STATE OF MICHIGAN

COURT OF APPEALS

LEONORA MCIVER, Plaintiff-Appellant,	UNPUBLISHED October 2, 2012
v	No. 303090 Oakland Circuit Court
ST. JOHN MACOMB OAKLAND HOSPITAL, Defendant-Appellee.	LC No. 2010-111263-NO

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

PER CURIAM.

Plaintiff Leonora McIver fell while hospitalized at defendant St. John Macomb Oakland Hospital and was injured. She brought an action against the hospital asserting negligence and breach of contract claims. The circuit court granted summary disposition to defendant, finding that McIver's allegations sounded in professional rather than ordinary negligence. The circuit court ruled that because McIver failed to follow the notice and pleading requirements applicable in medical malpractice actions, her complaint failed to toll the applicable statute of limitations, which had expired.[1] We affirm the circuit court's dismissal of McIver's breach of contract claim and those portions of her negligence claim sounding in professional malpractice, reverse the dismissal of the single ordinary negligence claim set forth in the complaint, and remand for further proceedings.

I. BACKGROUND

Leonora McIver suffers from multiple sclerosis and dementia. On March 13, 2008, she lost consciousness at her physician's office and was admitted to defendant hospital. According to hospital records, McIver displayed episodic confusion and unsteadiness on her feet. To reduce her risk of falling, her physicians signed "acute safety restraint" orders. Nursing notes for March 18 through March 23 describe that, despite the presence of restraints, McIver repeatedly

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[1] The circuit court also summarily dismissed McIver's breach of contract claim. McIver does not challenge that ruling on appeal and therefore has abandoned it. *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009).

attempted to get out of bed unassisted. A nurse characterized a "lap belt" restraint as "not effective" at keeping McIver in her bed.

On March 19, a nurse noted that McIver "continues with intermittent confusion; impulsive when confused; unsteady gait." At 5:00 p.m. that day, a nurse charted that McIver "attempted to get out of bed more than 15 [times] this shift." On March 20, a nurse documented: "[patient] still with episodic impulsive behaviors, at risk [for] falls [secondary to] weakness, MS." Another note written that day states, "Patient still takes mittens [and] lapbelt out [sic] several times. Gets out of bed [and] asking for assistance." On March 21 and 22, a "sitter" was posted at McIver's bedside pursuant to a physician's written order. A nurse noted that, in addition to the sitter, "fall/safety precautions [were] maintained."

On March 23, a physician discontinued the sitter's services. According to a nursing note, the sitter departed at approximately 10:30 a.m. The entry states in its entirety: "Sitter [discontinued]. [Patient] up to [bathroom]. Instructed [patient] to call for assist to get [out of bed]." 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.

McIver's complaint sets forth the following pertinent allegations:

> 9. Defendant assigned an employee to act as a "sitter", a non-medical task of being present to assist Plaintiff in any normal daily activities while at the hospital.
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> 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.
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> 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.
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> 12. Plaintiff started to sit down when the chair flipped over throwing Plaintiff to the floor.
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> * * *
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> 16. Defendant owed Plaintiff certain general and specific duties, including, but not limited to:
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> A) Duty to exercise reasonable and ordinary care for the Plaintiff's safety as the Plaintiff's known condition required;
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> B) Duty to maintain premises in a reasonably safe manner;
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> C) Duty to warn of unsafe conditions, including wet floors;
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> 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.

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23. Defendant failed, refused and neglected to provide adequate, safe, and proper care and facilities in 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.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), contending that McIver's allegations sounded in medical malpractice rather than ordinary negligence. In support of its motion, defendant submitted an affidavit signed by a registered nurse averring that decisions concerning restraint precautions, the need for sitters and the content of fall risk evaluations entail professional judgments outside the realm of common knowledge and experience. However, defendant submitted no evidence describing the circumstances of McIver's fall, or challenging McIver's contention that she fell after having been seated in an unsafe chair placed on a wet floor. The circuit court granted defendant's motion in a bench ruling, finding that "medical judgment comes into play in [sic] concerning how the plaintiff was assessed, treated, and provided a safe environment."

II. ANALYSIS

McIver disputes the circuit court's determination that her claims sound in professional rather than ordinary negligence. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Whether a claim sounds in ordinary negligence or medical malpractice presents a question of law subject to de novo review pursuant to MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). "In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Id.*

At the summary disposition hearing, defendant's counsel argued:

And finally, Mr. Halpern has thrown into his Complaint – I'm not sure what the basis for this is, kind of a throwaway allegation about a wet floor, and a – something about a chair slipping. I do – we deposed the plaintiff. She has no memory of anything that happened that day. We've deposed her husband. Nothing in either deposition brought up any issue at all about a wet floor, any

> issue at all about an improper chair. And I have to think that these are just red herrings.[2]

Despite counsel's belief that the chair allegation constituted a "red herring," defendant produced no evidence contradicting the facts set forth in the complaint. Neither McIver's deposition testimony nor her husband's appear in the circuit court record. In the absence of any documentary evidence challenging the facts alleged in the complaint, we must accept them as true. *Bryant*, 471 Mich at 419.

Defense counsel's disclaimer of the chair allegation does not qualify as substantively admissible evidence, and does not suffice to place in dispute the manner of McIver's fall. In *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), the Supreme Court emphasized that while "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material," a party "may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence," as long as "the substance or content of the supporting proofs [is] admissible in evidence." Defendant's failure to challenge with substantively admissible evidence the specific allegations describing McIver's fall require us to regard those allegations as true. *Id.*

In *Bryant*, 471 Mich at 422, the Supreme Court set forth the two "defining characteristics" of a medical malpractice clam:

> First, medical malpractice can occur only "'within the course of a professional relationship.'" [*Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999) (citation omitted)]. Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id*. at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id*. Therefore, 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

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[2] The dissent contends that by recognizing in McIver's complaint an allegation that she fell from a chair that slipped on a wet floor we have "craft[ed] for plaintiff a claim that is not even alleged in her complaint." *Post* at 4. We respectfully submit that we have read the complaint to mean precisely what it says, as did defense counsel. Specifically, paragraph 23 states that "Defendant failed, refused and neglected to provide adequate, safe, and proper care and facilities in 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." Moreover, we have accepted the complaint's factual allegations as true and have construed them in the light most favorable to McIver, as we must do under MCR 2.116(C)(7). *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). Indisputably, the complaint alleges that McIver "was thrown from a chair" placed on a wet floor, and that defendant owed a duty to "furnish hospital room[s] with safe and approved furniture, including chairs with non-slip contact surfaces with the floor[.]" Whether McIver can support her claim related to the chair remains to be tested in a properly-supported summary disposition motion.

> 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.

The parties agree that McIver's claims arose within the course of a professional relationship. Regarding *Bryant*'s second prong, McIver asserts that because her history of falling was well-known and "there is nothing whatsoever sophisticated, complicated or technical, or . . . medically or scientifically-based" about her case, she alleged only ordinary negligence.

Bryant's second inquiry directs us to examine "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 lay jurors are capable of drawing upon common knowledge and experience to evaluate whether a healthcare professional acted reasonably, the claim is for ordinary negligence. "If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Id.*

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.

The facts presented in *Bryant* and in the hypothetical case described in *Bryant* guide our analysis. Catherine Hunt, the plaintiff in *Bryant*, suffered from multi-infarct dementia and diabetes, had suffered several strokes, and required twenty-four-hour-a-day nursing home care for all her needs. *Bryant*, 471 Mich at 415. Hunt's physician authorized the staff of the nursing home to employ "various physical restraints" including wedges or bumper pads preventing the plaintiff from "entangling herself in . . . the rails" of her bed. *Id.* at 415-416. On the day before the event giving rise to Hunt's claim, nursing assistants observed that Hunt "was lying in her bed very close to the bed rails and was tangled in her restraining vest, gown, and bed sheets." *Id.* at 416. They untangled her and informed their supervisor that the wedges authorized by Hunt's physician afforded inadequate protection. *Id.* "The next day, . . . Hunt slipped between the rails of her bed and was in large part out of the bed with the lower half of her body on the floor but her head and neck under the bed side rail and her neck wedged in the gap between the rail and the mattress, thus preventing her from breathing." *Id.* at 417. Hunt died due to positional asphyxia. *Id.*

Hunt's complaint alleged that defendant "[n]egligently and recklessly fail[ed] to take steps to protect [her] when she was, in fact, discovered . . . entangled between the bed rails and

the mattress." *Id.* at 418. The Supreme Court determined that this claim sounded in ordinary negligence:

> No 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. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges. [*Id.* at 430-431(emphasis in original).]

After setting forth this analysis, the Supreme Court proposed that the following hypothetical facts also implicate ordinary rather than professional negligence:

> Suppose, for example, that two CENAs [Certified Evaluated Nursing Assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day. [*Id.* at 431].

The Supreme Court explained, "No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying on common knowledge and experience can readily determine whether the defendant's response was sufficient." *Id.* at 431.

In *Bryant* and the hypothetical case described by the *Bryant* majority, the patients presented readily-identifiable risks of specific injury. Both scenarios involve hospital personnel who became aware of the patients' vulnerabilities to injury and either disregarded the risks or neglected to address them. In both factual settings, the allegedly deficient care involved non-medical, routine decision-making. The circumstances in both cases required common-sense actions: notifying a physician of the need for more effective bed restraints, and maintaining hands-on supervision of a bathing patient.

Accepting as true the allegations in McIver's complaint, the immediate circumstances alleged to have attended McIver's fall bear important similarities to those described in *Bryant.* As in *Bryant* and *Bryant*'s hypothetical scenario, 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. This decision clearly was not a *professional* one; rather, it involved an ordinary action in surroundings that a layperson can readily understand. If proven, these facts require no expert explanation because lay jurors can evaluate the reasonableness of the allegedly negligent acts by employing their common knowledge and experience.

On the other hand, the remaining allegations in McIver's complaint state professional negligence claims, and the circuit court properly dismissed them. "[M]edical judgment is

implicated in determining whether safeguards against a fall should have been implemented and in determining the extent of those safeguards . . . ." *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 489; 708 NW2d 453 (2005). In *Sturgis*, this Court relied on deposition testimony from "various nurses" explaining that "a nursing background and nursing experience are at least somewhat necessary to render a risk assessment and to make a determination regarding which safety or monitoring precautions to utilize when faced with a patient who is at risk of falling." *Id.* at 498. Here, 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. 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.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly