STATE OF MICHIGAN

COURT OF APPEALS

ROBERT S. ZUCKER,

Plaintiff-Appellant,

v

MARK A. KELLEY, MELODY BARTLETT, NANCY SCHLICHTING, PAUL E. LACASSE, BOTSFORD HOSPITAL, PIERSON MEDICAL DIRECTOR, HENRY FORD HOSPITAL, and HENRY FORD HEALTH SYSTEM,

Defendants-Appellees.

UNPUBLISHED
July 25, 2013

No. 308470
Oakland Circuit Court
LC No. 2011-120950-NO

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

After plaintiff Robert S. Zucker was involuntarily admitted to defendants Botsford Hospital's (Botsford) and Henry Ford Hospital System's (Henry Ford) facilities, he sued the hospitals and certain hospital officials for misconduct and negligent acts. The trial court eventually dismissed Zucker's claims on defendants' motion for summary disposition and he now appeals by right to this Court. We conclude that the trial court did not err when it granted defendants' motion. Accordingly, we affirm.

I. BASIC FACTS

In August 2009, a police officer went to Zucker's home after he reported that his apartment had been broken into and his belongings destroyed. The officer found no signs of forced entry but observed trash throughout the apartment and spoiled food. Zucker's daughter went to his home after the officer notified the family about the incident. When she arrived, Zucker's daughter found him carrying a handgun around and, out of concern, she took it from him.

Dr. Sanford Vieder, one of Botsford's doctors, examined Zucker on the next day and diagnosed him with schizophrenia with paranoia and recommended hospitalization. Zucker was then involuntarily admitted to Botsford. The records reflect that Zucker was experiencing an altered mental status: he had rambling and aggressive speech, was irritable, agitated, loud, and appeared delusional and unable to care for himself.

After a two-day stay, Botsford transferred Zucker to Henry Ford. The records from Henry Ford indicate that Zucker was treated for schizoaffective disorder. In September 2009, after a hearing, the Oakland County Probate Court determined that Zucker was a danger to himself and others and ordered him to "undergo combined hospitalization and alternative treatment for a period not to exceed 90 days." Henry Ford continued to treat Zucker until he was released.

Zucker, acting on his own behalf, sued defendants in August 2011. He alleged that the police officers who initially detained him and transferred him to Botsford injured him. He stated that his requests for documentation of the injuries went unheeded and he was isolated until the injuries healed in order to conceal the police misconduct. Zucker also alleged claims of fraud, false imprisonment, and denial of appropriate medical care. Subsequently, he tried to amend his complaint to allege a violation of his civil rights under 42 USC 1983.

Defendants moved for summary disposition and the trial court granted both hospitals' motions. The trial court explained that Zucker's claims sounded in medical malpractice and had to be dismissed because Zucker did not comply with the statutory requirements applicable to medical malpractice claims. The trial court also dismissed the individual defendants because Zucker did not allege any claims against them and denied Zucker's request to amend because amendment would be futile.

Zucker then appealed to this Court.

II. NEGLIGENCE AND MISCONDUCT

Zucker first argues that the trial court erred when it dismissed his claims involving negligence and misconduct for failing to comply with the medical malpractice requirements because those claims did not sound in medical malpractice. Specifically, he argues that his claims did not involve medical judgment, but rather conspiracy to conceal his injuries. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). This Court also reviews de novo whether a claim sounds in ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

As a preliminary matter, we note that the trial court properly dismissed the individual parties from Zucker's lawsuit. Zucker did not allege any act or omission by any of the named individuals that might support a claim against them. See MCR 2.111(A)(1); MCR 2.111(B)(1). Accordingly, he failed to state any claims against those individuals. MCR 2.116(C)(8).

As for the claims against Botsford and Henry Ford, we agree that his claims sound in medical malpractice. As our Supreme Court has explained, medical malpractice can be distinguished from ordinary negligence by two defining characteristics: the existence of a professional relationship and the fact that medical practice will invariably involve questions of medical judgment. *Bryant*, 471 Mich at 422. If a plaintiff's claim arose during the existence of a professional relationship and implicates the medical professional's medical judgment, then "the

action is subject to the procedural and substantive requirements that govern medical malpractice actions." *Id.*

The events at issue plainly arose during the course of Zucker's professional medical relationship with these medical facilities—even though the relationship was involuntary. Therefore, the only issue is whether Zucker's claims involved questions of medical judgment. *Id.* at 422. "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." *Id.* at 423. But, if "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.*

Our Supreme Court further held that a claimant's allegations regarding staffing decisions and patient monitoring involved "questions of professional medical management and not ordinary negligence" because "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). It is undisputed that both hospitals provided Zucker with psychiatric care. Given Zucker's condition, medical expert testimony would be essential to explain to the jury the standard of care required in medical treatment, including whether and to what extent that it was necessary to commit Zucker, to "isolate" him, or document his physical condition. Similarly, whether he was properly diagnosed, housed, monitored, and treated involved issues of medical judgment. Such considerations could not be assessed by a lay juror based on common knowledge. *Id.*

No matter the titles, see *David v Sternberg*, 272 Mich App 377, 381-382; 726 NW2d 89 (2006), because Zucker's claims raise questions of medical judgment that are outside of common knowledge or experience, his complaint sounds in medical malpractice. As such, because he failed to comply with the statutory requirements applicable to medical malpractice claims, including the timely filing of a notice of intent to sue and an affidavit of merit, the trial court properly dismissed Zucker's claims. See, e.g., *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004).

III. CONSPIRACY

Zucker also argues that he adequately pleaded a claim for civil conspiracy. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[T]he motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id.*

A civil conspiracy is "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients and Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003) (citation and quotation marks omitted). A claim of civil conspiracy must be based on an underlying, separate, actionable tort. *Id.*

Zucker contends that he told Botsford and Henry Ford's staff that he intended to sue the police department after his involuntary detention. He argues that they refused to document his injuries, which was—in his view—tantamount to spoliation of evidence. He further argues that spoliation of evidence is a tort that can support his civil conspiracy claim.

This Court recently observed that "Michigan does not yet recognize as a valid cause of action spoliation of evidence that interferes with a prospective civil action against a third party," and declined the opportunity to recognize such a claim. *Teel v Meredith*, 284 Mich App 660, 661, 663-664; 774 NW2d 527 (2009). The *Teel* Court explained that the decision to impose new duties and recognize an independent tort claim for spoliation of evidence should be left to the Legislature. *Id*. at 663-665. Because Michigan does not recognize an independent tort claim for spoliation of evidence, which was the only tort underlying Zucker's conspiracy claim, the trial court properly granted summary disposition of that claim.

IV. AMENDMENT

Finally, Zucker argues that the trial court erred when it denied his request to amend his complaint to allege civil rights violations under 42 USC 1983. This Court reviews a trial court's decision on a party's motion to amend for an abuse of discretion. *Wormsbacher v Phillip R Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). "[A]mendment is generally a matter of right, rather than grace." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). An amendment is not justified, however, when the amendment would be futile. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006). "An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *Id.* (internal citations omitted). After reviewing his amended complaint, we agree that it was legally insufficient on its face.

In order to establish a § 1983 claim, Zucker would have to show that Botsford and Henry Ford deprived him of a right secured by the Constitution or laws of the United States and did so while acting under color of state law. *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 278 (2007). Zucker alleged that Botsford and Henry Ford violated his constitutional rights by refusing to document his injuries, by depriving him of his liberty, and by participating in the commitment proceeding.

Although Botsford and Henry Ford are not state entities, he alleged that they acted in concert with the police department to deprive him of his rights. As for depriving him of his liberty, Zucker did not allege that Botsford and Henry Ford were involved in the police department's decision to initially detain him. Further, Zucker did not allege that, after he was transferred to Botsford and Henry Ford's care, those institutions had no legitimate basis for holding him or that they otherwise held him in violation of the Constitution or federal law.

Indeed, he alleged that they retained him at their facilities after diagnosing him with schizophrenia. Similarly, Zucker failed to allege or identify any law that gave him a right to have the hospitals document his injuries. Finally, Zucker failed to state how the hospitals participation in the commitment proceedings caused him to lose his right to have a jury determine his competency. Therefore, as pleaded, his § 1983 claims were inadequate as a matter of law.

We also agree with the trial court's determination that Zucker's other claims merely restated his original claims, which sounded in medical malpractice, in different forms. Because those claims would have to be dismissed for the same reasons as his original claims, the trial court properly determined that those amendments were also futile.

Zucker also asserts that the trial court was aware that he was representing himself and should have allowed plaintiff to amend his complaint to cure the deficiencies in his pleadings. Although the pleadings of pro se litigants are "to be liberally construed" and are held to "less stringent standards" than those prepared by attorneys, courts will nevertheless not permit pro se litigants to ignore the court rules or sustain their claims despite the absence of factual support, evidence, or legal authority. *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976). Here, the record shows that the trial court treated Zucker with respect and considered his request to amend on the merits. Nevertheless, Zucker's request to amend his complaint was futile. Moreover, we do not agree that the trial court improperly limited Zucker's arguments at the hearing. Under MCR 2.119(E)(3), the trial court had the discretion to limit the time for arguments and did so after giving Zucker an appropriate amount of time to argue.

The trial court did not err when it dismissed Zucker's claims and denied his motion to amend.

Affirmed. On this record, we order that none of the parties may tax their costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly