

STATE OF MICHIGAN
COURT OF APPEALS

SENNA CARTER,

Plaintiff-Appellant,

v

HUTZEL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

August 26, 1997

No. 195529

Wayne Circuit Court

LC No. 94-408789-NH

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff brought this action against defendant for alleged medical malpractice resulting in a miscarriage while under defendant's care. We affirm in part and reverse in part.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition pursuant to MCR 2.116(C)(8) valid. . . . MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

A medical malpractice claim requires proof of the following factors: (1) the applicable standard of care; (2) a breach of that standard of care by the defendant, (3) an injury; and (4) proximate causation between the alleged breach and the injury. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Here, plaintiff alleged a standard of care and a breach of that standard of care in paragraph eighteen of her complaint. In paragraphs nineteen through twenty-one, she alleges that defendant's breach of the standard of care resulted in various injuries including the death of her child (§ 19), bodily injuries, shock, emotional damage and inability to perform services and attend to usual affairs (§ 20) and loss of consortium of the child (§ 21). Although not alleged in her complaint, in response to defendant's motion for summary disposition plaintiff also claimed that she was entitled to "bystander recovery" for witnessing the miscarriage. Plaintiff appears to have adequately alleged the elements of a medical malpractice action to survive a summary disposition motion under MCR 2.116(C)(8). However, some of the injuries she alleges are not cognizable in Michigan.

Initially, we note that the present action is a medical malpractice action by plaintiff, not a wrongful death action on behalf of the unborn child. At the hearing on the motion for summary disposition, plaintiff's counsel conceded that the child was neither born alive nor viable at the time the alleged negligence occurred and that the present action was not a wrongful death action. The wrongful death act does not create a cause of action for a nonviable fetus not born alive. *Fryover v Forbes*, 433 Mich 878; 446 NW2d 292 (1989); *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 192; 405 NW2d 88 (1987). "[T]he wrongful death act stands as the exclusive remedy for injuries resulting in death, MCL 600.2922(1); MSA 27A.2922(1)." *Endykiewicz v State Highway Comm*, 414 Mich 377, 387; 324 NW2d 755 (1982). Thus, in this medical malpractice action, plaintiff may not recover for the injuries to the unborn child that resulted in its death.

However, distinguishing plaintiff's compensable injuries arising out of the alleged malpractice from alleged injuries that are not compensable in a medical malpractice action is easier in theory than in practice. In *Tunncliffe v Railway Co*, 102 Mich 624, 629-630; 61 NW 11 (1894), the plaintiff suffered injuries including a miscarriage while alighting from a train that suddenly moved. The *Tunncliffe* Court indicated that a miscarriage caused by another person's negligence constitutes an injury to the mother recoverable in tort but carefully differentiated between cognizable damages (for the plaintiff's physical pain and mental suffering) and noncognizable damages (for the plaintiff's sorrow and grieving for the loss of the child). *Id.* The Court stated that a determination of damages involves:

[T]o some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for the sorrow and grieving of the mother. [*Id.*]

When an expectant mother brings an action for negligence resulting in a miscarriage, *Tunncliffe* indicates that the physical and emotional damages generally available in negligence actions apply, and recognizes that a miscarriage is likely to result in greater damages than, for example, a fractured limb.

But *Tunncliffe* explicitly states that damages may not include compensation for the mother's grief.¹ Further, a mother pursuing a medical malpractice claim for a miscarriage may not recover for the injuries resulting in the unborn child's death (because the wrongful death act is the exclusive remedy for injuries resulting in death, as discussed above) nor for loss of consortium of the unborn child (as discussed below). On one hand, a woman who alleges that medical malpractice caused the miscarriage of her nonviable fetus may not use a medical malpractice action as a guise to recover damages for which the wrongful death act is the exclusive remedy. However, on the other hand, where a plaintiff proves the elements of a medical malpractice claim, she should not be denied the types of damages normally cognizable in a medical malpractice action because the injuries resulting from the malpractice included the miscarriage of a nonviable fetus. It is difficult to differentiate compensable emotional damages from the types of damages that are unavailable in an action alleging that medical malpractice resulted in a miscarriage. In determining the admissibility of evidence and instructing the jury, the trial court must take great care to focus exclusively on direct injuries to the plaintiff resulting from the alleged malpractice.

Here, the injuries alleged in ¶ 20 of plaintiff's complaint appear to be injuries to plaintiff herself resulting from the alleged malpractice and therefore cognizable damages in a medical malpractice action. However, the injury alleged in ¶ 19 --that plaintiff's baby died-- appears to involve the injuries leading to the unborn child's death and an attempt to recover compensation for plaintiff's grief over the child's death, rather than injuries to plaintiff resulting from the alleged malpractice. Thus, summary disposition regarding the injury alleged in ¶ 19 was appropriate because it seeks damages only recoverable in a wrongful death action.

Plaintiff's claim for loss of consortium of her unborn child (¶ 21 of her complaint) fails as a matter of law. In *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988), the Michigan Supreme Court refused to expand a loss of consortium claim to the parents of a fifteen-year-old girl who was injured as a result of the defendant's negligence. The Court held that "the common law of this state does not recognize a parent's action for loss of a child's society and companionship and that any decision to further extend a negligent tortfeasor's liability for consortium damages should be determined by the Legislature." *Id.* at 285. A fortiori, plaintiff cannot maintain a loss of consortium claim for the loss of the society and companionship of her unborn child. Therefore, summary disposition regarding the injuries alleged in ¶ 21 of plaintiff's complaint was appropriate.

Plaintiff's bystander recovery claim also fails as a matter of law. She primarily relies on *Wargelin v Mercy Health Corp*, 149 Mich App 75; 385 NW2d 732 (1986), as establishing such a cause of action. In *Wargelin*, the mother was rushed to the hospital because her contractions were seven minutes apart. When the mother was placed in the labor room, a fetal monitor was placed on her abdomen. The mother became alarmed and alerted the nurse when the fetal heart rate became irregular. She was assured that everything was normal and taken to the delivery room where an intern delivered the baby. The intern, however, not realizing that the baby was stillborn, placed the baby on the mother's stomach. Then, a doctor began resuscitative efforts which continued for fifteen minutes to no avail, during which time he twice requested a pediatrician but was informed that none was available. The parents in *Wargelin* proceeded on the theory that they witnessed the negligent infliction of injury to

their child and suffered emotional distress as a consequence. The *Wargelin* Court reiterated the four elements of bystander recovery at 81:

(1) "the injury threatened or inflicted on the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff"; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock "fairly contemporaneous" with the accident. [Citing *Gustafson v Faris*, 67 Mich App 363, 368-369; 241 NW2d 208 (1976).]

The *Wargelin* Court found the series of negligent act and events in the particular case before it sufficient to submit this theory of recovery to the jury, but stated at 86:

However, we caution against a broad reading of this holding and reiterate that each case must be examined on its own facts. We do not hold that parents may maintain an action for bystander recovery in every instance where they witness the stillbirth of their child and negligence is alleged as a causative factor. However, we believe that plaintiffs have set forth allegations describing a series of events which, when viewed as a whole, would be likely to cause mental disturbance more extensive than the grief or trauma any parent might experience at witnessing the stillbirth of their child.

In *Wargelin*, the stillborn child must have been viable because the action at issue was both a wrongful death action on behalf of the child and an action by the parents individually. Here, as stated above, the unborn child was not viable at the time of the miscarriage. Thus, plaintiff is unable to meet the first element of a bystander recovery claim --serious injury threatened or inflicted on "the third person." We also note that plaintiff, unlike the father in *Wargelin*, was personally involved in the alleged malpractice. As discussed above, she is entitled to pursue medical malpractice damages on her own behalf and there is no need for her to resort to a bystander theory. Moreover, while a miscarriage is always a tragic event, here there were no exacerbating factors similar to those present in *Wargelin* --e.g., placing the stillborn baby on the mother's stomach, the parents' observation of resuscitative efforts. Accordingly, here the circumstances were not such that they "would be likely to cause mental disturbance more extensive than the grief or trauma any parent might experience at witnessing the stillbirth of their child." *Id.* at 86. Therefore, summary disposition regarding plaintiff's bystander recovery claim was appropriate.

For these reasons, we affirm in part the trial court's grant of summary disposition in favor of defendant regarding the injuries alleged in ¶¶ 19 and 21 of plaintiff's complaint, but otherwise reverse the grant of summary disposition in favor of defendant and remand for further proceedings consistent with this opinion. Our reversal of the grant of summary disposition is based on the pleadings, i.e., is pursuant to MCR 2.116(C)(8), not (C)(10). We note that in its motion for summary disposition, defendant summarily alleged that plaintiff suffered no physical injuries but provided no supporting documentary evidence. Thus, summary disposition pursuant to MCR 2.116(C)(10) was inappropriate

under MCR 2.116(G)(3). On remand, defendant may, of course, move for summary disposition under MCR 2.116(C)(10) if it can provide documentary evidence that demonstrates that plaintiff suffered no injuries from defendant's alleged malpractice.²

Affirmed in part, reversed in part.

/s/ Stephen J. Markman

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

¹ We are not unaware of the extreme difficulty of reconciling the Supreme Court's recognition of "intense" mental suffering damages resulting from a miscarriage with its preclusion of damages to compensate for the mother's grief over the death of her child. Nevertheless, the Supreme Court has drawn this fine line and we are bound to give reasonable effect to its direction.

² If, in fact, plaintiff suffered no physical injuries, a difficult question, not presently before us, would be raised: whether an expectant mother may recover for mental suffering allegedly caused by medical malpractice resulting in a miscarriage in the absence of physical injuries.