

STATE OF MICHIGAN
COURT OF APPEALS

ELAINE JOHNSON,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL and
PEGGY ANN NOWAK, M.D.,

Defendants-Appellees.

UNPUBLISHED
October 20, 2011

No. 299215
Oakland Circuit Court
LC No. 2010-108374-NO

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Elaine Johnson appeals as of right the trial court's amended order granting William Beaumont Hospital ("the Hospital") and Peggy Ann Nowak, M.D.'s ("Nowak") motion to dismiss. We affirm.

On March 27, 2008, Johnson underwent a left total parotidectomy¹ with facial nerve preservation performed by Nowak at William Beaumont Hospital in Royal Oak. Notably Nowak's operative report indicates that about an hour into the operation, Nowak noticed that Johnson's left earlobe was "extremely warm" and "the skin on her ear was actually peeling off and blistering." Nowak also noted that the headlight that she was wearing on her head was "extremely hot, and it actually had been causing a slight burn of the skin."

On March 8, 2010, Johnson filed a complaint against the Hospital and Nowak alleging ordinary negligence. Johnson contended that the Hospital had a duty to properly maintain its equipment, including the headlight that burned Johnson's ear, and keep it in safe working order. Johnson alleged that the Hospital and Nowak also had a duty to inspect and test its equipment to ensure that it was safe for use. Johnson claimed that the Hospital failed to maintain and/or test the headlight and failed to ensure that it was in proper working order. Johnson also contended that the Hospital did not supervise its staff to ensure that only safe and well-maintained equipment was used during surgery.

¹ A parotidectomy is the removal of the parotid gland, a salivary gland situated near the ear. *Random House Webster's College Dictionary* (1997).

Johnson alleged that Nowak negligently caused severe burns to her left ear by allowing the headlight that Nowak was wearing during surgery to contact and/or come into close proximity to her left ear. Johnson also alleged that the headlight was not involved in the medical procedure, and her left ear was not supposed to be involved in the procedure either. Johnson further claimed that no medical judgment was needed to prevent her injuries.

On April 20, 2010, the Hospital and Nowak filed a motion to dismiss pursuant to MCR 2.116(C)(7) and (C)(10) arguing that Johnson's complaint sounded in medical malpractice and not ordinary negligence because the alleged negligence occurred in the course of a professional relationship and involved medical judgment "outside the common knowledge and experience of a lay jury." They requested that the case be dismissed without prejudice since Johnson failed to file the requisite notice of intent at least 182 days before filing the complaint, and did not file an affidavit of merit in support of her allegations. Johnson opposed the motion. The court granted the motion to dismiss, finding that the complaint sounded in medical malpractice.²

On appeal, Johnson argues that the headlight that Nowak was wearing on her head during surgery became extremely hot and burned Johnson's ear. She also claims that there is no allegation that the headlight should not have been used during the surgery. Johnson contends that since no medical judgment was used by the Hospital or Nowak, and no expert testimony is necessary to show that the headlight became extremely hot and burned her ear, the complaint gives rise to a claim of ordinary negligence and not medical malpractice. We disagree and find that medical judgment was used and medical expert testimony will be needed, so the complaint sounds in medical malpractice.

"In determining whether the nature of a claim is ordinary negligence or medical malpractice . . . a court does so under MCR 2.116(C)(7)," and reviews such claims de novo.³ "In making a decision . . . all documentary evidence submitted by the parties" is considered "accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it."⁴

A motion for summary disposition brought pursuant to MCR 2.116(C)(10), "tests the factual support of a claim, [and] is subject to de novo review."⁵ In reviewing such a motion, "affidavits, pleadings, depositions, admissions, and documentary evidence" are considered "in the light most favorable to the party opposing the motion."⁶ "A trial court may grant a motion for summary disposition under 2.116(C)(10) if the affidavits or other documentary evidence

² The court later amended its order to indicate that the dismissal was without prejudice.

³ *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 419; 684 NW2d 864 (2004).

⁴ *Id.*

⁵ *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

⁶ *Id.* at 454.

show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.”⁷

“The gravamen of an action is determined by reading the claim as a whole.”⁸

A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only ‘within the course of a professional relationship.’ Second, claims of medical malpractice necessarily ‘raise questions involving medical judgment.’ Claims of ordinary negligence, by contrast, ‘raise issues that are within the common knowledge and experience of the [fact-finder].’⁹

In determining whether a claim sounds in ordinary negligence or medical malpractice, a court must ask:

(1) [W]hether 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. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.¹⁰

First, “[a] professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required [them] to render professional health care services to the plaintiff.”¹¹ It is undisputed that the alleged injury to Johnson occurred in the course of a professional relationship.

Next it must be determined whether Johnson’s claim “raises questions of medical judgment beyond the realm of common knowledge and experience.”¹² “If the reasonableness of the health care professionals’ action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence.”¹³ “If . . . the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to

⁷ *Id.* at 454-455.

⁸ *Lee v Detroit Medical Ctr*, 285 Mich App 51, 61; 775 NW2d 326 (2009) (citation omitted).

⁹ *Lee*, 285 Mich App at 61; citing *Bryant*, 471 Mich at 422 (citations omitted).

¹⁰ *Id.*

¹¹ *Bryant*, 471 Mich at 422.

¹² *Lee*, 285 Mich App at 61; citing *Bryant*, 471 Mich at 422 (citations omitted).

¹³ *Bryant*, 471 Mich at 423.

the medical issue before the jury explained by experts, a medical malpractice claim is involved.”¹⁴

The “headlight” used by Nowak during Johnson’s operation is a piece of surgical equipment. In analyzing the reasonableness of the actions of the Hospital in inspecting and testing its surgical equipment, it is necessary to know how often a hospital is required to inspect and test its equipment. This is outside of the scope of the knowledge of a lay juror, as it requires knowledge of the standard of care applicable to the Hospital. Since expert testimony is required for that determination, the claim against the Hospital sounds in medical malpractice.

Regardless of what was noted in Nowak’s operative report, the Hospital and Nowak have not conceded liability in this case. While Johnson has concluded that her alleged injuries were the result of Nowak’s negligent use of the “headlight” that she was wearing during surgery, that may not be the case. Medical expert testimony is necessary to explain the surgery to the jury, why the headlight was used, how long a headlight of this sort is typically used during this type of procedure, whether there are different settings for the headlight, and if so the appropriate settings for the headlight during this kind of procedure. Medical expert testimony is also needed regarding alternative causes for Johnson’s alleged injuries and whether the alleged injuries could have occurred in the absence of negligence. Such an analysis could not be performed by a lay juror based on common knowledge. As Johnson’s claims raise questions of medical judgment that are outside of the common knowledge or experience of a lay jury, her complaint sounds in medical malpractice and not ordinary negligence.

We affirm.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

¹⁴ *Id.*