STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE JOHNSON, as Personal Representative of the Estate of RICK ALAN JOHNSON, deceased,

Plaintiff-Appellant/Cross-Appellee,

v

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee/Cross-Appellant,

and

G. SCOTT JENNINGS, IV, D.O., and SCOTT JENNINGS, IV, D.O., P.C.,

Defendants.

FOR PUBLICATION
March 11, 2008
9:00 a.m.

No. 272129
Oakland Circuit Court
LC No. 2004-055682-NH

Advance Sheets Version

Before: Zahra, P.J., and White and O'Connell, JJ.

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

I agree that the circuit court properly dismissed ¶ 21(o), (p), (q), and (u) of plaintiff's amended complaint. I conclude that ¶ 21(n) was improperly dismissed, and in that regard dissent.

Plaintiff's complaint and amended complaint alleged medical malpractice against former codefendants Dr. G. Scott Jennings, IV, and his professional corporation, as well as vicarious liability and active negligence against Botsford General Hospital. After plaintiff's vicarious-liability claims were dismissed by stipulation, but while Dr. Jennings remained a party defendant, the hospital (hereafter defendant) filed various motions for summary disposition. Plaintiff challenges the dismissal of the following allegations:

> 21. That, Defendants, and each of them, by and through their duly authorized agents, servants and/or employees in disregard of their duties and obligations owed to Plaintiff . . . and to Plaintiff's decedent . . . and at variance with the prevailing standards, were guilty of negligence and malpractice in the following particulars:

* * *

n. Negligently and improperly discharging Plaintiff's decedent from Defendant hospital on November 3, 2002,[1] all of which could and should have been avoided;

o. Negligent and improper action on the part of Defendant hospital's administration, employees, agents, and/or servants by intervening in Plaintiff's decedent's clinical care by discharging him from Defendant hospital for insurance, financial reasons, all of which could and should have been avoided;

p. Corporate negligence and malpractice on the part of Defendant hospital, through their [sic] administration, employees, agents and/or servants, for intervening in the decision to discharge Plaintiff's decedent on November 3, 2002, all of which could and should have been avoided;

q. Failing and neglecting to offer Plaintiff's decedent the option to remain hospitalized during the admission at Defendant hospital on November 3, 2002 and to personally pay the medical/hospital expenses, all of which could and should have been accomplished;

* * *

u. Negligent and improper misrepresentation by Defendants that Plaintiff's decedent's hospital and medical expenses would not be covered by medical insurance[.]

The allegations in ¶ 21(o), (p), (q), and (u) were dismissed on defendant's *first* motion for summary disposition. With regard to these allegations, defendant correctly argues that plaintiff failed to raise the argument that these claims sounded in ordinary negligence in response to defendant's first motion, at the hearing on the motion, or at the hearing on defendant's motion for clarification. I thus agree that these allegations were properly dismissed.

Plaintiff also challenges the dismissal of ¶ 21(n), which occurred on defendant's *second* motion for summary disposition. Defendant's first motion for summary disposition did not seek dismissal of ¶ 21(n).

Defendant brought its second motion under MCR 2.116(C)(4), (7), (8), and (10). The circuit court dismissed ¶ 21(n), noting:

This is an action for medical malpractice. The plaintiff's theory is that the defendants were negligent in coercing the plaintiff's decedent into accepting a discharge from the hospital when he had a life threatening condition. At oral

[1] Plaintiff later clarified that the decedent's discharge occurred on November 4, 2002.

argument on these motions, the parties disclosed that the defendant doctor and his corporation have settled. That settlement has since been placed on the record. The plaintiff indicated that the remaining claim was a claim against the hospital for ordinary negligence relating to its discharge procedures.

This Court has ruled previously and stated repeatedly that there is only one claim remaining in this case, a claim for medical malpractice for discharging the decedent when he had a life threatening condition. The Court agrees with the defendants that the decision to discharge a patient is a medical decision, and that negligence relating to that decision must be brought as a medical malpractice claim. If a claim for ordinary negligence ever was pled against the hospital, it did not survive the prior motion for summary disposition, which limited the claims to the claim for malpractice set forth in paragraph 21(n) of the complaint.

Accordingly, given the settlement with the doctor and the plaintiff's admissions as to the nature of the claim it [sic] is seeking to pursue against the hospital, this case is dismissed. There are no claims remaining to be decided in light of these developments and the Court's prior rulings.

The court did not specify under which subrule it dismissed ¶ 21(n), but its opinion makes clear that the principal basis was its conclusion that plaintiff's claim sounded in medical malpractice, not ordinary negligence. The court also concluded that plaintiff failed to plead ordinary negligence, and that, even if plaintiff had pleaded ordinary negligence, such a claim would not have survived defendant's first motion for summary disposition.

In deciding a motion under MCR 2.116(C)(8) a court considers the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. "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.'" *Maiden, supra* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

I disagree with the circuit court's conclusion that plaintiff failed to plead ordinary negligence. Plaintiff's ¶ 21 expressly states that defendants were negligent *and* committed malpractice. A plaintiff is permitted to plead in the alternative. MCR 2.111(A)(2),[2] see, e.g., *H*

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[2] MCR 2.111(A)(2) provides, in pertinent part:

Inconsistent claims or defenses are not objectionable. A party may

* * *

(b) state as many separate claims . . . as the party has, regardless of consistency and whether they are based on legal or equitable grounds or on both.

J Tucker & Assoc, Inc v Allied Chucker & Engineering Co, 234 Mich App 550, 573; 595 NW2d 176 (1999) (a plaintiff is entitled to bring alternative counts of breach of contract and implied contract). Further, as our Supreme Court noted in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2000), "[t]he distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris* [*v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999)]."

I conclude that viewing the pleadings alone, the circuit court read ¶ 21(n) too narrowly. Paragraph 21(n) asserts the claim that the decedent's discharge from the hospital was a consequence of ordinary negligence as much as it asserts a claim that this discharge resulted from medical malpractice.

The circuit court also concluded that even if plaintiff had pleaded ordinary negligence in ¶ 21(n), such a claim did not survive defendant's first motion for summary disposition. I disagree. Defendant's initial motion for summary disposition and the circuit court's ruling thereon were premised on defendant's argument that plaintiff had not set forth her allegations in the notice of intent to bring the action (NOI). The NOI requirement is specific to medical-malpractice claims, and has no application to ordinary negligence. See MCL 600.2912b.[3] Further, as already noted, the initial motion did not seek dismissal of ¶ 21(n) on any basis. Thus, I see no basis for the circuit court's conclusion that assuming that plaintiff pleaded ordinary negligence in ¶ 21(n), that claim did not survive defendant's initial motion for summary disposition.

The majority accepts defendant's argument that plaintiff waived the argument of ordinary negligence by failing to raise it in response to defendant's first motion for summary disposition, and states that plaintiff "stipulated" that this was a medical-malpractice case. Neither argument has merit with regard to ¶ 21(n), in my opinion. Defendant's first motion for summary disposition and brief in support of the motion referred to plaintiff's claims as negligence, corporate negligence, and malpractice claims. Defendant entitled its first motion "Motion for Partial Summary Disposition as to Plaintiff's Claims of Negligence/Malpractice for Failure to Give Proper Presuit Notice and Failure to File a Supporting Affidavit of Merit Brief in Support of Motion" and argued that "Plaintiff alleges active claims of negligence/malpractice" against defendant, that "[t]his motion seeks to dismiss any claims of active negligence and/or malpractice against Botsford General Hospital," and that "[i]n paragraph 21 of Plaintiff's amended complaint, Plaintiff alleges corporate negligence . . . ."

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[3] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section , a person shall not commence *an action alleging medical malpractice* against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis added.]

Further, plaintiff's brief in response to defendant's first motion argued, in pertinent part:

> Plaintiff concedes that the only claim Plaintiff is presently pursuing against Defendant Hospital is one premised on Defendant's failure to take steps to allow Plaintiff's decedent to remain hospitalized when the surgery scheduled to be performed at the hospital was postponed. . . .
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> * * *
>
> Plaintiff's claim against Defendant Hospital boils down to the *administrative failure* to ascertain the true state of the insurance coverage available to Plaintiff's decedent, which resulted in the decision to discharge decedent being compromised by misinformation concerning this ability to meet the financial burdens of extending his hospitalization. . . . Dr. Jennings made the decision to discharge the patient laboring under a mistaken belief that had he ordered his patient to remain hospitalized to deal with the low platelets, there would have been no insurance coverage and it would have cost decedent "thousands of dollars" each day he was in the hospital.
>
> As shown above, decedent and his family made specific inquiries as to why decedent had to be discharged from the hospital and were led to believe that decedent's insurance would not cover an extended stay and that it would be futile to ask the insurance company to approve a continuing stay. But the person whose responsibility it was at the hospital to actually check into these matter[s] on behalf of the patient, Nurse Van Camp, contented herself with denying to the family that there would be coverage while negligently failing to actually check into the matter. . . . Had she checked, she would have found that there was coverage if Dr. Jennings wanted to keep decedent where he was, and the outcome could have been different. She did not check. [Emphasis added.]

Plaintiff's response brief's description of the claim as a claim of administrative failure based on the failure of Joanne Van Camp, R.N., to ascertain whether there was coverage available for the decedent to remain in the hospital may be read as a claim of ordinary negligence. Plaintiff's counsel also argued at the hearing on defendant's motion that this was a claim of ordinary negligence. I thus conclude that plaintiff did not waive the issue whether ¶ 21(n) sounded in ordinary negligence.

Remaining is the circuit court's conclusion that ¶ 21(n) sounded in medical malpractice, and that because plaintiff did not have a nursing expert to testify, the claim was properly dismissed. "In determining whether the nature of a claim is ordinary negligence or medical malpractice . . . a court does so under MCR 2.116(C)(7)." *Bryant*, *supra* at 419. On a motion brought under MCR 2.116(C)(7), all well-pleaded allegations are accepted as true, unless specifically contradicted by affidavits or other documentary evidence, and construed most favorably to the nonmovant. *Bryant*, *supra* at 419, see also *Maiden*, *supra* at 119, citing *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994).

Bryant, cited by both parties, sets forth the test to determine whether a claim sounds in ordinary negligence or medical malpractice. The plaintiff's decedent in *Bryant* died of positional

asphyxiation while a patient at the defendant licensed health-care facility. *Bryant, supra* at 414. The *Bryant* Court discussed the plaintiff's complaint and the two-pronged test for determining whether claims sound in medical malpractice or ordinary negligence:

> We now turn to the complaint in the present case. Plaintiff alleges that defendant is liable for: (1) negligently failing to assure that plaintiff's decedent was provided with an accident-free environment; (2) negligently failing to inspect the bed, bed frame, and mattress to assure the plaintiff's decedent was not at risk of suffocation; (3) negligently failing to properly train its CENAs [Certified Evaluated Nursing Assistants] regarding the risk to decedent of positional asphyxiation posed by the bed rails; and (4) negligently failing to take steps to protect decedent from further harm or injury after discovering her entangled between her bed rail and mattress on March 1. We address the application of *Dorris* to each of these claims below.
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> A. PROFESSIONAL RELATIONSHIP
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> The first question in determining whether . . . claims sound in ordinary negligence or medical malpractice is whether there was a professional relationship between the allegedly negligent party and the injured party. This analysis is fairly straightforward and, in this case, is identical for each of plaintiff's claims. Because defendant, Oakpointe Villa Nursing Centre, Inc., a licensed health care facility, was under a contractual duty requiring both it and its employees to render professional health care services to plaintiff's decedent, a professional relationship existed to support a claim for medical malpractice.
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> B. MEDICAL JUDGMENT VS. LAY KNOWLEDGE
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> The second question is whether the acts of negligence alleged "raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." [*Id.* at 424-425, citing *Dorris, supra* at 46.]

"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 (emphasis added).

The *Bryant* Court concluded that one of the plaintiff's claims—that the defendant negligently and recklessly failed to take steps to protect the plaintiff's decedent when she was discovered entangled between the bed rails and the mattress the day before she was asphyxiated—sounded in ordinary negligence, noting:

> We turn, finally, to a claim fundamentally unlike those discussed previously. Plaintiff alleges that defendant "[n]egligently and recklessly fail[ed] to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress."

> This claim refers to an incident on March 1, 1997—the day before Ms. Hunt was asphyxiated—when two of defendant's CENAs [Certified Evaluated Nursing Assistants] found Ms. Hunt tangled in her bedding and dangerously close to asphyxiating herself in the bed rails. According to the CENAs, they moved Ms. Hunt away from the rail and informed their supervising nurses that Ms. Hunt was at risk of asphyxiation.
>
> Plaintiff now contends, therefore, that defendant had notice of the risk of asphyxiation through the knowledge of its agents and, despite this knowledge of the problem, *defendant did nothing to rectify it*. It bears repeating that plaintiff's allegation in this claim is not that defendant took inappropriate steps in dealing with the patient's compulsive sliding problem or that defendant's agents were negligent in creating the hazard in the first place. Instead, plaintiff claims that defendant knew of the hazard that led to her death and did nothing about it.
>
> This claim sounds 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.
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> * * *
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> . . . Professional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff's allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant's agents noticed that Ms. Hunt was in peril. Thus, plaintiff has stated a claim of ordinary negligence under the standards articulated in *Dorris.* [*Id.* at 430-432 (emphasis in original).]

There is no dispute that a professional relationship existed to support a claim for medical malpractice. *Id.* at 425.

Regarding the second prong of the test discussed in *Bryant*—"whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience," *Bryant, supra* at 422, plaintiff contends that common knowledge and experience inform that it is careless to misguide patients concerning their insurance coverage. Plaintiff notes that her claim focuses on the decision to discharge the decedent to go home rather than keep him in the hospital to build up his platelet count in order to reschedule the aortic aneurysm surgery as soon as his platelet count was satisfactory. Plaintiff contends that the decision to discharge the decedent was improperly influenced by economic considerations, specifically by representations made by Joanne Van Camp, R.N., defendant's employee.

Regarding the events preceding the decedent's leaving the hospital, the majority engages in extensive fact-finding, which, in my opinion, is inappropriate given that this is an appeal challenging a summary disposition determination. The majority additionally engages in an

extensive discussion of the issues of duty and proximate cause, in the context of that fact-finding, although the issues presented by both parties focused only on the questions whether the claim at issue sounds in ordinary negligence or malpractice and whether plaintiff adequately supported her claim with a qualified expert.

I conclude that a jury could evaluate without assistance the question whether hospital personnel called on to inform a patient regarding insurance coverage, under the circumstances presented in this case, should convey only verified information. A jury could also evaluate without assistance whether the decision to discharge the decedent was influenced by Van Camp's saying to the decedent and his family, among other things, that "[t]hey [the insurance company] are going to say to us, we aren't going to pay for this," and "[w]e [Botsford Hospital] are going to be lucky if we can get today covered because nothing was done." Plaintiff's claim is that Van Camp's errant advice regarding insurance coverage influenced Dr. Jennings's decision to discharge. I conclude that a jury could evaluate that question without expert testimony and, thus, that the circuit court improperly dismissed ¶ 21(n) as sounding in medical malpractice.

I would reverse the dismissal of ¶ 21(n) and remand for further proceedings.

/s/ Helene N. White