STATE OF MICHIGAN

COURT OF APPEALS

MARGARETT KRUGER, as Personal Representative of the Estate of KATHERINE KRUGER, deceased,

Plaintiff-Appellant,

v

G. SCOTT JENNINGS, M.D.,

Defendant-Appellee.

UNPUBLISHED
April 19, 2002

No. 227480
Oakland Circuit Court
LC No. 99-017354-NO

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm in part and reverse in part.

I. Facts and Procedural History

Plaintiff filed a complaint on September 7, 1999, alleging medical malpractice on the part of defendant. The complaint stated that on June 21, 1997, Katherine Kruger was struck by a vehicle on M-59 in White Lake Township. Katherine displayed serious and obvious injuries at the scene of the accident and was taken to the emergency room for medical attention. At the hospital Katherine was examined by Dr. Eadie and Dr. Shapiro. While Katherine was in the emergency room, Dr. Shapiro called defendant, who was the thoracic surgeon on call, for a consultation. Defendant offered his opinion over the phone but did not come to the hospital. Katherine subsequently bled to death from an undiagnosed and untreated transected aorta. The complaint stated that prompt thoracic surgery upon Katherine's arrival to the hospital could have saved her life.

According to plaintiff, Katherine's death was proximately caused by defendant's negligence. Plaintiff argues that Katherine would not have died if her transected aorta had been properly diagnosed and treated when she arrived. Plaintiff alleges that defendant therefore breached his duty to Katherine. Specifically, plaintiff asserts that to comply with the applicable standard of care defendant should have: (1) asked pertinent questions regarding the severity of the injury; (2) immediately gone to the emergency room when contacted by the hospital; (3) properly and timely diagnosed Katherine's chest injury within thirty minutes or less; (4) properly interpreted the chest x-ray; (5) airlifted her to a trauma center; and (6) performed an emergency

thoracotomy. Dr. William Scott made the same allegations in his Affidavit of Merit attached to plaintiff's complaint. Dr. Scott opined that defendant deviated from the standard of care in his treatment of Katherine.

On November 3, 1999, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Defendant argued that the facts in this case did not support the existence of a physician-patient relationship between defendant and Katherine. Defendant also asserted that plaintiff failed to file an adequate affidavit of merit in compliance with MCL 600.2912d. Specifically, defendant opined that the lack of a physician-patient relationship with Katherine negated the allegations in plaintiff's affidavit and complaint. However, defendant also argued that if the court were to find that a physician-patient relationship existed and find the affidavit sufficient, defendant would prefer a consolidation of this case with the already pending litigation concerning Katherine's death.[1]

On December 1, 1999, plaintiff filed a response to defendant's motion for summary disposition. Plaintiff maintained that she stated a claim upon which relief may be granted. Plaintiff claimed that defendant failed or refused to treat Katherine and that defendant failed to properly advise the treating physicians with the appropriate treatment course. The parties agreed that defendant was the on-call physician on the night of Katherine's injuries. Plaintiff, however, conceded that defendant was telephoned at home from the emergency room sometime between midnight and one in the morning. Plaintiff further conceded that it was during this phone call that defendant offered the emergency physicians advice on whether to insert a chest tube based on the results of Katherine's x-rays.

On December 6, 1999, defendant filed a supplemental brief in support of his motion for summary disposition. In that brief, defendant alleged that he suffered prejudice due to plaintiff's delay in bringing this action. He further asserted that the Doctrine of Laches prohibited plaintiff from maintaining this separate action. Defendant argued that since his dismissal from the other malpractice action in this case, on June 7, 1999, twenty-four key witnesses and experts had been noticed for deposition without defendant's participation. Dr. William C. Scott, plaintiff's affiant in the instant case, was among the key witnesses deposed. As a result of plaintiff's lack of due diligence and failure to file a conforming affidavit, defendant argued that the Doctrine of Laches should apply.

Thereafter, on January 25, 2000, defendant filed a second supplemental brief in support of his motion for summary disposition. This brief considered testimony that had been recently given in the 1998 consolidated case pending on the same matter. According to defendant, Dr. Scott's affidavit of merit against defendant in the instant case had no basis in fact. Defendant claimed that it was undisputed that defendant was not called to consult on Katherine's condition until after the attending physicians had received and reviewed her chest x-rays. According to

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[1] Defendant noted that plaintiff had filed five complaints in this matter as of September 1997 and that defendant was dismissed twice due to plaintiff's failure to provide an adequate affidavit. At the time of plaintiff's instant complaint against defendant, litigation was pending against the hospital, the emergency room physicians, the police department, and several other individuals that were connected with Katherine's accident and ultimate death.

defendant, the record indicated that the x-rays were not taken until 11:43 p.m. and that Katherine began to code[2] at 12:15 a.m. During his deposition, plaintiff's expert testified that once Katherine began to code there was a less than ten percent chance for her survival. Thus, defendant opined that if defendant left for the hospital as soon as he was informed of plaintiff's condition, there was still a less than fifty percent chance of her survival.[3] Because plaintiff's affidavit of merit failed to show that defendant's conduct was "more probably than not" the proximate cause of plaintiff's death, defendant opined that it was inadequate. In the final paragraph of defendant's brief, he noted that the motion was brought pursuant to MCR 2.116(C)(8) and (10).

During the summary disposition hearing, the trial court stated that the motion was brought pursuant to MCR 2.116(C)(8). Applying *Oja v Kin*, 229 Mich App 184; 581 NW2d 739 (1998), the trial court found that a physician-patient relationship existed between defendant and plaintiff. The trial court stated that the facts indicated that defendant participated in the diagnosis of plaintiff's condition, prescribed a course of treatment for her, and owed a duty to the hospital and its staff as the physician on call. However, the trial court also found that plaintiff's affidavit of merit failed to comply with the requirements of MCL 600.2912d. The trial court specifically noted Dr. Scott's deposition testimony concerning the delay in getting the x-rays and the fact that defendant should have been called earlier. Essentially, the trial court found that Dr. Scott's testimony suggested that the breaches in the standard of care were solely related to delays caused by the emergency room physicians. Moreover, the trial court held that plaintiff presented no testimony concerning the allegations that defendant failed to ask pertinent questions concerning the severity of Katherine's situation. The trial court further found that there was no testimony that defendant should have immediately gone to the hospital when he was called that night. For these reasons, the trial court granted defendant's summary disposition motion. The trial court subsequently dismissed plaintiff's motion for reconsideration on the grounds that she merely presented the same issues already ruled upon by the court.

II. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Draprop Corp v City of Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001). Because defendant filed his motion for summary disposition pursuant to MCR 2.116(C)(8), only the pleadings are considered. MCR 2.116(G)(5); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). "Pleadings," as defined by MCR 2.110(A), include a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. In a MCR 2.116(C)(8) motion, this Court accepts as true all the factual allegations and

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[2] The term "code" and "arrest" are used interchangeably throughout the record and in this opinion. The medical record indicates that Katherine became bradycardic (her heart slowed) and that she had a cardiac arrest at 12:15 a.m.

[3] The Michigan Tort Reform Statute, MCL 600.2912a(2) requires that for a plaintiff to recover for a loss of opportunity to survive, that plaintiff must show that the patient's survival was greater that fifty percent.

reasonable inferences supporting the claim. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). "The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

III. Physician-Patient Relationship

Defendant first suggests that plaintiff's malpractice claim must fail because it did not establish that a physician-patient relationship existed between defendant and Katherine Kruger. A claim for medical malpractice requires a patient-physician relationship to establish the physician's duty. *Theisen v Knake*, 236 Mich App 249, 257; 599 NW2d 777 (1999).

Based on the pleadings, we find that a physician-patient relationship existed between Katherine and defendant. According to *Oja, supra* at 191, a physician-patient relationship can exist with an on-call physician that participates in the patient's diagnosis or treatment. In the case at bar, defendant received a call from Dr. Shapiro requesting advice concerning the care of Katherine. As the on-call thoracic surgeon, defendant offered advice to the physicians working with Katherine. In this regard, defendant's actions differ from those of the doctor in *Oja, supra*, because he actively participated in the course of Katherine's treatment. *Id*. at 191-192. As such, we find no error in the trial court's conclusion that a physician-patient relationship existed.

IV. Affidavit of Merit

Plaintiff next argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) because the affidavit of merit specifically provided breaches of the standard of care by defendant. We agree.

Simply considering the complaint and the attached affidavit of merit, as permitted in a MCR 2.116(C)(8) motion, we find that plaintiff adequately presented a cause of action against defendant. Accepting all the factual allegations in the complaint as true, plaintiff could present facts to provide sufficient evidence of medical malpractice. Indeed, defendant was the on-call physician, the physicians that assessed plaintiff's condition called him, and defendant provided advice but never went to the hospital to personally oversee plaintiff's case. Thereafter, plaintiff died of an undiagnosed aortic transection that would have been treatable if timely diagnosed.

We find that the trial court looked beyond the pleadings, and erroneously considered deposition testimony, during the summary disposition hearing that was brought pursuant to MCR 2.116(C)(8). Moreover, we note that while defendant filed this motion pursuant to MCR 2.116(C)(8) there was much discussion in the briefs that went beyond the scope of the pleadings. However, plaintiff must have adequate notice and an opportunity to respond to a MCR

2.116(C)(10) motion.[4] Based solely on the pleadings, we find that plaintiff has presented a cause of action against defendant and filed an adequate affidavit of merit.

V. Laches

Defendant contends that plaintiff's claim should be barred by laches or estoppel. However, while the trial court noted that defendant had access to the depositions taken in the other case, it based its decision on plaintiff's allegedly deficient affidavit. Because the trial court failed to determine the applicability of laches or estoppel the issue is not properly before this Court. *Estes v Idea Engineering & Fabricating, Inc*, 245 Mich App 328, 348; 631 NW2d 89 (2001). This issue may be considered by the trial court on remand. *Id*.

We affirm the trial court's conclusion that a physician-patient relationship existed. However, we reverse the trial court's decision that the complaint and attached affidavit did not adequately state a cause of action, pursuant to MCR 2.116(C)(8).[5] We remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper

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[4] Further, the deposition testimony relied on by defendant was taken in the related case, and did not specifically address the allegations against this defendant.

[5] We note that defendant is free to file a motion, pursuant to MCR 2.116(C)(10).