodologies that, based on experience will provide a safe environment for the patients. These measures may include, as they did with plaintiff, "physical restraints" and "safety sitters." Over the course of plaintiff's hospital stay, her condition was continually assessed by medical staff using their professional education, training, and experience. Upon continued assessments of plaintiff, those interventions were "continued, modified and ultimately discontinued." Whether those decisions were, in retrospect, correct is not relevant to this analysis. What is unmistakable, however, is that the propriety of the decision to discontinue those measures, in light of the medical professionals' assessment of plaintiff's then-existing risk of falling, necessarily "raises questions of medical judgment." In deciding whether the decision was wrong, a jury would therefore need expert testimony as to the appropriate medical standard of care. *Bryant*, 471 Mich at 423, 425.

⁵ The Court in *Bryant* also rejected the plaintiff's claim that the defendant had "fail[ed] to assure that plaintiff's decedent was provided with an accident-free environment." 471 Mich at 425. As the Court found, such a claim "is an assertion of strict liability that is not cognizable in either ordinary negligence or medical malpractice." *Id.* (emphasis in original). In my view, the majority's view comes dangerously close to imposing a regime of "strict liability."

Similarly here, and as plaintiff herself (and even the majority) recognizes, the question of whether defendant was negligent in its ongoing assessments of plaintiff's risk of falling, and in imposing, continuing, modifying, and ultimately discontinuing the safety mechanisms that it deemed appropriate in light of plaintiff's then-existing condition, is inextricably tied to its knowledge of her underlying medical condition. Answering that question therefore requires an evaluation of the medical judgment that formed the basis for those decisions, in light of that underlying condition and the progress of plaintiff's condition over the course of her hospital stay, and thus requires expert testimony. Plaintiff's claim accordingly sounds exclusively in medical malpractice.

The majority endeavors, unsuccessfully in my view, to squeeze plaintiff's claim (as re-articulated by the majority) into a narrow exception recognized in *Bryant*. Specifically, the plaintiff's decedent in *Bryant* had been found "tangled in her bedding and dangerously close to asphyxiating herself in the bed rails." *Id.* at 430. The plaintiff alleged that the defendant was negligent in failing to take any corrective action after learning of a hazard creating a known risk of imminent harm. The Court characterized this claim as "fundamentally unlike" the plaintiff's other claims, holding that "[n]o expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard." *Id.* at 430-431 (emphasis in original).⁶

Here, by contrast, there was no "learning of [any] hazard," no known risk of imminent harm, and no failure to take any corrective action. To the contrary, knowing of plaintiff's underlying medical condition, defendant continually evaluated plaintiff's condition, and adjusted its safety measures based on medical judgment. Unlike in the narrow exception of *Bryant*, plaintiff here is asking this Court to evaluate the propriety of the *extent* of the safety measures taken, and the wisdom of discontinuing the safety sitter, not the complete *lack* of action taken by defendant in the face of a known risk. To determine whether those judgments were proper, the jury would require expert testimony. Under these circumstances, therefore, plaintiff's claim sounds in medical malpractice.⁷

⁶ The concurrence asserts that I have "misread" and "distort[ed]" *Bryant*, and "disregard[ed] elementary tort principles." *Ante* at __, __. To the contrary, I believe that the concurrence would re-write *Bryant*'s narrow exception into one that would swallow the rule. The concurrence's related citation to *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011) is inapposite. *Loweke* did not, as the concurrence suggests, address whether "only one variety of negligence is actionable." *Ante* at __. Nor, for that matter, have I; I have merely applied *Bryant*. *Loweke* instead distinguished between contract obligations and tort duties to non-contracting parties in the performance of a contract, something that is not at issue here.

⁷ The hypothetical posed in *Bryant* similarly presumes that the defendant's employees had discovered a patient's risk of drowning, and that "[t]he nurse, then, does *nothing at all* to rectify the problem, and the resident drowns while taking a bath the next day." *Id.* at 430. The Court stated that "no expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem" when the hypothetical plaintiff

This case is more akin to *Sturgis Bank and Trust Co v Hillsdale Community Health Center*, 268 Mich App 484, 489; 708 NW2d 453 (2005). In *Sturgis*, the plaintiff’s conservatee fell from her hospital bed, and plaintiff alleged that defendant’s nurses were negligent in failing to prevent her fall, permitting her to rise unassisted, failing to protect her from falling, and failing to take correctives measures when they knew of her risk of falling. *Id.* at 487. This Court held that “[m]edical judgment is implicated in determining whether safeguards against a fall should have been implemented and in determining the extent of those safeguards.”

As in the instant case, the issues in *Sturgis* involved the various factors taken into consideration when assessing a patient’s risk of falling and determining which safety precautions to use when faced with such a patient. *Id.* This Court stated:

While, at first glance, one might believe that medical judgment beyond the realm of common knowledge and experience is not necessary when considering [the plaintiff’s conservatee’s] troubled physical and mental state, the question becomes entangled in issues concerning . . . medications, the nature and seriousness of the closed-head injury, the degree of disorientation, and the various methods at a nurse’s disposal in confronting a situation where a patient is at risk of falling. The deposition testimony indicates that there are numerous ways in which to address the risk . . . all of which entail some degree of nursing or medical knowledge. . . . *In sum, we find that, although some matters within the ordinary negligence count might arguably be within the knowledge of the layperson, medical judgment beyond the realm of common knowledge and experience would ultimately serve a role in resolving the allegations contained in this complaint. Accordingly, we find that the trial court did not err in dismissing the ordinary negligence claim. [Id. (emphasis added).]*

As noted above, the majority facially agrees with *Sturgis*, and holds that “the affidavit filed by defendant similarly supports that nursing assessments and the selection of fall precautions require professional judgments. Whether or not a sitter’s services are necessary also constitutes a professional judgment.” *Ante* at ___. But the majority then inexplicably departs from *Sturgis*, and reaches an inconsistent conclusion. I find this case to be indistinguishable from *Sturgis*, and would follow it. Accordingly, I would affirm the trial court’s dismissal of plaintiff’s claim for ordinary negligence in its entirety.

Finally, in allowing plaintiff’s claim to go forward as an “ordinary negligence” claim, but ostensibly affirming the circuit court’s dismissal of plaintiff’s unidentified aspects of plaintiff’s negligence claim (as sounding in medical malpractice), the majority offers the following as somehow limiting of plaintiff’s claim at trial:

alleges that the defendant negligently “allowed the decedent to take a bath under conditions known to be hazardous.” *Id.* Here, again, there is nothing remotely akin to those circumstances in the record before us.

Thus, McIver is limited to proving that she fell in the manner set forth in the complaint, and that defendant's personnel unreasonably allowed her to remain unattended after seating her in an unstable chair located on a wet floor. [*Ante* at ___.]

As noted, however, plaintiff's complaint inextricably ties the alleged negligence to consideration of plaintiff's underlying medical condition. Consequently, limiting plaintiff to proving "that she fell in the manner set forth in the complaint" is no limitation at all. It essentially allows a medical malpractice claim to proceed under the guise of "ordinary negligence." To paraphrase an old adage, it "giveth back what the law hath taken away." Further, by re-characterizing plaintiff's claim, and the proofs to be shown at trial, as demonstrating that "defendant's personnel unreasonably allowed her to remain unattended after seating her in an unstable chair located on a wet floor," the majority actually expands plaintiff's claim beyond that which was asserted in plaintiff's own complaint.

Had the majority instead limited plaintiff to proving negligence without any reference at trial to her underlying medical condition, or to its effects or plaintiff's resultant propensities, then it is conceivably appropriate that an ordinary negligence claim might proceed without raising questions of medical judgment that require expert testimony. However, the majority's opinion does not so limit the proofs at trial.

Accordingly, I would affirm the circuit court's dismissal of plaintiff's claim in its entirety, and to the extent that the majority does not do so, I respectfully dissent.

/s/ Mark T. Boonstra