

STATE OF MICHIGAN
COURT OF APPEALS

DONNA PITTS,

Plaintiff-Appellant,

V

FRANCO ATTANASIO, M.D.,

Defendant-Appellee.

UNPUBLISHED

December 16, 2010

No. 294320

Wayne Circuit Court

LC No. 09-012436-NH

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

In this action alleging medical malpractice, plaintiff, acting *in propria persona*, appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

On May 22, 2009, plaintiff filed a complaint against defendant, a family practitioner who treated her mother. In the complaint, it was alleged that defendant ordered plaintiff to discontinue administration of cancer medication to her mother, and defendant refused to consult with other doctors. Plaintiff's mother died on July 14, 2007. Defendant filed a motion for summary disposition of the complaint, alleging that plaintiff lacked standing to file the lawsuit because she was not the personal representative of the decedent's estate, the notice of intent requirement was not fulfilled, and an affidavit of merit was not filed with the complaint.

Plaintiff did not file a brief in opposition to the motion for summary disposition. Rather, she requested the appointment of counsel to assist her in answering the motion for summary disposition and a five-month adjournment. The trial court advised plaintiff that appointment of counsel was provided only in criminal cases and that the case could not be adjourned for such a long period of time because cases had to be resolved within two years of filing.

With regard to the merits of defendant's motion for summary disposition, plaintiff asserted that she essentially complied with the notice of intent requirement because defendant's insurance company denied her claim. Furthermore, defendant prevented her from complying with the prerequisites for filing a medical malpractice action because his office refused to turn over the medical records despite her mother's completion of a patient advocate form before her death. Finally, plaintiff alleged that she had not filed a medical malpractice action, but a claim alleging negligence. The trial court advised plaintiff of the role of the probate court and the appointment of a personal representative as well as the prerequisites to filing a medical

malpractice action. Ultimately, the trial court granted the motion for summary disposition because the action was not brought by the personal representative of the estate and the failure to file an affidavit of merit with the complaint. Plaintiff appeals as of right.

The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). A trial court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. *Lansing v Hartsuff*, 213 Mich App 338, 350-351; 539 NW2d 781 (1995). To succeed on appeal, a plaintiff must successfully challenge the basis of the trial court's ruling. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). When an issue is not raised in the trial court below, it is not preserved, and it is not properly brought before this Court. *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 569-570; 766 NW2d 896 (2009). An issue is preserved for appellate review when it is raised before and decided by the trial court. *Ligon v Detroit*, 276 Mich App 120, 129; 739 NW2d 900 (2007).

The trial court did not err in granting defendant's motion for summary disposition. Plaintiff brought the action in her own name instead of filing the action as personal representative of her mother's estate. An action must fail when relatives of the deceased file the action in their individual capacities and not as representatives of the decedent's estate. *Maiuri v Sinacola Constr Co*, 382 Mich 391, 393; 170 NW2d 27 (1969); see also MCL 600.2922(2). An affidavit of merit is a procedural requirement necessary to file a medical malpractice action, and the appropriate sanction for failure to file an affidavit of merit is dismissal without prejudice. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 43-47; 594 NW2d 455 (1999). Plaintiff's contention that defendant blocked her access to the medical records to prevent her compliance with the requirements and that the patient advocate form provided for the release of the medical records is unpersuasive. The patient advocate form contained the qualification that it was contingent on the extent permitted by law, and it cannot over ride federal law protecting patient privacy. The complaint did not allege basic negligence, but rather presented questions of a professional relationship involving medical judgment outside the realm of common knowledge and experience. *Kuznar*, 481 Mich at 176-177. Therefore, plaintiff was not excused from meeting the requirements for filing a medical malpractice action. Finally, the trial court did not abuse its discretion by denying the request for an adjournment in light of the length of the delay requested and the extensive deficiencies in her filing. *Hartsuff*, 213 Mich App at 350-351.¹

¹ We note that plaintiff raised additional issues in her brief on appeal. However, the remaining issues are not preserved for appellate review because they were not raised, addressed, and decided in the trial court. *Ligon*, 276 Mich App at 129. Furthermore, the issues do not entitle plaintiff to appellate relief.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood