STATE OF MICHIGAN

COURT OF APPEALS

GARY JOSEPH HIGGINS,

Plaintiff-Appellee,

v

HUTZEL HOSPITAL,

Defendant-Appellant,

and

DR. R. KRAMER,

Defendant.

UNPUBLISHED
December 12, 2000

No. 212469
Wayne Circuit Court
LC No. 98-800851-NH

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying in part its motion for summary disposition of plaintiff's claims for negligent and intentional infliction of emotional distress. We affirm.

In 1996, plaintiff and his wife learned that the fetus she was carrying had a serious heart defect. Plaintiff's wife testified that she was told that the fetus had a zero to five percent chance of survival. Plaintiff's wife then decided to terminate the pregnancy; plaintiff supported her decision. The termination procedure was scheduled for April 25, 1996, at defendant Hutzel Hospital (hereinafter Hutzel). The procedure involved the injection of potassium chloride into the heart of the fetus through a needle inserted through the mother's abdomen. The procedure was performed by defendant Ralph L. Kramer, M.D.

Plaintiff decided that he would be present during the procedure in order to lend emotional support to his wife. Plaintiff alleges, and his wife confirms, that before the procedure began, Dr. Kramer informed them that he was "shorthanded" and might need plaintiff's assistance. Both plaintiff and his wife testified that at the time they thought the doctor was joking. Nonetheless, plaintiff testified that before entering the room where the procedure was done, he told the doctor

that he did not want to participate. Although Dr. Kramer testified that he had no independent recollection of this particular procedure, he insists that he would never have made these remarks.

Plaintiff also testified that he asked Dr. Kramer how much potassium chloride would be needed, as well as "how much would it take to hurt him or me." According to plaintiff, Dr. Kramer responded five cc's and 25 to 30 cc's, respectively.

According to plaintiff, Dr. Kramer had some difficulty during the procedure. After the first injection failed to cease fetal cardiac activity, plaintiff claims that Dr. Kramer asked him to get a second bottle of potassium chloride from a shelf. Plaintiff says he complied, and alleges he was instructed by the doctor to hold the bottle while the doctor filled a syringe. According to plaintiff, when the second attempt also failed, Dr. Kramer then asked him to go down the hallway and get a "resident" and ask for more potassium chloride. Plaintiff testified he did as he was asked, returning with an unidentified female, who, when asked by Dr. Kramer to draw some potassium chloride, replied that she was not sure how to do it. At that point, plaintiff testified he told the doctor that he would do it. Plaintiff alleges that Dr. Kramer then told plaintiff to get another syringe and load it with potassium chloride. Plaintiff testified that the following events then took place:

> First I tried to hand him the needle and he says, "No. Take off the end of the syringe," which I did, and then he said for me to screw it on the catheter. I tried to hand it to him. He goes, "No. Screw it on the catheter," and I did and then I went to sit down and he goes, "No. You're going to have to inject it." And I looked at him and he said, "Now," and then I plunged it for him. He said, "Now" and then he said, "Plunge it," and then I put it in for him.

Plaintiff asserts that fetal heart activity ceased after the third injection.

Plaintiff's wife confirmed that it took three attempts before fetal heart activity ceased. Conversely, Dr. Kramer was insistent that if the first injection were to fail, the procedure is always successful by the second injection. Dr. Kramer did acknowledge that if, hypothetically, the second injection were to fail, he would make a third attempt. Plaintiff's wife also agreed that plaintiff held the vial when the second dose was being drawn, and that the doctor told her husband to get and load another syringe, screw it "onto the hub of the needle," and plunge the syringe.[1] Dr. Kramer was not asked in his deposition whether he did or might have told plaintiff to assist in the ways alleged.

Plaintiff subsequently commenced this action against defendants Hutzel and Dr. Kramer, alleging claims for negligence/medical malpractice, breach of contract, negligent infliction of emotional distress, and intentional infliction of emotional distress.[2] Dr. Kramer was

[1] There are, however, some differences between plaintiff's and his wife's accounts. For example, she testified that a needle, not a catheter was used. She also indicated that plaintiff left the room to get another vial before the second injection, and that Dr. Kramer told plaintiff to get the vial from a "secretary."

[2] Plaintiff's wife did not join in the lawsuit.

subsequently dismissed upon the stipulation of the parties. Plaintiff alleges that the shock of the emotional distress he suffered as a result of being told by Dr. Kramer to assist in the abortion procedure, has caused numerous physical injuries, including dizziness, ringing in the ears, chest pain, shakes, sweats, insomnia, major depressive disorder and panic disorder.

The trial court granted defendant's motion for summary disposition of the negligence/medical malpractice and breach of contract claims, but denied defendant's motion for summary disposition of the negligent and intentional infliction of emotional distress claims. This Court granted leave to appeal to consider the partial denial of defendant's motion for summary disposition.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. 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 damages 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. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Hutzel argues that because plaintiff cannot establish that Dr. Kramer owed plaintiff any duty of care, the trial court erred in denying its motion for summary disposition on plaintiff's negligent infliction claim. We disagree. Hutzel's argument is premised on the assertion that regardless of how it is characterized, plaintiff's claim must necessarily be a medical malpractice claim. Because no physician-patient relationship existed between Dr. Kramer and plaintiff, Hutzel asserts that plaintiff cannot establish the requisite duty.

While issues of medical malpractice permeate this case, Hutzel incorrectly assumes that breach of physician-patient relationship is the only basis on which a claim can be brought in circumstances like those present in the case at hand. An actor can owe a duty of care to various individuals in any given circumstance. In negligence cases, the concept of "duty" refers to "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Prosser & Keeton, Torts (5^{th} ed), § 53, p 356. "Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 14; 506 NW2d 231 (1993).

When the circumstances involve a physician acting in his official capacity, the law recognizes that more than one relationship can exist, thus giving rise to more than one duty of care. For example, Michigan recognizes a cause of action for negligent infliction of emotional distress where a parent witnesses the negligent medical treatment of a child. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75; 385 NW2d 732 (1986). Such a cause of action is based on the notion that given the foreseeability of the harm, even those outside the so-called "zone of danger" can maintain a cause of action for the emotional distress and attendant physical

consequences caused by witnessing the negligent infliction of injury upon an immediate family member. *Toms v McConnell*, 45 Mich App 647, 654; 207 NW2d 140 (1973).

In this case, plaintiff's cause of action is not premised on any duty of care owed to his wife. Rather, plaintiff is arguing that Dr. Kramer violated a duty of care owed to plaintiff when the doctor negligently involved plaintiff in the procedure to terminate his wife's pregnancy. Plaintiff argues that Dr. Kramer, and thus Hutzel, had a duty not to subject plaintiff to the emotional trauma associated with being an integral part of the procedure. See 2 Restatement Torts, 2d, § 313, p 113. We believe that not only does Michigan recognize such a cause of action, but, viewing the evidence presented in the appropriate light, we agree with the trial court that under these circumstances, plaintiff has established the duty element of his cause of action.

We also see no error in the denial of Hutzel's motion for summary disposition on plaintiff's intentional infliction of emotional distress claim. Looking at the evidence in a light most favorable to plaintiff, we conclude that reasonable persons could find both that Dr. Kramer acted recklessly, and that the doctor's conduct was extreme and outrageous. See *Haverbush v Powelson*, 217 Mich App 228, 234-235; 551 NW2d 206 (1996).

Finally, we reject Hutzel's assertion that no question of fact exists regarding whether plaintiff knowingly and voluntarily assumed the risks associated with becoming an instrument of the procedure. Again looking at the evidence in a light most favorable to plaintiff, we believe that reasonable persons could conclude both that plaintiff did not appreciate the risks created by Dr. Kramer's negligence, and that he did not freely accept those risks. *Id.*, §§ 496 A, 496 C, 496 D, and 496 E. Plaintiff testified that he initially told Dr. Kramer he did not want to assist in the procedure. Confronted with the repeated failure of the procedure, the apparent lack of competent assistance, the reasonable belief that at some point the amount of potassium chloride injected could put his wife at risk, as well as the tendency for patients and their family to submit to the authority of a physician (especially in emotionally charged circumstances), we believe reasonable persons could conclude that plaintiff felt compelled to do as he was told.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald