STATE OF MICHIGAN

COURT OF APPEALS

DONNA YANKOVIAK, as Legal Guardian of JOSEPH YANKOVIAK,

Plaintiff-Appellant,

v

STEVEN HUDER, M.D., GREAT LAKES NEUROLOGY, P.C., and NORTHERN MICHIGAN HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
January 15, 2008

No. 268368
Emmet Circuit Court
LC No. 03-007558-NI

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right from the jury verdict of no cause of action. We affirm.

I. Basic Facts

Plaintiff is married to Joseph Yankoviak. James Shirilla, M.D., was Joseph's family doctor in Petoskey and Joseph went to him in July 2000, complaining of neck pain and dizziness after playing baseball. Shirilla testified that he concluded that Joseph "may have become dizzy and lightheaded because he had not eaten all day, played a vigorous game of baseball and might have become hypoglycemic[,]" and so he recommended that Joseph "eat a snack before playing baseball in the morning, to drink lots of fluid before and during the game, to make sure he was well hydrated." Shirilla next saw Joseph in September 2000. Shirilla testified that Joseph was showing "frontal lobe dysfunction" and "was not the same person that [he] had seen on the previous visit." Shirilla ordered a blood test, a CAT scan, and an EEG. He then referred Joseph to defendant Steven Huder, M.D., a neurologist.

Huder is an independent physician, employed by defendant Great Lakes Neurology. He is not an employee of defendant Northern Michigan Hospital (NMH). Over a three-week period, Huder ordered numerous tests including an EEG, a CT scan, a MRI, and a cerebral angiogram. Joseph was also treated with Solu-Medrol/steroids to rule out vasculitis. The testing and treatment were performed at NMH although Joseph was never admitted as a patient. Eventually, Huder sent Joseph to the Cleveland Clinic, where a blood clot in his sinus was diagnosed and surgery was performed.

In her complaint, plaintiff alleged that the applicable standard of care was violated when the blood clot was not timely discovered and treated. She further alleged that as a result, Joseph suffered a debilitating stroke and brain damage that have permanently impaired his ability to function as an independent adult. Prior to trial, the trial court granted summary disposition to NMH finding that neither Shirilla nor Huder was an agent of NMH. It further found that there was no evidence of any direct negligence on the part of NMH and denied plaintiff's motion to amend her complaint.

II. Summary Disposition

Plaintiff first argues that the trial court erred in granting summary disposition to NMH. She asserts that Huder was acting as an agent of the hospital, either directly, or through Shirilla as an agent of the hospital. We disagree. Under the common law, agency is established based upon the relations of the parties as they exist under either agreement or by their acts and fundamental to that is the right of the principal to control the agent. *St Clair Intermediate School Dist v Intermediate Educ Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998).

A motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition should be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). Such a motion therefore tests whether there is factual support for a claim or whether it instead can be decided as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "When deciding a motion for summary disposition under subrule C(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id*. The motion must be supported by documentary evidence, and "[a]ll reasonable inferences are to be drawn in favor of the nonmovant." *Id*.

Plaintiff first asserts that Shirilla's equivocation, in his deposition taken before trial, about when he was employed by NMH created a question of fact. However, Shirilla's official employment records from NMH were entered into evidence, and they clearly showed that he was not employed by the hospital during the relevant timeframe. Plaintiff failed to produce any evidence to contradict or bring into question the veracity of those employment records.

Plaintiff alternately argues that Huder was a direct agent of the hospital because of his involvement with the hospital as the Director of NMH's Stroke Program and as an officer on NMH's Medical Executive Committee. But no evidence was presented that Joseph was either admitted to or treated by the hospital's stroke program. And, plaintiff presented no evidence or authority to suggest Huder's involvement with the executive committee had anything to do with his outpatient treatment of Joseph.

The trial court did not err in granting summary disposition.

III. Amendment to the Complaint

Plaintiff argues that the trial court erred by granting summary disposition to NMH on plaintiff's claims of direct negligence regarding Joseph's care. However, a review of the record

indicates that the trial court did not grant summary disposition on plaintiff's claim of direct negligence. Rather, the trial court denied as futile plaintiff's motion to amend her complaint to add the claim of direct negligence. We find that the trial court properly denied plaintiff's motion. The grant or denial of a motion for leave to amend pleadings is reviewed for an abuse of discretion. *Titan Ins Co v North Pointe Ins Co,* 270 Mich App 339, 346; 715 NW2d 324 (2006).

No allegations were made that Joseph was either admitted to NMH or that any of the tests performed were done negligently. Instead, plaintiff claims that NMH had a duty to review and supervise his treatment because he had various tests done within the hospital. Plaintiff claims that this duty extends to ensuring that, based upon the test results, proper follow-up treatment is provided. We find plaintiff's argument to be without merit.

In support of her argument, plaintiff cites *Hamburger v Henry Ford Hosp,* 91 Mich App 580, 587; 284 NW2d 155 (1979).[1] But *Hamburger* only provides that a hospital is liable when a patient, admitted to that hospital, is injured after being negligently handled by a volunteer at that hospital. *Id.* at 587-589. The other cases cited only indicate that "[h]ospitals are liable for want of ordinary care toward their patients." *Bivens v Detroit Osteopathic Hosp,* 77 Mich App 478, 487-488; 258 NW2d 527 (1977), rev'd on other grounds 403 Mich 820 (1978). None of the cases cited by plaintiff provide support for her contention that hospitals owe a duty beyond that of ordinary care. Moreover, the cases only stand for the proposition that hospitals must provide care and monitoring for patients of a hospital *while they are admitted.* See *Duckett v North Detroit Gen Hosp,* 84 Mich App 426, 436; 269 NW2d 626 (1978) (hospitals must provide continuing daily care to all patients admitted regardless of whether a patient has his or her own independent physician).

Plaintiff also relies on MCL 333.21513(a),[2] MCL 333.21521,[3] and 1999 AC, R 325.1027[4] in support of her contention that hospitals are responsible for follow-up treatment indicated by

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[1] Plaintiff also cites a number of out-of-state-cases, which are not binding on this Court. *Ammex, Inc v Dep't of Treasury,* 273 Mich App 623, 640 n 15; 732 NW2d 116 (2007).

[2] Section 21513(a) provides that "[t]he owner, operator, and governing body of a hospital licensed under this article . . . [a]re responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital."

[3] Section 21521 provides, "A hospital shall meet the minimum standards and rules authorized by this article and shall endeavor to carry out practices that will further protect the public health and safety, prevent the spread of disease, alleviate pain and disability, and prevent premature death."

[4] The administrative rule provides in pertinent part as follows:

> (1) All persons admitted to a hospital shall be under the continuing daily care of a physician licensed to practice in Michigan.
>
> * * *
>
> (b) There shall be a written hospital policy denoting when consultation should be held. Consultation shall be recorded.

(continued…)

testing done within a hospital. Plaintiff's reliance is misplaced. None of these statutes or regulation creates a private cause of action. Indeed, in *Fisher v WA Foote Mem Hosp*, 261 Mich App 727, 730; 683 NW2d 248 (2004), this Court held that MCL 333.21513(e) specifically does *not* provide a private cause of action. Further, there is nothing to suggest that any of these provisions would extend a duty to a hospital to the extent claimed by plaintiff based solely on testing being done to patients not otherwise admitted to the hospital. At most, they suggest the same duty set forth in case law above, i.e., that hospitals owe a duty of care to patients admitted or being administered to *while they are in the hospital*. The trial court did not err in denying plaintiff's motion to amend her complaint.

IV. Jury Instructions

Plaintiff next contends that she is entitled to a new trial because of the trial court's refusal to give seven special jury instructions. We disagree. Whether a requested jury instruction is accurate and applicable based on a legal issue is a question of law, *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 694-695; 630 NW2d 356 (2001), which is reviewed de novo, *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004).

Pertinent portions of the standard Michigan Civil Jury Instructions must be given in each action in which they are applicable, accurately state the law, and are requested by a party. MCR 2.516(D)(2). "When the standard jury instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001).

> "Generally, a trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative. Supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially." [*Novi v Woodson*, 251 Mich App 614, 630; 651 NW2d 448 (2002), quoting *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998) (citations omitted by *Fewless* Court); see also MCR 2.516(D)(4).]

"[T]here is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Murdock v Higgins*, 454 Mich 46, 59; 559 NW2d 639 (1997).

In ruling that the seven requested jury instructions would not be given to the jury, the trial court stated:

(…continued)

* * *

> (4) The hospital shall employ professional and auxiliary personnel to give patients necessary services. . . .

> . . . instructions are not to be a vehicle for advocacy, that is for the attorneys to argue.
>
> The standard jury instructions in this case, and in particular, the court would refer to standard instruction 3001 [sic], professional negligence or malpractice, 5001 [sic], on damages, and 1501 [sic], defining proximate cause, all sets [sic] forth accurately and adequately the applicable law.
>
> They present the law in a fair and balanced fashion. . . . the proposed special instructions fail to accurately state the law or do so in a fashion that is somewhat argumentative.

After reviewing the record, we find no error requiring reversal. The subjects of plaintiff's first three requested special jury instructions—the standard of care and due diligence—were already covered by M Civ JI 30.01, the standard instruction regarding the standard of care. The subject of plaintiff's proposed fourth instruction, proximate cause, was adequately and fairly covered by M Civ JI 15.01, which defines proximate cause. Moreover, the proposed fourth instruction was argumentative and slanted, given the use of the word "tortfeaser." Because there were no allegations that any of the care following Huder's treatment was negligent, there was no reason to provide a jury instruction regarding the negligence of subsequent treatment. As the court observed, "Special instruction number four might be appropriate if there was some issue . . . about subsequent treatment having been negligent . . . , but there is no such . . . evidence in this case." Plaintiff's fifth requested instruction—regarding the standard of care—simply restated the general standard of care, and it was adequately covered by M Civ JI 30.03, the standard instruction regarding the burden of proof in malpractice cases. The sixth requested special jury instruction was argumentative in that it directly stated that Huder had a duty to promptly and accurately diagnose Joseph's ailment. However, doctors have a duty to follow the appropriate standard of care, and whether this duty includes a duty to promptly and accurately diagnose is for the jury to decide. Further, the proposed instruction includes mention of a "substantial factor," which is not defined and is not part of the legal standard. Plaintiff's seventh requested special jury instruction addressed a physician's use of "all scientific facilities" without explaining the meaning of that concept.

Plaintiff's proposed special instructions proposed were argumentative—some more than others—and often did not accurately reflect the applicable law. To the extent that the requested instructions accurately reflected the law, they did not add anything to the standard jury instructions given by the trial court. Thus, the trial court was not obligated to use them, and it did not err by failing to do so. *Woodson*, *supra* at 630; *Bouverette*, *supra* at 401-402.

V. Defense Counsel Memo

Finally, plaintiff claims that the trial court committed error requiring reversal when it prevented plaintiff from entering into evidence part of a report prepared by Huder's defense counsel regarding a conversation with M.A. Angileri, M.D. We disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). But a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.* at 159.

Generally, relevant evidence is admissible and irrelevant evidence is not. *Woodard v Custer*, 476 Mich 545, 568-569; 719 NW2d 842 (2006). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Plaintiff argues that a document that was presented by Huder's counsel as notes taken in a discussion with Angileri should have been admitted in evidence as an admission against Huder because his defense counsel was acting as his agent when he made that document. But the alleged admissions claimed by plaintiff pertain to medical matters, specifically the angiogram and what it showed regarding the straight sinus. Huder's attorney is not a doctor, so clearly any relevant medical information in those notes came from Angileri, not counsel. The notes themselves are hearsay under MRE 801(c). That the notes themselves are based on information gathered from Angileri makes the notes hearsay about hearsay. Because Angileri was neither a party opponent nor an agent of any defendant, nothing he may have said could be construed as a party admission under MRE 801(d)(2). As hearsay within hearsay, not falling under any hearsay exception, the notes were not admissible evidence. MRE 805. Therefore, the trial court did not err when it did not admit the notes as evidence at trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell