

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH SCHWARTZ,

Plaintiff-Appellant,

v

MARGO GILBERT, PAMELA WARNER,
BELA CHOPP, and OAKLAND UNIVERSITY,

Defendants-Appellees.

UNPUBLISHED
February 19, 2009

No. 279992
Oakland Circuit Court
LC No. 2005-070175-CZ

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition. We affirm.

Plaintiff, a student at Oakland University, underwent counseling with defendant Margo Gilbert, a therapist at the school. Plaintiff also worked as a phlebotomist at William Beaumont Hospital. While working at Beaumont Hospital, plaintiff discovered that Gilbert had been a patient there and accessed Gilbert's personal medical records at the hospital. Plaintiff later told Gilbert that she had done this, and Gilbert notified Beaumont Hospital. Plaintiff was subsequently fired from her hospital position. Plaintiff was also removed from the university because of a psychological emergency and elected not to return. Plaintiff subsequently filed an action in circuit court against Gilbert and her supervisors, defendants Pamela Warner and Bela Chopp, for breach of confidentiality. She filed a separate action in the Court of Claims against Oakland University, alleging claims for respondeat superior liability, violation of due process and equal protection, and breach of contract. The two actions were consolidated in the circuit court.

The circuit court granted the individual defendants' motions for summary disposition, agreeing with them that plaintiff's action was substantively one for medical malpractice, and was improperly filed for failure to comply with the applicable procedural requirements for filing a malpractice action. The trial court also granted defendant Oakland University's motion for summary disposition, ruling that plaintiff's failure to file a proper malpractice action precluded respondeat superior liability, that there was no factual or legal support for plaintiff's due process or equal protection claim, and that plaintiff failed to establish the existence of a contract in order to prevail on a breach of contract theory.

Plaintiff first argues that the trial court erred in dismissing her claim against the individual defendants for breach of confidence. This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court stated that it was granting summary disposition pursuant to both MCR 2.116(C)(8) and (10), because the court considered evidence beyond the pleadings, subrule (C)(10) is the appropriate rule to apply. *Id.* A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiff's breach of confidentiality claim alleged that the individual defendants violated MCL 333.18237, which provides that a psychologist "cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services." At issue here is whether a claim for breach of confidence is properly characterized as one for medical malpractice, as defendants argue, or whether such a claim should be viewed as an independent cause of action, as urged by plaintiff.

Although the statute establishes a psychologist-patient privilege, it does not expressly provide a cause of action if the privilege is violated. As the parties observe, other states have differed on how a claim for breach of confidence should be characterized. See *Watts v Cumberland Co Hosp Sys, Inc*, 75 NC App 1, 4, 7-8; 330 SE2d 242 (1985), rev'd on other grounds 317 NC 321 (1986); *Pierce v Caday*, 244 Va 285, 291-292; 422 SE2d 371 (1992); *Wyatt v St Paul Fire & Marine Ins Co*, 315 Ark 547, 554-555; 868 SW2d 505 (1994); *Hammer v Polsky*, 36 Misc 2d 482, 483-484; 233 NYS2d 110 (1962). In this case, we find it unnecessary to resort to decisions from other states. In this state, a claim against a health care provider is properly characterized as one for medical malpractice if the claim (1) arises from conduct that occurred during the course of a professional relationship, and (2) involves questions of medical expertise or judgment outside the realm of common knowledge and experience. *Kuznar v Raksha Corp*, 481 Mich 169, 176-177; 750 NW2d 121 (2008); *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). If both inquiries are answered affirmatively, the action is one for malpractice and is subject to the procedural and substantive requirements that govern medical malpractice actions. *Id.*

In this case, plaintiff's claim is based on allegedly confidential communications made during a professional relationship with Gilbert. To establish a violation of the duty imposed by MCL 333.18237, plaintiff must demonstrate that the information she revealed to Gilbert, and which Gilbert disclosed, was both confidential and necessary to enable Gilbert to render services. Indeed, to establish factual support for her claim below, plaintiff relied on the deposition testimony of Dr. Jeffrey Kezlarian, a psychiatrist, to show that her statements to Gilbert were for purposes of therapy and that Gilbert's contact with Beaumont Hospital involved the disclosure of confidential information and violated the therapeutic relationship by breaking plaintiff's confidences. Thus, plaintiff's claim is dependent upon questions of medical expertise or judgment outside the realm of common knowledge and experience of laypersons. Accordingly, the trial court did not err in determining that plaintiff's claim is one for medical malpractice and,

therefore, subject to procedural and substantive requirements that govern medical malpractice actions.

Further, because defendants asserted the statute of limitations as an affirmative defense and the limitations period for a malpractice action had expired, defendants were not precluded from asserting the procedural requirements for a malpractice action as a bar to plaintiff's action. As this Court recently stated in *Miller v Malik*, 280 Mich App 687, 693; ___ NW2d ___ (2008):

Beaumont asserted in its affirmative defenses that plaintiff's claim was barred by the applicable statute of limitations, without referring to MCL 600.2912b or otherwise specifically challenging the notice of intent. However, a defendant is not obligated to challenge the sufficiency of a plaintiff's notice of intent pursuant to MCL 600.2912b until the plaintiff has raised the issue of the tolling provision of MCL 600.5856, which necessarily occurs after the defendant has raised a statute of limitations defense in its first responsive pleading. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 70 n 7; 642 NW2d 663 (2002) (*Roberts I*). Therefore, Beaumont did not waive its right to challenge the notice of intent.

Next, plaintiff argues that the trial court erred in dismissing her claim of a due process violation against Oakland University.¹ Plaintiff argues that her right to due process was violated when she was removed from the university without a hearing, contrary to the university's own policies and procedures set forth in its student handbook.

Public students are afforded due process protection in school disciplinary proceedings. *Seal v Morgan*, 229 F3d 567, 574 (CA 6, 2000). Due process typically requires notice and a hearing before a student is suspended. *Goss v Lopez*, 419 US 565; 95 S Ct 729; 42 L Ed 2d 725 (1975); *Birdsey v Grand Blanc Community Schools*, 130 Mich App 718, 725-727; 344 NW2d 342 (1983). But due process is a flexible concept, the essence of which is to ensure fundamental fairness. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). Thus, a student may be removed in an emergency situation without a hearing, so long as a hearing promptly follows. *Goss*, *supra* at 571 n 6.

Here, Oakland University's student handbook states that students can be removed for emotional health-related emergencies if there is imminent danger to the student or the campus, without conducting a hearing beforehand. The record discloses that plaintiff was removed from the university not for disciplinary reasons, but rather because of a psychological emergency. The undisputed evidence established that plaintiff had a history of self-mutilation and had cut herself with scissors in the past. She was removed following an incident in which she deliberately broke a glass frame and threatened to cut herself. Under the circumstances, a hearing was not required before plaintiff's removal. See *Hill v Bd of Trustees of Michigan State Univ*, 182 F Supp 2d 621, 629-630 (WD Mich, 2001); *Picozzi v Sandalow*, 623 F Supp 1571, 1578-1579 (ED Mich, 1986), *aff'd* 827 F2d 770 (CA 6, 1987).

¹ Although plaintiff also alleged a violation of her right to equal protection, her argument on appeal is limited to a due process violation. Thus, plaintiff has abandoned any equal protection claim.

The university's emergency procedures provide that in a situation of an attempted suicide or threat, "[i]n most cases, the individual will not be allowed to return to the university or university housing until a psychological evaluation is completed and approval is granted by the dean of students." Plaintiff admitted that she was notified that she might be able to return to school if she could show that she was no longer a threat to herself and others, and that she had obtained treatment. Instead, plaintiff decided to attend school elsewhere and did not pursue reinstatement at Oakland University. Because the university's procedures afforded plaintiff an opportunity to request reinstatement to the university, and it was plaintiff who decided not to pursue reinstatement, plaintiff cannot establish a due process violation. Accordingly, the trial court properly dismissed this claim.

Finally, the trial court also properly dismissed plaintiff's breach of contract claim against the university. That claim is based on the university's failure to follow the procedural requirements in its student handbook that are applicable when a student is removed for misconduct or other disciplinary reasons. Here, however, plaintiff was not removed for a disciplinary reason set forth in the handbook, but rather was removed pursuant to the university's emergency psychological removal procedures. Because the student handbook's disciplinary procedures did not apply to plaintiff's situation, plaintiff cannot establish a contract, or breach thereof, based on the handbook. Accordingly, the trial court properly dismissed this claim.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray