

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DENISE BRYANT, as Personal Representative of  
the Estate of CATHERINE HUNT, deceased,

Plaintiff-Appellant/Cross-Appellee,

v

OAKPOINTE VILLA NURSING CENTRE, INC.,

Defendant-Appellee/Cross-  
Appellant.

UNPUBLISHED  
May 21, 2002

No. 228972  
Wayne Circuit Court  
LC No. 98-810412-NO

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DENISE BRYANT, as Personal Representative of  
the Estate of CATHERINE HUNT, deceased

Plaintiff-Appellee,

v

OAKPOINTE VILLA NURSING CENTRE, INC.,

Defendant-Appellant.

No. 234992  
Wayne Circuit Court  
LC No. 01-104360-NH

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Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In Docket No. 228972, plaintiff appeals as of right and defendant cross appeals from the trial court's order granting summary disposition in favor of defendant. In Docket No. 234992, defendant appeals by leave granted from the trial court's order denying its motion for summary disposition of plaintiff's subsequent medical malpractice action. We reverse and remand for further proceedings.

This case arises out of the death of plaintiff's decedent, Catherine Hunt, who was a resident at defendant facility, a skilled-nursing facility. Hunt died of asphyxiation when she became wedged between the mattress and bed rails of her bed. Plaintiff originally filed suit in April 1998, and defendant subsequently moved for summary disposition, contending that plaintiff's suit was grounded in medical malpractice and that plaintiff failed to follow the procedures set forth in MCL 600.2912b and MCL 600.2912d. The trial court initially denied

defendant's motion, finding that the action was grounded in ordinary negligence and not medical malpractice. The trial court later recused itself from the case and the matter was reassigned to a new trial judge. Plaintiff then filed an amended complaint and defendant again moved for summary disposition. This time, the trial court granted defendant's motion, finding that plaintiff's claims were grounded in medical malpractice. Plaintiff appeals from this order.

After the motion for summary disposition was entered, plaintiff filed a new complaint alleging medical malpractice. Defendant moved for summary disposition on the ground that the action was barred by the statute of limitations. The trial court denied the motion, determining that the statute of limitations had been tolled. Defendant appeals from this ruling.

Initially, we must determine whether plaintiff's complaint in the first action was grounded in ordinary negligence or medical malpractice. In her first amended complaint filed on July 28, 1999, plaintiff alleged that Catherine Hunt's neck was caught between the bed rail and the mattress of her bed causing her to suffocate and later die of positional asphyxiation. Plaintiff specifically alleged that defendant "[n]egligently and recklessly fail[ed] to assure that plaintiff's decedent was provided with an accident-free environment." Plaintiff further alleged that defendant failed to train the Certified Evaluated Nursing Assistants (CENA), failed to protect decedent when she was found entangled between the bed rail and the mattress, and failed to inspect the bed, bed frame, and mattress to assure that the risk of positional asphyxiation did not exist for decedent. Plaintiff contends that the crux of the complaint is that the bed contained a mattress that was too small, resulting in a sizeable gap between the mattress and bed rail, thus allowing the decedent's head to become caught between the mattress and the bed rail in that gap.

In *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999), our Supreme Court held:

The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment.

As this Court stated in *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652; 438 NW2d 276 (1989), the key to a medical malpractice claim is whether it alleges that the negligence occurred within the course of a professional relationship.

We find that plaintiff's complaint that defendant owed a duty to provide an accident-free environment sounds in ordinary negligence and not medical malpractice. Plaintiff's complaint does not call into question the medical judgment of the nursing home in utilizing bed rails for decedent; it does not allege that an error was made regarding decedent's "medical symptoms" or that defendant failed to adhere to the specified "circumstances under which bed rails [were] . . . to be used." MCL 333.21734. Rather, plaintiff's allegation is that decedent died as a result of improper custodial care. See *Owens v Manor Health Care Corp*, 159 Ill App 3d 684, 688; 512 NE2d 820 (1987) ("Custodial shelter care must be distinguished from medical treatment."). Plaintiff's allegation involving the safety of the environment in which decedent was placed and the acts and omissions of decedent and its employees simply does not impugn the exercise of medical judgment. See *Chafin v Wesely Homes, Inc*, 186 Ga App 403; 367 SE2d 236 (1988)

(observing that if the alleged negligent act or omission of a hospital employee does not require the exercise of expert medical judgment or involve any medical question, then it is not a medical malpractice action).

Moreover, plaintiff's complaint does not allege that the use of the bed rails was inappropriate in this case. Plaintiff's complaint clearly focuses on the fact that the decedent died as a result of becoming caught in the gap between the bed rail and the mattress. While the manner in which decedent was asphyxiated implicates the equipment that made up her bed, the crux of plaintiff's action is no more a question of whether bed rails were medically appropriate than whether the use of a mattress was medically appropriate. Thus, while it is true that "a complainant cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence," *Dorris*, supra at 43, neither should a legitimate negligence action be classified as a malpractice action simply because "it calls into question the conduct of one who happens to be a medical professional." *Candler General Hosp, Inc v McNorrill*, 186 Ga App 107, 110; 354 SE2d 872 (1987).

Additionally, there is no need for expert testimony with regard to plaintiff's allegations. The complaint focuses on whether defendant was negligent for allowing a gap to exist between the mattress and bed rail such that decedent could be strangled in the gap. The safety of the environment alleged in this case is certainly within the common knowledge and experience of a jury and does not require expert medical testimony.

Accordingly, the trial court erred in granting summary disposition in favor of defendant in Docket No. 228972. Plaintiff's complaint sounds in ordinary negligence and not medical malpractice, therefore, the statutory requirements of filing a notice to sue and an affidavit of merit do not apply here.

Because we find that plaintiff's complaint sounds in ordinary negligence and not medical malpractice, we also find that the trial court erred in granting summary disposition to defendant on the basis that vicarious liability was not sufficiently pleaded. Here, plaintiff alleged in the first amended complaint that "defendant Oakpointe Villa, *by and through its employees*, breached the duties set forth." (Emphasis added). This is a sufficient allegation of vicarious liability. See *PM One Ltd v Dep't of Treasury*, 240 Mich App 255, 270; 611 NW2d 318 (2000) (an employer is vicariously liable for the acts of its employees when the employees remain under the employer's direction and control).

To the extent that plaintiff argues that the trial court's grant of summary disposition was not authorized because a predecessor judge had previously denied the motion, we disagree. Under MCR 2.116(E)(3) and (F), a party may file more than one motion for summary disposition as long as it is not filed in bad faith. Here, there is no indication that the motions were filed in bad faith, thus, the successor judge had the authority to render any judgments or orders as necessary.

In Docket No. 234992, defendant raises the issue whether the trial court erred in ruling that the statute of limitations on plaintiff's subsequent medical malpractice action was tolled. This issue is essentially moot in light of our ruling that plaintiff's complaint sounds in ordinary negligence rather than medical malpractice. However, we find that the trial court erred in denying summary disposition because the statute of limitations period was not tolled. *Scarsella*

*v Pollack*, 461 Mich 547; 607 NW2d 711 (2000) (The filing of a complaint in a medical malpractice action without the requisite affidavit of merit is insufficient to commence the lawsuit, but a complaint filed without an affidavit of merit does not toll the period of limitation).

Accordingly, the trial court erred in granting summary disposition in favor of defendant in Docket No. 228972 because we hold that plaintiff's complaint sounds in ordinary negligence and not in medical malpractice; therefore, the statutory requirements of MCL 600.2912b and MCL 600.2912d do not apply. We remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen

/s/ Donald E. Holbrook, Jr.