

STATE OF MICHIGAN
COURT OF APPEALS

MILDRED L. LAWRENCE, Personal
Representative of the Estate of LLOYD C.
GINGER, Deceased,

UNPUBLISHED
June 4, 2002

Petitioner-Appellee,

v

BATTLE CREEK HEALTH SYSTEMS,

No. 224874
Calhoun Circuit Court
LC No. 98-000973-NO

Respondent-Appellant,

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

In this negligence, personal injury action, defendant appeals as of right from a judgment, following a jury trial, awarding Lloyd C. Ginger¹ damages of \$173,658.41, plus interest and costs. We affirm.

After undergoing a bone survey x-ray procedure, plaintiff Lloyd Ginger, who was eighty-seven years old, injured himself by falling from the x-ray table. He filed this suit against the hospital and alleged ordinary negligence.

Defendant argues that the trial court erred in denying its motions for summary disposition, directed verdict, judgment notwithstanding the verdict (JNOV), or new trial, which were all predicated on defendant's claim that this is an action for medical malpractice, not one for ordinary negligence.

We review de novo a trial court's ruling on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Here, defendant's motions were based on both MCR 2.116(C)(8) and MCR 2.116(C)(10). In regard to a motion for summary disposition pursuant to MCR 2.116(C)(8), the *Beaudrie* Court opined:

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of

¹ Ginger died while this appeal was pending and Mildred L. Lawrence, as personal representative for Ginger's Estate, was substituted as the plaintiff.

such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Id.* at 129-130.]

“All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party.” *Madejski v Kotmar Ltd*, 246 Mich App 441, 444; 633 NW2d 429 (2001).

In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), however, we consider “the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion.” *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). “Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Id.*

Our Supreme Court has explained our review of motions for directed verdict and JNOV as follows: “The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted.” *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 307 (2000). Finally, we review a trial court’s decision on a motion for a new trial for an abuse of discretion. See *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

Again, each motion required resolution of the same issue: whether plaintiff’s claim alleged ordinary negligence or medical malpractice. Generally, the gravamen of an action is determined by reading the claim as a whole. *Adkins v Annapolis Hospital*, 116 Mich App 558, 563; 323 NW2d 482 (1982). Our Supreme Court has explained that 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.” *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 44-46; 594 NW2d 455 (1999). The *Dorris* Court ruled that “allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury. *Id.* at 47. Consequently, the Court concluded that the plaintiff’s action was required to follow the procedural requirements of a medical malpractice claim. *Id.*

Here, unlike *Dorris*, there are no issues requiring expert medical testimony. Instead, the jurors were asked to draw upon their respective experiences to determine defendant’s liability, if any. The complaint, read as a whole, merely alleged that defendant, through its agents, failed to exercise ordinary care in preventing the injury to plaintiff’s decedent. Thus, we are not persuaded that the trial court erred as a matter of law in declining defendant’s request to characterize plaintiff’s action as one alleging medical malpractice. Therefore, we conclude that the trial court did not err by denying defendant’s motions for summary disposition, directed verdict, JNOV, and a new trial.

Defendant contends that his motion for JNOV should also have been granted because plaintiff failed to establish what duty was owed or how any duty was breached. In addition to

the aforementioned standard of review, we further note that a JNOV motion should be granted only when there was insufficient evidence to create an issue for the jury. *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). “If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper.” *Id.*

It is well established that, to establish a prima facie case of negligence, a plaintiff must prove the following four elements: “(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Hampton v Waste Management of Michigan, Inc.*, 236 Mich App 598, 602; 601 NW2d 172 (1999). A duty can arise by application of the basic rule of common law, “which imposes an obligation to use due care or to act so as to not unreasonably endanger the person or property of others.” *Id.* Plaintiff alleged that defendant breached this duty of ordinary care; accordingly, the trial court did not err by refusing to grant defendant’s motion for JNOV for lack of a legal duty owed by defendant to plaintiff.

In addition, the clinical instructor testified that he did not see the accident because he was behind a screen. Nevertheless, he testified that he did not assist the student in helping Ginger off the table. The student testified that no special expertise or knowledge was required in order to help a patient get on and off the x-ray table. Moreover, the jury was given the opportunity to see both the instructor and the student, and to perhaps consider their size difference as it related, if at all, to the issue of ordinary negligence in not properly assisting Ginger off the table. Viewing this evidence in a light most favorable to plaintiff, reasonable minds could differ regarding defendant’s purported breach of its duty of ordinary care. Accordingly, the trial court correctly denied defendant’s motion for JNOV on this alternate ground.

Defendant also argues that the trial court abused its discretion in denying its motion for a new trial, because: (1) this was a medical malpractice action improperly tried as an ordinary negligence case; (2) plaintiff’s counsel improperly raised issues of “informed consent” in his closing argument, and (3) the trial court erroneously denied its requested special standard of care jury instruction.

As previously discussed, the trial court did not err in determining that the action was properly brought as an ordinary negligence action. Accordingly, the trial court did not abuse its discretion by denying defendant’s motion for a new trial on this ground.

Also, defendant did not object to the allegedly improper “informed consent” remarks at trial, thereby precluding relief absent plain error affecting defendant’s substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). The trial court instructed the jury that the arguments, statements, and remarks by the attorneys were not evidence, and that it should disregard any statements by the attorneys that were not supported by the evidence. Thus, were we to view counsel’s remarks as injecting the concept of “informed consent,” we are satisfied that defendant’s substantial rights were not affected.

Finally, we find no merit to defendant’s claim of instructional error. We review jury instructions “in their entirety to determine whether the instructions given adequately informed the jury regarding the applicable law reflecting and reflected by the evidentiary claims in the particular case.” *Rickwalt v Richfield Lakes Corp.*, 246 Mich App 450, 459; 633 NW2d 418 (2001). Having already concluded that plaintiff’s action alleged ordinary negligence, we believe

that the instruction provided, SJI2d 10.02, appropriately defined the applicable standard of care. Therefore, the trial court did not err by denying defendant's request for a special jury instruction.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Jessica R. Cooper