STATE OF MICHIGAN

COURT OF APPEALS

MARY E. PERKINS and THOMAS W. PERKINS,

Plaintiffs-Appellants,

v

COUNTY OF TUSCOLA, TUSCOLA COUNTY MEDICAL EXAMINER, TUSCOLA COUNTY BOARD OF COMMISSIONERS, HERBERT L. NIGG, M.D., RONALD G. HINES, M.D. and SAGINAW COMMUNITY HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
September 3, 1996

No. 174477
LC No. 91-043756-NZ

Before: Gribbs, P.J., and Hoekstra and C. H. Stark,* JJ.

PER CURIAM.

Plaintiffs appeal the circuit court order granting summary disposition to defendants County of Tuscola, Tuscola County Medical Examiner, and Herbert L. Nigg, M.D., and from the directed verdict in favor of defendant Ronald G. Hines, M.D. We affirm.

The trial court did not err in deciding as undisputed fact that Tuscola County had a policy requiring consent of the next of kin before corneas could be removed at autopsies by the medical examiner. There was deposition testimony that the county medical examiner, defendant Dr. Nigg, had a policy of requiring consent prior to tissue removal. Plaintiffs presented nothing to the contrary which would raise a question of fact, and presented no evidence showing a widespread or common pattern of abuse. The nonmovant in a motion for summary disposition may not rest upon allegations or denials in the pleadings. The trial court properly applied a different standard when deciding the MCR 2.116(C)(10) motion than when deciding a motion under MCR 2.116(C)(8), where the court must take all well pleaded allegations as true. We find no error.

Plaintiffs also contend that the trial court erred in holding, as a matter of law, that defendant Dr. Hines was not a policy maker. We do not agree. The allegation that Dr. Hines made a discretionary

* Circuit judge, sitting on the Court of Appeals by assignment.

decision is not enough to make him a policy maker. *St Louis v Praprotnik*, 495 US 112; 108 S Ct 915; 99 L Ed 2d 107, 122 (1988). Plaintiffs made no showing that defendants Tuscola County or Dr. Nigg either delegated authority or acquiesced in the nonconsensual harvesting of tissue.

Plaintiffs argue that the trial court improperly granted summary disposition as to defendant Saginaw Community Hospital. Plaintiffs argued that the hospital had a duty to supervise more closely the operation of the morgue. However, there was no evidence of any illegal tissue harvesting by Dr. Hines or Dr. Herrara prior to the allegations in this case, and no evidence that they were not competent and well qualified physicians. There is no evidence that the hospital had any knowledge of illegal activity, particularly when, at the time of this incident, the removal of corneas was permitted by statute when there was no objection by next of kin. We find no error.

Plaintiffs raise two interrelated issues concerning their claim under 42 USC 1983. These issues, which are dependent on one another, are not preserved for appeal because plaintiffs fail to cite any pertinent authority to support them. *Sargent v Browning-Ferris Industries*, 167 Mich App 29, 32-33; 421 NW2d 563 (1988). The cases cited by plaintiffs in their brief and supplemental briefs are inapposite. The trial court in this case specifically concluded, for purposes of the motion, that plaintiffs had a property right in their deceased child's body. In any case, there is no merit to plaintiff's claim. Because the statute allows the medical examiner to delegate function only to a deputy medical examiner, and not to a pathologist, the trial court correctly concluded that defendant Dr. Hines was not a de facto medical examiner. MCL 52.201c; MSA 5.953(1c). As a pathologist, defendant Dr. Hines had the discretion to retain decedent's body parts for further investigation, and there was evidence that organs are often retained in case of future inquiry, especially in the case of infants. The trial court did not err in holding that defendant Dr. Hines was acting in a discretionary capacity and was entitled to qualified immunity.

Plaintiffs also argue that the trial court improperly refused to instruct the jury on a statutory duty. We disagree. There was no basis to apply the statutory duties of a medical examiner to the pathologist who performed the autopsy, and whom the trial court had determined was neither the ipso facto nor the de facto medical examiner. The jury was properly instructed on plaintiffs' claims of mutilation of a body and professional malpractice. We find no abuse of discretion.

Nor did the trial court abuse its discretion by denying plaintiffs' motion for leave to file an amended complaint to add allegations of gross negligence. Plaintiffs' complaint in this case sounded in negligence. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Amendment would have been futile.

Affirmed.

/s/ Roman S. Gribbs
/s/ Joel P. Hoekstra
/s/ Charles H. Stark