

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM ADAM, Individually and as Personal
Representative of the Estate of MARGARET
ADAM,

Plaintiff-Appellee/Cross-Appellant,

V

SISTERS OF BON SECOURS NURSING CARE
CENTER,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED
September 6, 2011

No. 292144
Macomb Circuit Court
LC No. 2007-001381-NO

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

PER CURIAM.

Defendant, Sisters of Bon Secours Nursing Care Center, appeal as of right from a judgment in favor of plaintiff, William Adam, in this action for breach of contract and loss of consortium. Plaintiff filed a cross appeal, challenging the trial court's dismissal of additional tort claims, the evidentiary ruling regarding privilege, and the denial of plaintiff's request for attorney fees. We reverse and remand for entry of summary disposition in favor of defendant.

Plaintiff filed this action alleging that defendant was responsible for injuries suffered by his wife, Margaret Adam (the "decedent"), while in the care of defendant's nursing home. Before trial, the trial court granted defendant's motion for summary disposition of plaintiff's count I, which alleged claims for wrongful death, negligence, gross negligence, and assault and battery.¹ The case proceeded to trial on plaintiff's claims for breach of contract and loss of consortium. The breach of contract claim was based on plaintiff's allegation that defendant breached various provisions of the statutory resident bill of rights, MCL 333.20201, which were incorporated into defendant's admission agreement when the decedent was admitted to

¹ The trial court also dismissed plaintiff's claims for negligent hiring or retention (count III), failure to train or negligent training (count IV), and wrongful death (against unknown defendants) (count V), but those claims are not at issue on appeal.

defendant's facility. The jury did not award any damages for the loss of consortium claim, but awarded plaintiff \$240,000 for his breach of contract claim.

I. BREACH OF CONTRACT

Defendant argues that the trial court erred in denying its motion for summary disposition with respect to plaintiff's breach of contract claim, as well as its motions for a directed verdict and judgment notwithstanding the verdict. We agree.

The trial court's decision regarding a motion for summary disposition is reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Plaintiff's breach of contract claim is based on defendant's breach of statutory resident rights that were incorporated into defendant's admission agreement. The admission agreement provides, in pertinent part:

4. Resident Rights and Responsibilities

The resident acknowledges receipt of the facility policy on rights and responsibilities of the resident as required by law, including the right to execute an advanced directive, and the facility grievance procedures, policies and a schedule of services and charges.

This policy and these items are integrated in and made part of this contract as the resident admission handbook.

It is understood and agreed that the resident, the legal guardian and the resident's representative shall have the right to terminate the occupancy of the resident at any time upon giving five (5) days advance written notice to the facility, exclusive of Sundays and holidays.

* * *

5. Additional Provisions Agreed to Between the Parties

A. Care and Safety of the Residents. The management of the facility undertakes only such reasonable care toward the resident as his or her condition may require. *The facility is not an insurer of the resident's safety or welfare and makes no guarantees to the contrary. The facility shall not be liable for any injury suffered by the resident while under the facility's care, except when caused*

by the negligence of the facility or its employees, agents, officers or directors acting in the scope of their responsibilities under this agreement. Furthermore, should the resident permanently leave the facility with or without physician or management consent, the facility, its [sic] management and personnel are absolved from all responsibility for injuries resulting from the resident so leaving. [Emphasis added.]

A separate document entitled “resident rights and responsibilities,” which is the basis for plaintiff’s breach of contract claim, provides in pertinent part:

9. Resident is assured the right to be free from mental, physical, verbal and sexual abuse, corporal punishment and involuntary seclusion, and free from chemical and (except in emergencies) physical restraints except as authorized in writing by a physician for a specified and limited period of time, or when necessary to protect the resident from injury to self or to others.

We conclude that the trial court erred in ruling that the resident rights document could give rise to a breach of contract claim.

MCL 333.20201 states, in pertinent part:

(1) A health facility or agency that provides services directly to patients or residents and is licensed under this article *shall adopt a policy describing the rights and responsibilities of patients or residents* admitted to the health facility or agency. Except for a licensed health maintenance organization which shall comply with chapter 35 of the insurance code of 1956, 1956 PA 218, MCL 500.3501 to 500.3580, the policy shall be posted at a public place in the health facility or agency and shall be provided to each member of the health facility or agency staff. Patients or residents shall be treated in accordance with the policy.

(2) The policy describing the rights and responsibilities of patients or residents required under subsection (1) shall include, as a minimum, all of the following:

* * *

(l) A patient or resident is entitled to be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized in writing by the attending physician for a specified and limited time or as are necessitated by an emergency to protect the patient or resident from injury to self or others, in which case the restraint may only be applied by a qualified professional who shall set forth in writing the circumstances requiring the use of restraints and who shall promptly report the action to the attending physician. In case of a chemical restraint, a physician shall be consulted within 24 hours after the commencement of the chemical restraint.

* * *

(6) *A nursing home patient or home for the aged resident is entitled to be fully informed, as evidenced by the patient's or resident's written acknowledgment, before or at the time of admission and during stay, of the policy required by this section. The policy shall provide that if a patient or resident is adjudicated incompetent and not restored to legal capacity, the rights and responsibilities set forth in this section shall be exercised by a person designated by the patient or resident. The health facility or agency shall provide proper forms for the patient or resident to provide for the designation of this person at the time of admission.*

(7) This section does not prohibit a health facility or agency from establishing and recognizing additional patients' rights. [Emphasis added.]

MCL 333.20203 provides:

(1) The rights and responsibilities prescribed in sections 20201 and 20202 *are guidelines* for health facilities, facility staff, facility employees, patients, and residents. *An individual shall not be civilly or criminally liable for failure to comply with those sections.*

(2) Sections 20201 and 20202 shall not be construed to expand or diminish other remedies at law available to a patient or resident under this code or the statutory and common law of this state.

(3) The department shall develop guidelines to assist health facilities and agencies in the implementation of sections 20201 and 20202. [Emphasis added.]

In *Alar v Mercy Mem Hosp*, 208 Mich App 518, 523-525; 529 NW2d 318 (1995), the plaintiff/patient sued for breach of contract based on a violation of his right to confidentiality, which was one of the rights listed in the defendant hospital's patient rights policy. On appeal, this Court reversed the trial court's denial of the hospital's motion for a directed verdict or JNOV with respect to the plaintiff's breach of contract claim. *Id.* at 525-526.

On appeal, this Court noted that the hospital "was required by MCL 333.20201 . . . to adopt a policy describing the rights and responsibilities of patients and to treat patients in accordance with that policy." *Id.* at 525. Because the right to confidentiality was included in the mandatory resident rights policy, as well as required by a separate statute, "the requirement that such duties be imparted to plaintiff was a preexisting duty under the statute." *Id.* This Court reasoned that "[b]ecause [the hospital] had a preexisting statutory duty to afford plaintiff these rights of confidentiality when plaintiff sought the services of the hospital and became a patient, this duty could not provide adequate consideration for any alleged contractual relationship." *Id.* Accordingly, the hospital's "preexisting duty imposed by statute cannot be considered adequate consideration to create a contract." *Id.*

We conclude that *Alar* is controlling in this case. Although a contract existed between the parties, the resident rights policy was a preexisting duty mandated by statute. Defendant was required to adopt a policy containing those rights and was required to inform its residents of those rights before or at the time of admission. Defendant chose to meet those duties by incorporating the resident rights policy into its admission documents. Because the duty to adopt a policy and inform the residents was preexisting, adding the resident rights policy to the admission documents did not add a new or separately enforceable contract term to the parties' agreement. Pursuant to the *Alar* decision, defendant's alleged violation of the resident rights policy cannot give rise to a breach of contract action. Accordingly, the trial court erred in denying defendant's motion for summary disposition, directed verdict, and JNOV with respect to plaintiff's contract claim. *Alar*, 208 Mich App at 525-526.

In light of our decision, it is unnecessary to consider defendant's remaining issues on appeal.

II. PLAINTIFF'S CROSS APPEAL

On cross appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of count I of its first amended complaint, entitled "wrongful death, negligence, gross negligence, intentional infliction of emotional distress, and/or assault and battery." We disagree.

A. NEGLIGENCE-BASED CLAIMS

Our Supreme Court has held that "a complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999). The first consideration of whether a claim involves a malpractice action is whether the alleged negligence occurred during the course of a professional relationship. *Id.* at 45. The second is "whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Id.* at 46.

The alleged negligence in this case arose during the course of a professional relationship. Plaintiff's complaint alleges that defendant had a duty to provide appropriate care and treatment to the decedent and to avoid acts of negligence and gross negligence. Plaintiff alleges that the decedent was inappropriately restrained and that defendant is vicariously responsible for the negligent acts of its employees because it failed to properly screen, train, and supervise its employees, and failed to inspect the premises and monitor its residents to prevent improper use of restraints. Plaintiff's claims addressing whether defendant exercised appropriate supervision of its employees, the appropriate use of restraints, staffing decisions, and monitoring of patients raise questions of professional judgment that are beyond the common knowledge and experience of a layperson. *Id.* at 46-47. Thus, plaintiff's negligence claims (negligence, gross negligence and wrongful death) substantively involve a claim for malpractice, which is subject to the procedural requirements applicable to malpractice actions. Because it is undisputed that plaintiff did not satisfy those requirements, plaintiff's negligence-based claims were properly dismissed.

B. INTENTIONAL TORTS

Claims of intentional infliction of emotional distress and assault and battery are intentional torts. The admission agreement signed by plaintiff provides that defendant is liable for the negligence of its employees *acting within the scope of their employment*. Similarly, an employer is not liable for its employees' intentional torts committed outside the scope of employment. *Salinas v Genesys Health Sys*, 263 Mich App 315, 317-318; 688 NW2d 112 (2004). An intentional tort is not normally within the scope of an employee's employment, and is not alleged to be within the scope of employment in this case. See *McClements v Ford Motor Co*, 473 Mich 373, 381; 702 NW2d 166 (2005). Therefore, under the parties' contract as well as the doctrine of respondeat superior, defendant is not liable for the intentional torts alleged in this case.

In addition, under the doctrine of respondeat superior, an employer has no duty to prevent an intentional tort by an employee unless the employer is on notice of the employee's propensity to commit an offense. *Brown v Brown*, 478 Mich 545, 552-555; 739 NW2d 313 (2007). In this case, plaintiff surmises that the decedent was attacked by an employee, but offered no proof of the alleged individual's identity, let alone his or her propensity to commit an offense. Therefore, plaintiff failed to establish a question of fact with regard to defendant's liability for an intentional tort.

For these reasons, the trial court did not err in dismissing count I of plaintiff's amended complaint. Given our resolution of this issue, it is unnecessary to consider plaintiff's remaining issues on cross appeal.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood