STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of IRENE WILCZYNSKI.

ROSEMARIE HUNT, Personal Representative for the Estate of IRENE WILCZYNSKI,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL, KURT W. FILIPS, ARFANA A. KISHAN, MARKUS K. TAUSCHER, and KENT R. DONOVAN,

Defendants-Appellees.

UNPUBLISHED
August 21, 2012

No. 303150
Oakland Circuit Court
LC No. 2009-105075-NH

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting defendants' motion to strike plaintiff's ordinary negligence and medical malpractice claims against William Beaumont Hospital and denying plaintiff's motion to preclude expert witness testimony.[1] For the following reasons, we affirm in part, reverse in part, and remand.

Plaintiff, the personal representative of the estate of the deceased, sued defendants in relevant part on the grounds that an unlicensed radiology technician administered contrast dye during a CT scan of the deceased, which was not authorized by the doctors or the deceased. The deceased visited Beaumont Hospital on February 28, 2006, because she experienced shortness of breath and chest pains. Although she allegedly refused any test other than an x-ray, the doctors ordered a CT scan because the x-ray revealed a potential aneurism in the deceased's chest. While the doctor's order did not specify whether contrast dye was to be administered to the deceased, Barbara Ratliff, the radiology technician, administered the CT scan with contrast dye.

[1] *Estate of Irene Wilczynski v William Beaumont Hosp*, unpublished order of the Court of Appeals issued April 29, 2011 (Docket No. 303150).

Although the test did not reveal an aneurism, the deceased suffered acute renal failure after being administered the dye, which caused her to suffer until she passed away in 2007.

Plaintiff pleaded both ordinary negligence and, in the alternative, medical malpractice claims against the hospital. To substantiate plaintiff's medical malpractice claim, plaintiff included a sworn affidavit of merit with her complaint from Alfio Banegas, who attested to the standard of care owed by radiology technicians while administering CT scans. Plaintiff further placed Banegas on her witness list, although the witness list was filed after the deadline established in the scheduling order. Although plaintiff, through emails to defendants, stated that her claim against the hospital did not sound in medical malpractice such that expert testimony was unnecessary, at no time did plaintiff specifically withdraw this witness or explicitly abandon the medical malpractice claim against the hospital.

After several adjournments in the scheduling order, the trial court set the following deadlines: (1) lay and expert witnesses, as well as exhibits, needed to be disclosed by September 30, 2010; (2) the dispositive motion and in limine motion cutoff date was November 24, 2010; and (3) discovery was set to end on December 16, 2010, after the case evaluation. The court also adjourned the trial date from January 17, 2011, to April 4, 2011. It appears the only discovery order imposed by the trial court required plaintiff to produce a recording device prior to the deposition of defendants' fact witness, Dr. Wilkinson. Wilkinson's deposition was not completed until February 2, 2011, and plaintiff did not make Banegas available for deposition until February 8, 2011. Neither of these actions occurred until well after discovery had closed.

In lieu of deposing Banegas, defendants filed a motion to strike "plaintiff's radiology technician claims" against defendants. In the motion, defendants asserted that plaintiff could not prevail in her radiology technician claims because: (1) the claims sound in medical malpractice not ordinary negligence because the technician in question had a professional relationship with the deceased and the technician's actions utilized medical judgment; and (2) plaintiff waived her medical malpractice claims by failing to produce her expert witness "after repeated requests" for deposition prior to the close of discovery. Defendants reasoned that, because it would be grossly prejudicial to defendants if Banegas were allowed to testify, the medical malpractice claim needed to be dismissed because plaintiff could not meet her burden of proof without expert testimony regarding the applicable standard of care. Plaintiff responded by arguing that defendant's motion was dispositive in nature and was therefore untimely filed and improperly presented, and that plaintiff had pleaded medical malpractice in the alternative and made her expert witness available for deposition. Plaintiff reasoned that the discovery error was entirely defendants' fault because they failed to file a motion requesting production of the witness. Further, plaintiff claimed that her expert witness could not complete his opinion because defendants failed to produce Wilkinson until February 1, 2011, which was also after the close of discovery. Regardless, plaintiff maintained her primary theory that the action sounded in ordinary negligence by filing a motion to preclude expert witness testimony regarding the applicable standard of care owed by Ratliff to the deceased. The trial court granted defendants' motion and dismissed all of plaintiff's claims against the hospital that were based on the actions of the radiology technician.

On appeal, plaintiff first argues that the trial court erred by dismissing her ordinary negligence claim against the hospital because her claim did not sound in medical malpractice.

We disagree. The trial court's determination regarding the proper classification of a claim as ordinary negligence or medical malpractice is reviewed de novo. *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 419; 684 NW2d 864 (2004).

"The fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." *Bryant*, 471 Mich at 421 (emphasis in original). MCL 600.5838a expanded the common-law list of entities (physicians and surgeons) subject to medical malpractice actions. *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008). MCL 600.5838a provides in relevant part:

> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health care facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . .

In *Bryant*, the Court established a two-part test to determine whether MCL 600.5838a rendered the defendant exclusively subject to a medical malpractice action. 471 Mich at 420-422. First, a person is only subject to medical malpractice when their conduct occurred "within the course of a professional relationship." *Id.* at 422 (citation and quotation omitted). If the person is employed by a licensed health care facility that was under a duty to render professional health care services to their patients, then a professional relationship exists between the employee and the patient. *Id.* at 425. Second, a medical malpractice claim must "necessarily raise questions involving medical judgment." *Id.* at 422 (citation and quotation omitted). Questions involving medical judgment are those that "raise issues that are [beyond] the common knowledge and experience of the jury" and that require the use of expert witness testimony. *Id.* at 423, 425 (citation and quotation marks omitted). In order to establish that plaintiff's claim sounds in medical malpractice rather than ordinary negligence, both of these elements must be satisfied. If a claim sounds in medical malpractice, the claim is subject to "the standards of proof and procedural requirements of a medical malpractice claim." *Id.* at 423-424.

Here, Ratliff clearly had a professional relationship with the deceased. It is undisputed that the hospital is a licensed health care facility that was required to render professional health care services to the deceased. Further, there is no dispute that Ratliff was an employee of the hospital. Plaintiff relies on *Kuznar* to argue that Ratliff lacks a professional relationship with the deceased because Ratliff was not a licensed health care professional as defined by MCL 600.5838a(1)(b). However, plaintiff's reliance on *Kuznar* is misplaced. The *Kuznar* Court specifically found that an unlicensed pharmacy employee did not qualify as a licensed health care professional, and the Court only reached that analysis because the pharmacy was not a licensed health care facility. 481 Mich at 178-179. Here, because the hospital clearly qualifies as a licensed health care facility as defined by MCL 600.5838a(1)(a) and MCL 333.20106(g), Ratliff had a professional relationship with the deceased as an employee of a licensed health care facility. The fact that she did not independently qualify as a licensed health care professional is

irrelevant. *Lockwood v Mobile Med Response, Inc*, 293 Mich App 17, 24 n 1; 809 NW2d 403 (2011).

Regarding the second portion of the test, case law addresses the circumstances when medical judgment is involved. In *Bryant*, the Court found that medical judgment was not at issue when medical staff failed to untangle the deceased and prevent her suffocation when they were aware of the danger and yet failed to rectify the problem. 471 Mich at 430-431. In *David v Sternberg*, 272 Mich App 377, 384; 726 NW2d 89 (2006), this Court concluded that a failure to act invokes medical judgment when it is pursuant to medical analysis, diagnosis or treatment. In *Lockwood*, 293 Mich App at 24-25, this Court noted that an emergency medical technician's response time invokes medical judgment where the EMT's decisions were subject to guidelines that were not within the understanding of a lay juror absent expert testimony.

In the present case, the parties failed to submit the entirety of Ratliff's deposition into evidence. Therefore, the record is unclear as to: (1) Ratliff's precise job responsibilities to the deceased, and (2) Ratliff's specific conduct that she performed before and during the CT scan. In light of the evidence of record, we conclude that Ratliff's conduct did invoke medical judgment. The *Bryant* Court stated that the person's conduct must *necessarily* invoke medical judgment. 471 Mich at 422. In other words, the conduct invoking medical judgment must be performed within the scope of the person's job responsibilities. In this case, Ratliff conducted the CT scan with the contrast dye, which was within the scope of her duties as a radiology technician. Because the CT order from defendant Filips did not state whether contrast dye should have been used, Ratliff necessarily made the decision to administer the dye. This decision was based on factors and knowledge outside the realm of the lay juror, and an expert witness would be required in order to explain why she chose to do so. Since this decision invoked medical judgment, plaintiff's action clearly sounds in medical malpractice. Accordingly, the trial court properly dismissed plaintiff's ordinary negligence claim.

Plaintiff argues that the trial court abused its discretion by dismissing plaintiff's expert witness as a discovery sanction, thereby disposing of her medical malpractice claim. We agree. Although defendants framed their position as a motion to strike the claim, the actual decision was twofold. First, the court implicitly dismissed plaintiff's expert witness as a discovery sanction. This Court reviews for an abuse of discretion the trial court's decisions regarding sanctions for discovery violations. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Second, the trial court dismissed plaintiff's claim for lack of evidence to support the medical malpractice claim, and such decisions are made pursuant to MCR 2.116(I)(1). This Court reviews such decisions de novo, and the relevant inquiry is whether: (1) defendants were entitled to judgment as a matter of law; and (2) no dispute over any genuine issue of material fact remains. *Kenefick v City of Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009).

To prevail in a medical malpractice action, a plaintiff must establish the following elements: (1) the applicable standard of care; (2) the defendant's breach of the standard of care; (3) injuries; and (4) that the breach proximately caused the injuries. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). Generally, an expert witness is required in order to establish

the applicable standard of care. *Id*. Without Banegas's testimony regarding the standard of care applicable to Ratliff, plaintiff's claim cannot succeed. Therefore, resolution of this matter ultimately depends on whether the trial court's decision to strike Banegas as an expert was an abuse of discretion.

MCR 2.313(B)(2) provides that if a party fails to obey an order to provide or permit discovery, the court may order such sanctions as are just. A trial court may exclude evidence or witnesses as a sanction for discovery violations. *Dorman v Twp of Clinton*, 269 Mich App 638, 655; 714 NW2d 350 (2006); MCR 2.313(B)(2)(b). In determining whether this sanction is the appropriate action under the circumstances, the court should consider the following factors: (1) whether the violation was accidental or willful in nature; (2) the party's history of noncompliance with discovery requests; (3) any prejudice to the opposing party; (4) any actual notice to the opposing party of the witness; and (5) timely attempts to cure the defect. *Dorman* at 655-656. However, if a party desires to depose a witness, it is their responsibility to issue a notice and, if necessary, a subpoena to the witness. MCR 2.305(A); MCR 2.306(B); See *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). Among other items, the notice must state the time and place for taking the deposition. MCR 2.306(B)(1)(a). A court may impose discovery sanctions against a party for failing to timely reveal the identity of a witness in a timely fashion. *Dorman*, 269 Mich App at 655.

Based on the facts submitted at trial and the legal support above, we hold that the trial court's decision fell outside the range of principled outcomes and thus was an abuse of discretion. Every single factor weighed against imposing any discovery sanction against plaintiff. Plaintiff did not commit any violation because it was defendants' responsibility to pursue Banegas's deposition. While the emails indicated that defendants had requested Banegas's deposition generally, there is no indication in the record that defendants filed a notice of deposition or subpoena to depose Banegas that would comply with the requirements of MCR 2.306. If plaintiff did not make Banegas available for deposition, defendants should have filed a motion to compel discovery. However, the facts presented to the trial court did not demonstrate that plaintiff interfered with discovery or refused to make Banegas available; plaintiff simply maintained that her witness may not have been necessary because she believed the claim sounded in ordinary negligence. Plaintiff nevertheless placed Banegas on her witness list, indicating that she may call him at trial and proceed under her alternative theory of liability. Accordingly, defendants had clear notice of Banegas's identity and could have sought to depose him. As such, any prejudice suffered by defendants was of their own doing.[2] This is notwithstanding the fact that defendants similarly failed to fully depose all their fact witnesses until long after the scheduling deadline had lapsed.[3] Plaintiff also had no history of failing to

[2] The trial court also could have cured any prejudice to defendants by adjourning the trial date.

[3] Plaintiff argues that Banegas could not complete his expert opinion until after all of defendants' fact witnesses were deposed. This Court has acknowledged that expert witnesses need substantial time - more than 21 days- after all the relevant evidence has been made available to form a sound medical opinion. *Tyler v Field*, 185 Mich App 386, 393; 460 NW2d 337 (1990).

comply with discovery orders; although the court ordered plaintiff to disclose a recording, it appears that plaintiff complied with this request.[4]

This case is similar to the facts presented in *Put v FKI Industries, Inc*, 222 Mich App 565, 571-572; 564 NW2d 184 (1997). In *Put*, this Court found that a trial court did not abuse its discretion in refusing to grant the defendant's motion to strike the plaintiff's expert witnesses because: (1) the defendant was aware of the identity, addresses, and proposed testimony of the plaintiff's expert witnesses; and (2) the defendant did not attempt to depose the witnesses until after discovery had closed and the timing was "on the cusp of trial." *Id.* Admittedly, *Put* involved the trial court denying, rather than granting, a motion to strike witnesses, and defendants here did informally ask for the deposition prior to the close of discovery. Nevertheless, defendants' own failures with discovery further highlight the inappropriateness of the trial court's chosen sanction that it imposed on plaintiff.

Defendants also contend on appeal that plaintiff waived their medical malpractice claim by pursuing the claim under a theory of ordinary negligence. However, MCR 2.111(A)(2) permits a party to plead opposing facts or claims in the alternative, regardless of their consistency. *Belle Isle Grill Corp*, 256 Mich App at 471. In fact, the *Bryant* Court encouraged possible plaintiffs to proceed with claims against medical service entities under both a theory of ordinary negligence and medical malpractice. *Bryant*, 471 Mich at 432-433. Regardless, defendants offer no legal support for their position that plaintiff "waived" a claim by aggressively pursuing one claim while maintaining and presenting only minimal factual support for the alternative claim, in the event the trial court issued an adverse ruling.[5] In penalizing plaintiff for maintaining alternative legal theories, the trial court: (1) unfairly deprived plaintiff of a permissible legal strategy; and (2) effectively penalized plaintiff and rewarded defendants for defendants' own failure to aggressively pursue discovery. Such a decision is not within the range of principled outcomes.

Because we find that the trial court erred in striking plaintiff's expert witness, we need not resolve plaintiff's remaining issue on appeal.

However, plaintiff did not submit Wilkinson's deposition to the record and has not otherwise shown how his deposition would have been relevant to this particular claim against the hospital.

[4] Defendants did not deny this below or on appeal.

[5] "It is not enough for [a party] in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood