# STATE OF MICHIGAN

# COURT OF APPEALS

LACI BURSLEY,

Plaintiff-Appellant,

v

PGPA PHARMACY, INC,

Defendant-Appellee,

and

MARY ELLEN BENZIK, MD and FAMILY HEALTH CENTER OF BATTLE CREEK,

Defendants.

UNPUBLISHED
November 8, 2012

No. 307655
Calhoun Circuit Court
LC No. 2010-002822-NM

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant PGPA Pharmacy Inc.'s (PGPA) motion for summary disposition. Plaintiff was prescribed the drug Lamictal, and defendant filled that prescription. Plaintiff experienced a severe adverse reaction to the drug and was permanently injured. The trial court dismissed plaintiff's claim against defendant with prejudice because she did not file an affidavit of merit against defendant and the statutory limitations period had expired.[1] This appeal followed.

The facts are, at least for purposes of the instant motion for summary disposition, not seriously disputed. Plaintiff was a patient at Family Health Center of Battle Creek. She had previously been prescribed Lamictal by her psychiatrist, Dr. Sven Zethelius, but she did not actually take it at the time. Plaintiff filled her prior Lamictal prescription at Walgreens; nobody

[1] Plaintiff had commenced another action in federal court against the remaining defendants under the Federal Tort Claims Act, 28 USC 2671 *et seq*, and as far as we know, that action remains pending. The trial court in the instant action dismissed plaintiff's claims against those other defendants without prejudice, and they are not participating in this appeal.

at Walgreens discussed the drug with her, and although Walgreens provided her with some literature about the drug, plaintiff neither read nor kept it. Dr. Mary Ellen Benzik prescribed Lamictal for plaintiff after reviewing her prior medical records. Dr. Benzik did not discuss possible alternatives to the medication or the possible adverse reactions to the Lamictal with the plaintiff, including, but not limited to, the life-threatening condition Stevens Johnson Syndrome.

Plaintiff filled the prescription for Lamictal at defendant PGPA, which was the on-site pharmacy in Dr. Benzik's building. According to plaintiff, PGPA did not include a "Black box warning" set forth by the Food and Drug Administration (FDA) for the Lamictal and did not advise her of the possible adverse reactions to the drug. Instead, she received the Lamictal in a paper bag with "two papers folded in half stapled to the bag." Plaintiff read the papers before she took the drug, but contended that they contained no warning about the possibility of her severe reaction; rather, the papers warned of dizziness and "something about a skin rash" and painful urination. The literature provided by the pharmacy contained the following paragraph:

> POSSIBLE SIDE EFFECTS: SIDE EFFECTS that may occur while taking this medicine include blurred or double vision, constipation, decreased coordination, diarrhea, dizziness, drowsiness, headache, nausea, runny or stuffy nose, stomach upset, trouble sleeping, vomiting, or weakness or fatigue. If they continue or are bothersome, check with your doctor. CHECK WITH YOUR DOCTOR AS SOON AS POSSIBLE if you experience difficult or painful urination; persistent sore throat; involuntary trembling; muscle aches; painful menstrual periods or other menstrual changes; swelling of the hands, ankles, or feet; unusual weakness or fatigue; vaginal itch or discharge; vision changes; or weight loss. CONTACT YOUR DOCTOR IMMEDIATELY if you experience a missed menstrual period; calf pain or tenderness; chest pain; dark urine; fast or irregular heartbeat; fever or chills; new or worsening mental or mood changes (such as anxiety, depression, restlessness, irritability, or panic attacks); new or worsening seizures; pale stools; red, swollen, or blistered skin; severe or persistent stomach pain; severe muscle pain or tenderness; shortness of breath; sores in the mouth or around the eyes; suicidal thoughts or attempts; swelling of your hands, legs, face, lips, eyes, throat, or tongue; difficulty swallowing or breathing; hoarseness; swollen lymph glands; unusual bruising or bleeding; or yellowing of the eyes or skin. STOP TAKING THIS MEDICINE AND SEEK IMMEDIATE MEDICAL ATTENTION IF YOU DEVELOP A RASH. An allergic reaction to this medicine is unlikely, but seek immediate medical attention if it occurs. Symptoms of an allergic reaction include itching, hives, severe dizziness, swelling, or trouble breathing. If you notice other effects not listed above, contact your doctor, nurse, or pharmacist.

Plaintiff signed a form for PGA purportedly stating that "Consultation has been offered," but she denied remembering having done so or having actually been offered any counseling. We note that the copy of the form provided to us unambiguously does *not* constitute a certification by the signer that consultation actually had been offered, but rather the statement that "consultation has been offered" appears to be merely a somewhat anomalous-looking assertion by PGPA itself. It is in no way dispositive of whether plaintiff was, in fact, actually offered any sort of

consultation, and consequently cannot be a basis for defendant's alternative ground for affirming the grant of summary disposition.

Plaintiff began taking the Lamictal immediately. She shortly began developing symptoms associated with Stevens Johnson Syndrome, including but not limited to flu-like symptoms, back pain, severe headache, eye pain and discharge, tingling in the hands and feet, fever, swelling of the face and tongue, target lesions, painful swallowing, lesions in her throat. Because plaintiff was not aware that her reactions were caused by the Lamictal, she continued to take it, not knowing that she should discontinue use and seek emergency medical attention. She went to the emergency room somewhat more than a week later and was admitted to Battle Creek Health System with target lesions covering her body with significant eye and oral mucosal involvement, where she was diagnosed with erythema multiforme. Lamictal was identified as causing her symptoms and was immediately discontinued. Plaintiff's illness was then diagnosed as Stevens Johnson Syndrome, and plaintiff was transferred to Bronson Methodist Hospital where she developed Toxic Epidermal Necrolysis and stayed in the intensive care burn unit for approximately three weeks. Plaintiff had to undergo daily debridement of the skin for approximately four weeks, required extensive pain medication, and is left with severe, disabling, and permanent damages.

Plaintiff filed suit against defendants Dr. Benzik and Family Health Center for medical malpractice and for negligence against defendant PGPA. However, FHC is federally funded, so plaintiff voluntarily dismissed the cases against Dr. Benzik and FHC from the state court and re-filed them in federal court under the Federal Torts Claim Act, 28 USC 2671 *et seq*. Plaintiff sought a stay of proceedings "for 6 months while the federal tort claims administrative proceedings are continuing." The trial court held a hearing on March 14, 2011, for which no transcript was provided to this Court. "For the reasons stated on the record in the course of oral argument on March 14, 2011," the trial court granted plaintiff's motion to stay proceedings in part for 182 days, during which PGPA was permitted to take plaintiff's deposition and both parties "may conduct such other discovery as they may mutually agree."

After the stay expired, PGPA moved for summary disposition. PGPA argued, in essence, that plaintiff's claim against it truly sounded in professional malpractice and that its liability could only be vicariously based on alleged misconduct of the unnamed pharmacist, whose initials were NSL, who had actually dispensed the Lamictal to plaintiff; but because plaintiff failed to file an affidavit of merit, her suit was not properly commenced and the statute of limitations was not tolled and had now expired. Plaintiff argued in response that no affidavit of merit was required for a claim against a pharmacist, PGPA failed to file an affidavit of meritorious defense, and plaintiff had been unable to obtain discovery from PGPA. Plaintiff additionally moved for "voluntary dismissal of this action without prejudice, in order to proceed with the pending federal court action against all the Defendants." PGPA responded that because it had an absolute defense to plaintiff's claims, it would be prejudiced by dismissal without prejudice. The trial court concluded that plaintiff had been obligated to file an affidavit of merit as to PGPA, but failed to do so, and the statute of limitations had subsequently run; consequently, the trial court granted summary disposition in favor of PGPA with prejudice.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v*

*Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the non-moving party and affirm a grant of summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. We likewise review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003).

In a nutshell, plaintiff contends that her claim is against the pharmacy, and she relies on our Supreme Court's decision in *Kuznar v Raksha Corp*, 481 Mich 169; 750 NW2d 121 (2006), which explicitly and unanimously held that pharmacies are not licensed health-care professionals subject to professional liability claims. *Id*. at 179-183. Defendant contends that plaintiff's claim, no matter how it was pleaded, is actually an assertion of wrongdoing by a pharmacist, who *is* a health-care professional, and the only way defendant itself could be liable is vicariously.

Defendant correctly points out that in *Kuznar*, the plaintiff asserted an ordinary-negligence claim against a pharmacy and the pharmacy's non-pharmacist employee. *Id*. at 171-174. Our Supreme Court explained in no uncertain terms that a pharmacy cannot ever be *directly* liable for medical malpractice. *Id*. at 172. However, our Supreme Court did not state that a pharmacy cannot be *vicariously* liable for medical malpractice *per se*; rather, its holding was only that the pharmacy in that case could not be vicariously liable for medical malpractice because the employee upon whose misconduct that vicarious liability would be based was not a licensed health-care professional or employee thereof. *Id*. By implication, there is no reason why a pharmacy could not be vicariously liable for professional malpractice committed by a licensed health-care professional employee.

Significantly, our Supreme Court subsequently confirmed "that when claims alleged against a PC [professional corporation] are predicated on its vicarious liability for a licensed health care provider rendering professional services, an NOI [notice of intent] must be provided." *Potter v McLeary*, 484 Mich 397, 402; 774 NW2d 1 (2009). "Pharmacists are considered health care providers for purposes of malpractice statutes." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), citing MCL 333.17711. Furthermore, it is explicitly within the scope of a pharmacist's duty as a pharmacist to "change a patient's . . . directions for use" "[a]fter consultation with and agreement from the prescriber." MCL 333.17751(6). Finally, according to the affidavit the president of PGPA, a pharmacist dispensed plaintiff's Lamictal.

This Court determines whether an action is for ordinary negligence or for medical malpractice by looking beyond the technical labels affixed by the parties to the claim as a whole. *David v Sternberg*, 272 Mich App 377, 381-382; 726 NW2d 89 (2006). It appears that the

gravamen of plaintiff's claim against PGPA is truly for vicarious liability arising out of a pharmacist's decision to change the directions for use given to a patent in the course of a professional relationship between the pharmacist and patient and within the scope of the pharmacist's duties as a health care professional. Additionally, we think it axiomatic that determining whether the substitute directions for use were adequate necessarily entails some exercise of medical judgment outside what could be within a jury's common knowledge or experience. See *David*, 272 Mich App at 382. Consequently, defendant and the trial court correctly concluded that plaintiff's claim against PGPA sounded in medical malpractice and required an affidavit of merit. See *Potter*, 484 Mich at 403.

Plaintiff makes a convincing argument that she had no way to know the identity of the dispensing pharmacist; indeed, even PGPA's president apparently only knows that the pharmacist's initials were "NSL." We think it unfair that the trial court permitted PGPA to have discovery but did not permit plaintiff to have discovery. Nevertheless, plaintiff was not required to actually name the individual pharmacist as a defendant because her complaint against PGPA set forth a claim for vicarious liability arising from the negligence of the pharmacy's pharmacist, irrespective of the pharmacist's specific identity. See *Al-Shimmari v Detroit Medical Center*, 477 Mich 280, 294-296; 731 NW2d 29 (2007) (explaining that a principal may be held liable for the conduct of an agent even if the agent is dismissed for failure of service of process). In any event, changing the directions for use would either be an exercise of medical judgment by a licensed health-care professional or by someone holding him-or herself out as such, because doing so is within the scope of a pharmacist's duty. Consequently, while plaintiff's argument is a sympathetic one, the identity of the person who engaged in the specific acts or omissions at issue is not truly relevant because the nature of the claim would still be for professional negligence.

Although our conclusion above renders defendant's alternative asserted bases for affirmance irrelevant, we note briefly that both of them are wrong. First, as noted above, the form plaintiff signed in no way establishes that plaintiff actually was offered any kind of consultation. Second, pharmacists are not obligated to provide drug warnings to patients where a prescription appears proper on its face and neither the physician nor the manufacturer has required a warning, nor are pharmacists liable for failing "to monitor and intervene in a customer's reliance on drugs prescribed by a licensed treating physician." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 204; 544 NW2d 727 (1996). However, whether or not any particular warning would otherwise have been required for the Lamictal, "[c]ourts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume." *Baker*, 215 Mich App at 205. Having undertaken to provide its own warning, PGPA was obligated to do so competently.

Although the decision whether to grant a dismissal with or without prejudice is usually within the trial court's discretion, whether summary disposition should or should not be with prejudice is an issue of law reviewed de novo. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997). A medical malpractice complaint filed without an affidavit of merit does not commence a medical malpractice action, and therefore the running of the applicable statute of limitations is not tolled. *Vanslembrouck v Halperin*, 277 Mich App 558, 561; 747 NW2d 311 (2008). "When the untolled period of limitations expires before the plaintiff files a complaint accompanied by an AOM [affidavit of merit], the case must be dismissed with

prejudice on statute-of-limitations grounds." *Ligons v Crittenton Hosp*, 490 Mich 61, 73; 803 NW2d 271 (2011). It is apparently uncontested that the limitations period applicable to medical malpractice actions had expired by the date of the summary disposition motion. Accordingly, the trial court correctly dismissed the case against PGPA with prejudice.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause