

STATE OF MICHIGAN
COURT OF APPEALS

MARY B. IVANISZYN,

Plaintiff-Appellant,

v

TERRIE J. BROWNING and ALTERNATIVE
THERAPIES, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 19, 2013

No. 307906
Oakland Circuit Court
LC No. 2011-117313-NZ

Before: JANSEN, P.J., and O'CONNELL and M.J. KELLY, JJ.

PER CURIAM.

This appeal by right requires us to decide whether the trial court correctly determined that plaintiff's claims against a family counselor sounded in medical malpractice. We conclude that Counts II, III, IV, and V of plaintiff's complaint sound in malpractice and that those claims are time-barred. We further conclude that Count I of the complaint does not state a viable claim, because plaintiff did not assert any consideration for the alleged contractual duty in that Count. Accordingly, we affirm the trial court's grant of summary disposition in favor of defendants.

I. FACTS AND PROCEDURAL HISTORY

In 2005, plaintiff gave birth to a child. When the child was born, plaintiff was not living with the child's father. However, when the child was approximately one and a half years old, plaintiff and the father started living together. During the next year, the couple's relationship was argumentative. In November 2007, the couple started receiving counseling with defendant Terrie Browning, who was doing business as defendant Alternative Therapies, P.C. According to Browning, plaintiff's goal in the counseling was to repair the couple's relationship, while the father's goal was to establish a child custody agreement. The couple jointly attended counseling through January 2008, and they approved a temporary parenting time agreement that Browning reduced to writing. At some point, Browning provided the father with the names of a child custody lawyer and a pediatrician.

In October 2008, Browning prepared a two-page letter addressed to the Friend of the Court and sent the letter to the father's child custody attorney. The letter reported that Browning had assisted plaintiff and the father in reaching a temporary parenting time agreement. The letter further reported that the father presently had no consistent parenting time, that plaintiff was confrontational regarding parenting time, and that the child became agitated when plaintiff

initiated verbal arguments with the father. Apparently, the father's attorney later provided Browning's letter to the trial court.

Two and a half years after Browning wrote the letter, plaintiff filed a five-count complaint against defendants for breaching an alleged duty of confidentiality. In Count I, plaintiff alleged breach of contract, in Count II, invasion of privacy, Count III, disclosure of embarrassing private facts, Count IV, intentional infliction of emotional distress, and Count V, negligence. In keeping with the trial court's scheduling order, plaintiff filed a witness list that identified potential expert witnesses, including licensed professional counselors and child custody specialists. After some written discovery, defendants moved for summary disposition on the ground that plaintiff's claim was time-barred by the two year statute of limitations governing malpractice actions. The trial court agreed and granted summary disposition in favor of defendants under MCR 2.116(C)(7) (untimely claims). The trial court also granted summary disposition on the alternative ground that plaintiff failed to state claims under MCR 2.116(C)(8).

II. ANALYSIS

A. ORDINARY NEGLIGENCE OR MALPRACTICE: COUNTS II THROUGH V

The limitations period for bringing a medical malpractice claim is two years. MCL 600.5805(6). In this case, plaintiff filed her complaint more than two years after the alleged breach of confidentiality occurred. Accordingly, if plaintiff's claims sound in medical malpractice, the claims are time-barred by the two year limitations period of MCL 600.5805(6). See also MCL 600.5838a(1) (medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim").

Plaintiff labeled most of her claims as ordinary torts: invasion of privacy; public disclosure of embarrassing facts; intentional infliction of emotional distress; and negligence. However, plaintiff cannot avoid the two-year limitations period by labeling her claims as torts. See *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). This Court disregards the plaintiff's labels when reviewing a claim for timeliness. *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006). Instead, the Court considers the complaint as a whole to identify the exact nature of the claim. We review de novo the trial court's determination that plaintiff's claims sound in medical malpractice. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). We accept the allegations in the complaint as true unless the documentary evidence in the record specifically contradicts the allegations. *Kuznar*, 272 Mich App at 134.

In *Bryant*, 471 Mich at 422, our Supreme Court established the test for determining whether a claim sounds in medical malpractice or in negligence:

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.

Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (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. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Id.*, internal quotation marks and citations omitted.]

The *Bryant* Court went on to explain the analysis for each of the two steps of the test. For the “professional relationship” step, the Court must determine whether the defendant is a licensed health care professional who is subject to a contractual duty that requires the defendant to render professional health care services to the plaintiff. *Id.* For the “medical judgment” step, the Court must determine

whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury’s common knowledge and experience. 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. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Id.* at 423.]

The trial court in this case properly applied the *Bryant* test to conclude that plaintiff’s claims sound in malpractice. Regarding the “professional relationship” step of the test, the record indicates that Browning was a licensed health care professional who had a contractual duty to provide services to the plaintiff. See *Bryant*, 471 Mich at 422. Defendants submitted an affidavit confirming that defendant Browning received a Michigan limited professional counselor’s license in 2004, and that in 2007, during the course of the joint counseling, Browning received a full professional counselor’s license.¹ Regarding a contractual duty, plaintiff alleged in her complaint that she “was a customer of [defendants] pursuant to an oral, written, or implied contract.” Plaintiff further alleged that for several weeks, defendants provided joint counseling services to her and the child’s father. On the basis of these allegations, we conclude that the record was sufficient to establish a professional relationship within the meaning of a medical malpractice claim.

The record also supports the trial court’s determination on the “medical judgment” aspect of the *Bryant* test. The allegedly wrongful conduct in this case was the preparation of the letter to the Friend of the Court in the child custody action. Plaintiff argues that the letter breached

¹ At the summary disposition hearing, plaintiff’s counsel argued that Browning had failed to obtain proper supervision while she held a limited license. However, plaintiff never sought to amend the complaint to add these allegations, nor did plaintiff submit deposition transcripts or documentary support for the allegations. The trial court thus did not consider allegations.

confidentiality and privilege standards. However, nothing in the record establishes the scope of a privilege when parents embark upon joint counseling that addresses custody or parenting time disputes. Expert testimony would be helpful to a jury in determining the scope of privilege applicable in this joint counseling situation. More importantly, expert testimony would be necessary to determine whether any of the disclosures in Browning's letter breached a standard of confidentiality owed to *plaintiff*, as opposed to a standard owed to the father. In addition, expert testimony would be necessary to determine whether the language of the report indicates that the father provided the information in the letter, and if so, whether disclosure of that information breached any standard of confidentiality that Browning owed to plaintiff.

In addition, each of plaintiff's claims in Counts II through V would require expert testimony. In Count II, labeled invasion of privacy, plaintiff alleged that Browning disclosed private information obtained during counseling. The report at issue, however, indicates that Browning may have been reporting on the status of the couple's relationship as of the date of the letter, which was several months after plaintiff stopped participating in counseling. Absent a review of Browning's files by an expert, and an expert explanation of the terms used in the letter, a jury would have significant difficulty determining whether the references in the letter violated a standard of care concerning confidentiality in joint counseling arrangements when the disclosure addresses the status of the parenting relationship subsequent to the joint counseling.

In Count III, labeled disclosure of embarrassing private facts, plaintiff complains that defendants embarrassed her by disclosing that her goals for counseling differed from the father's goals. Expert testimony would be required to assist a jury in determining whether, when child custody is at issue, a professional counselor may disclose the reasons the parents initially sought counseling. Similar testimony would be required to prove the allegations in Count IV, labeled intentional infliction of emotional distress, and Count V, labeled negligence. In the emotional distress claim, plaintiff alleged that defendants' disclosure of information was extreme and outrageous conduct; in the negligence claim, plaintiff alleged that the disclosure was negligent. To prove either of these allegations, plaintiff would be required to prove that the disclosure was wrongful. In turn, to establish that the disclosure was wrongful, plaintiff would have to establish that the information was privileged. Expert testimony is necessary to determine whether the disclosed information was privileged and whether the disclosure was proper in the course of a parenting dispute. Consequently, the trial court properly determined that plaintiff's claims sounded in malpractice and that the claims were barred by the two-year statute of limitations. See generally *Saur v Probes*, 190 Mich App 636; 476 NW2d 496 (1991).

B. CONTRACTUAL DUTY OF CONFIDENTIALITY: COUNT I

For the purposes of this issue, the Court analyzes the dismissal of plaintiff's claim under MCR 2.116(C)(8). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party." *Dalley v Dykema Gossett*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010) (citations omitted). This Court reviews de novo the trial court's decision. *Id.* at 304.

Plaintiff argues that the trial court erred by dismissing her contract count for failure to state a claim. Specifically, plaintiff maintains that the trial court's decision was internally

inconsistent with regard to the contract claim, in that the court found that there was a contract for professional services, but found that there was no contract requiring confidentiality. Plaintiff's argument fails to distinguish between the existence of a general contract for joint counseling, which she expressly alleged in her complaint, and a specific contract requiring confidentiality, for which plaintiff failed to allege any consideration.

To allege a valid contract in a breach of contract claim, a plaintiff must allege "(1) the parties are competent to form a contract; (2) the contract involves a proper subject matter; (3) the existence of legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 412; 468 NW2d 58 (1991). A preexisting statutory duty cannot provide adequate consideration for a contract. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 525; 529 NW2d 318 (1995).

The trial court correctly concluded that plaintiff failed to state a contract claim, on the ground that plaintiff failed to allege consideration for any contractual duty of confidentiality. MCL 333.18117 creates a duty by counselors to maintain confidentiality: "the confidential relations and communications between a licensed professional counselor or a limited licensed counselor and a client of the licensed professional counselor or a limited licensed counselor are privileged communications, and this part does not require a privileged communication to be disclosed, except as otherwise provided by law." As this Court recognized in *Alar*, the existence of a statutory duty to maintain confidentiality cannot serve as consideration for a contractual duty to maintain confidentiality. 208 Mich App at 525.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly