STATE OF MICHIGAN

COURT OF APPEALS

MARK HETHERINGTON,

Plaintiff-Appellant,

v

GREAT LAKES ORTHOPAEDIC CENTER, PC; JOHN BRUDER, MD; DAVID LINT, MD; JOSEPH M. MCGRAW, MD; BAILEY SCOTT GROSECLOSE, MD; THE GRAND TRAVERSE BAY YOUNG MEN'S CHRISTIAN ASSOCIATION, INC, d/b/a THE GRAND TRAVERSE BAY YMCA,

Defendant-Appellees.

UNPUBLISHED
March 17, 2009

No. 282006
Grand Traverse Circuit Court
LC No. 07-25746-NO

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

In this personal-injury action, plaintiff brought a suit sounding in ordinary negligence and premises liability against the YMCA where he suffered injury while playing a game called pickleball.[1] Plaintiff also brought suit against certain medical providers claiming, inter alia, that they acted with ordinary negligence in failing to order an MRI study on his request. The trial court granted summary disposition as to all defendants under MCR 2.116(C)(10) and denied plaintiff's motion for reconsideration. Plaintiff appeals as of right. We affirm the grant of summary disposition.

I. CLAIMS AGAINST THE YMCA

On February 13, 2004, plaintiff contacted defendant The Grand Traverse YMCA (YMCA) and reserved one-half of a basketball/gym court for solo basketball practice. Plaintiff, who was not a member of the YMCA, alleged that he was told on the telephone and again when he arrived that the court would be available for his exclusive use and that, based on those

[1] Pickle-ball is something of a cross between ping-pong and tennis, played on a badminton sized court with specialized paddles and hard, plastic, wiffle-ball-type balls.

assurances, he paid an $8.00 fee and began to shoot baskets on the court. After about 15 minutes, plaintiff was joined in the gym by pickleball players who began to play pickleball in a center area in the gym that overlapped the basketball court. Plaintiff stopped shooting baskets and observed the pickleball game. While watching, plaintiff was asked whether he would like to be a fourth player in the pickleball game and he agreed to play.

Two of the pickleball players were deposed and testified that they taught plaintiff how to play in about five to ten minutes because "it's not a difficult game." The players were not certain how long plaintiff had been playing, but at some point they saw plaintiff fall. Plaintiff's initial complaint alleged that he fell on a pickleball that he asserted had rolled onto the court.

Plaintiff filed a first amended complaint on May 25, 2007. This complaint alleged, in various ways, that YMCA was negligent for allowing pickleball and basketball to be played simultaneously in the same gym area. It also alleged that the premises were defective and that this caused or allowed the ball to roll under his foot, thereby causing his fall. YMCA filed a motion for summary disposition alternatively referencing MCR 2.116(C)(8) and MCR 2.116(C)(10). After both oral argument and briefing, the trial court granted summary disposition in favor of YMCA under MCR 2.116(C)(10), concluding, inter alia, that "failure to take precautionary measures could not, as a matter of law, have been the proximate cause of the Plaintiff's injury." Plaintiff's request for reconsideration was denied.

Plaintiff argues on appeal that the trial court improperly granted YMCA's motion for summary disposition as to his claims of ordinary negligence and premises liability. We disagree and conclude that the trial court properly granted summary disposition under MCR 2.116(C)(10) due to the absence of any evidence as to causation.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "[A] trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* at 119-120. This Court evaluates a motion for summary disposition brought under (C)(10) "by considering the substantively admissible evidence actually proffered in opposition to the motion" and "may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial." *Id.* at 121.

As to the ordinary negligence claims, plaintiff did not offer to the trial court, and has not directed this Court to, any evidence of proximate cause. Plaintiff claims that pickleball players should not be allowed to play on the court when someone is playing basketball. However, we need not make that determination since plaintiff was not injured while playing basketball as a result of an unexpected intrusion on his game by a ball from a pickleball game. Rather, he was playing pickleball and fell on a pickleball. Plaintiff's claim amounts to the argument that had the YMCA not allowed basketball and pickleball to be played simultaneously in the same gym, he would not have been invited to play pickleball. However, that establishes only but-for causation as it goes only to whether the activity would have taken place, not to any particular danger in that activity or the way in which it was conducted. Thus, the trial court correctly ruled YMCA's "failure to take precautionary measures could not, as a matter of law, have been the proximate cause of the Plaintiff's injury."

As to the premises liability aspects of plaintiff's claims, there is no evidence that the ball on which plaintiff allegedly slipped was present due to any defect in the premises and, even assuming plaintiff's various allegations of premises defect had merit, unless they can be linked to the injury-causing event, they do not provide a basis for recovery. Plaintiff fell on a plastic ball and absent evidence that the plastic ball was present in that location as a result of a premises defect, summary disposition was proper. Plaintiff offers his own affidavits and the deposition testimony of two of the other pickleball players, but none of these offer any evidence on the issue of causation. The two players testified that they did not know where the ball came from and plaintiff's affidavits offer nothing on this issue either. Put simply, regardless of whether any premises defect existed, there is nothing in the record that suggests that any alleged premises defects were a but-for cause of the ball being on the court on which plaintiff was playing. Nor does plaintiff's brief suggest that any discovery was ever requested - even after the filing of YMCA's motion - that might have given rise to such evidence.[2]

Thus, there is no question of material fact as to proximate causation pertaining to the claims of negligence nor as to but-for causation pertaining to the claims of premises liability. Where no question of material fact exists, trial courts may decide the issue. *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998). The trial court properly determined that plaintiff had failed to demonstrate a question of material fact as to causation and, therefore, properly granted summary disposition in favor of YMCA pursuant to MCR 2.116(C)(10).

II. CLAIMS AGAINST MEDICAL PROVIDERS

A. Ordinary Negligence

After being injured, plaintiff went to see his family physician, who arranged an appointment with defendant Bailey Scott Groseclose, MD, an orthopaedic surgeon providing care at defendant Great Lakes Orthopedic Center, P.C. (GLOC).[3] Groseclose examined plaintiff the day of the injury and scheduled an MRI for the following day. The MRI confirmed that plaintiff had a ruptured Achilles tendon. Groseclose performed surgery on February 16, 2004 to repair the ruptured tendon.

After seven weeks in a cast, plaintiff began physical therapy. Plaintiff continued therapy for about a month, going three times per week, after which, according to plaintiff's affidavit, he "began experiencing new signs and symptoms." Plaintiff attests that "he requested a follow-up

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[2] Although summary disposition under (C)(10) is generally premature when granted prior to completion of discovery on the disputed issue, it may still be appropriate where there is no reasonable chance that further discovery will uncover factual support for the opposing party's position. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).

[3] Because this case is an appeal from summary disposition, we have included facts alleged by plaintiff, the nonmoving party, as if they were true, but we take no position as to whether any of these facts are proven under the record before us.

MRI"[4] but that defendants did not order one for three months thereafter. The second MRI revealed a new tendon tear remote to the previous surgical site. Plaintiff was placed in a cast and told to follow-up in one month. Plaintiff never returned to GLOC.

On February 10, 2006, plaintiff sent a "Notice of Claim and Intent" (NOI) to GLOC, Groseclose, McGraw, Lint and Bruder (the GLOC defendants) alleging various acts and omissions constituted medical malpractice. Plaintiff then filed his complaint on February 12, 2007, but his claims against the GLOC defendants did not allege medical malpractice.

The trial court concluded that plaintiff's claim sounded in medical malpractice and dismissed the claim as time-barred. Plaintiff argues on appeal that the trial court erred in granting summary disposition to the GLOC defendants because his complaint regarding the alleged refusal to order an MRI asserted ordinary negligence, not medical malpractice.

Determinations of whether the nature of a claim is ordinary negligence or medical malpractice, and whether such claims are barred based on the appropriate statute of limitations are done under MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). This Court reviews de novo such determinations, considering all documentary evidence submitted by the parties and accepting the contents of the complaint as true "unless affidavits or other appropriate documents specifically contradict it." *Id.*

A claim sounds in medical malpractice, rather than ordinary negligence, when both of the following questions are answered in the affirmative: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Id.* at 422. Plaintiff concedes that the claim pertains to actions taken in the course of a professional relationship, but argues that his claims require only lay knowledge. We disagree.

> A physician's decision whether, and when, an MRI is necessary or appropriate involves the use of medical judgment, as it requires decisions about whether such a study would be diagnostically useful and whether some other test might equally or better serve to diagnose the problem. Thus, Plaintiff's claim that an MRI should have been ordered by his doctor sounds in medical malpractice, not ordinary negligence.

Because plaintiff's claim was a medical malpractice claim, the two-year statute of limitations applied, MCL 600.5805(6), and plaintiff has not argued that time remained for him to file a medical malpractice action within the statute of limitations. Accordingly, the trial court properly granted summary disposition to the GLOC defendants on the grounds that the claim was time-barred.

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[4] We note that although plaintiff's complaint characterized a letter to the GLOC defendants as a request to "promptly schedule a second MRI at plaintiff's sole expense," there is nothing in the letter that references either an MRI or payment.

B. Plaintiff's Other Claims Against the GLOC Defendants

Plaintiff's complaint also alleged conspiracy, consumer protection act violations, fraud, intentional inflection of emotional distress, and spoliation of evidence against the medical Defendants. Because we conclude that in each case, plaintiff failed to state a claim, the trial court properly dismissed them.

1. Conspiracy

"'A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.'" *Advocacy Org for Patients and Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), quoting *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). "However, 'a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.'" *Id.* quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). Because plaintiff failed to establish an underlying tort, his conspiracy claim fails as a matter of law. *Id.* at 384-385.

2. Michigan Consumer Protection Act[5]

Plaintiff is correct that "allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice may be brought under the MCPA." *Nelson v Ho*, 222 Mich App 74, 83; 564 NW2d 482 (1997). However, plaintiff neglects to note that "[a]llegations that concern misconduct in the actual performance of medical services or the actual practice of medicine would be improper." *Id.* As previously noted, plaintiff's claims against the GLOC defendants involve the actual practice of medicine and medical decision-making. Accordingly, a claim under the MCPA in this setting is improper as a matter of law, and the trial court properly dismissed it.

3. Fraud

A party must plead a fraud claim with particularity. MCR 2.112(B)(1). General allegations of fraud are insufficient to state a claim and are legally insufficient to overcome a motion for summary disposition. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Plaintiff's compliant makes no more than vague references and conclusory statements as to the elements of a fraud claim and provides no details regarding what representations were made by the GLOC defendants, how they were false, and plaintiff's alleged reliance and injury suffered based on that reliance. Accordingly, plaintiff's complaint was legally insufficient as a matter of law and the trial court properly dismissed this claim.

[5] MCL 445.901, *et seq.*

4. Intentional Infliction of Emotional Distress

A claim of intentional infliction of emotional distress requires a plaintiff to show "(1) extreme or outrageous conduct, (2) intention or recklessness, (3) causation, and (4) severe emotional distress." *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003) (internal quotations and citations omitted).

> Liability only attaches when a plaintiff can demonstrate that the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. [*Id.* (internal quotations and citations omitted).]

The trial court determines if a jury could reasonably conclude that a defendant's conduct was so extreme or outrageous that it would permit recovery. *Id.* at 196-197. Only where reasonable minds could differ as to whether defendant's conduct is sufficiently extreme and outrageous does it become a question for the jury. *Id.* at 197. Plaintiff has not offered any evidence as to several, if not all, of the elements of this cause of action. Therefore, the trial court properly dismissed this claim as a matter of law.

5. Spoliation of Evidence

Plaintiff's complaint asserts that not all of his medical records were provided to him when he submitted a request for those records pre-suit and he fashions this assertion as a claim for spoliation of evidence that he apparently asks this Court to recognize. Even if such a cause of action was held to exist, plaintiff has provided no evidence to support it. If, prior to the filing of the instant suit, plaintiff believed that records were being withheld, he could have brought an action to compel their production. He did not do so. Moreover, the lower court record neither refers to nor contains any request for these records during the instant suit, let alone the filing of a motion to compel those records. Plaintiff offers no evidence that any records were destroyed or altered. Finally, his brief on appeal offers no argument regarding this claim and thus, any such claim has been abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro