STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA BLACKWELL and DONALD BLACKWELL,

Plaintiffs-Appellees,

v

CITIZEN'S INSURANCE COMPANY OF AMERICA,

Defendant-Appellant

and

DETROIT INDUSTRIAL CLINIC and SEID A. MOOSSAVI,

Defendants.

UNPUBLISHED
June 4, 1996

No. 169023
LC No. 91-131120-CZ

Before: O'Connell, P.J., and Reilly and D.E. Shelton,* JJ.

PER CURIAM.

Defendant Citizens Insurance Company of America (CICA) appeals a circuit court order denying its motion for summary disposition. Although this Court initially denied CICA's application for leave to appeal, the Supreme Court remanded the case for consideration as on leave granted. *Blackwell v Detroit Industrial Clinic*, 444 Mich 864; 509 NW2d 154 (1993). We reverse.

According to the complaint, plaintiff Cynthia Blackwell[1] was injured at work on August 21, 1989 when she slipped and struck her hand and arm on a table. She received treatment at the Garden City Hospital emergency room on August 22, 1989 and, at CICA's direction, at the Detroit Industrial Clinic, on August 23, 1989. The clinic referred her to defendant Moosavi, who examined her on August 24, 1989. Plaintiff alleged that the clinic and Moosavi "prescribed minimal medical treatment." On December 28, 1989, CICA referred plaintiff to Dr. Sahn, a neurologist, for an independent medical

* Circuit judge, sitting on the Court of Appeals by assignment.

examination. He examined her on January 10, 1990, and provided a letter to CICA indicating his diagnosis of reflex sympathetic dystrophy (RSD) and advising a particular course of treatment. Plaintiff alleged that RSD can be effectively treated only during its early stages and that she did not receive the course of treatment as recommended by Dr. Sahn.

Plaintiff and her husband filed this action on November 1, 1991. The complaint contained four counts: Count I (medical negligence as to the Detroit Industrial Clinic); Count II (medical negligence against Dr. Moosavi); Count III (ordinary negligence against CICA); and Count IV (ordinary negligence against the Detroit Industrial Clinic and Dr. Moosavi). The claims against the clinic and Dr. Moosavi were dismissed pursuant to a stipulation of the parties, and the order of dismissal states that the clinic and Moosavi were not agents of CICA at the time they treated plaintiff. The allegations against CICA asserting vicarious liability for the actions of the clinic and Moosavi are not at issue. The parties agree that the allegations against CICA that are pertinent to this appeal are those alleging direct liability.

Count III states in pertinent part:

> 42. That pursuant to understanding and contractual agreements had between plaintiff BLACKWELL's employer and defendant CITIZENS, BLACKWELL was directed to and did in fact submit her person to the care of various agents. . . and/or employees of defendant CITIZENS for the purpose of receiving medical care, aid, diagnosis, treatment and attention, as set forth above.
>
> 43. That defendant CITIZENS, in conducting its business activities, did owe to the plaintiff certain duties and particularly the duty of hiring, employing and allowing to be represented as its agents, servants, and/or employees of said CITIZENS, persons who were qualified, competent and capable of administering properly to injured employees of insureds of defendant CITIZENS and in utilizing only those persons who would exercise ordinary care in conducting defendant's business in a prudent, careful and lawful manner.
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> 44. That defendant CITIZENS did breach the aforesaid duties in the following particulars:
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> F. By failing to follow and conform medical treatment to the recommended course of treatment of Dr. Leonard Sahn, a neurologist employed by CITIZENS to evaluate, diagnose and recommend treatment for injured insured's employees, and particularly for plaintiff BLACKWELL.
>
> G. By failing to implement a medical review program to notify the examined claimant of the diagnosis, suggest treatment regemine [sic], need for prompt treatment and dangers of failure to receive prompt treatment, under the particular circumstances as set forth when CITIZENS had provided appropriate medical care and attention to plaintiff BLACKWELL, through

> Dr. Sahn, who was found by defendant's agent to be suffering from early reflex sympathetic dystrophy.

CICA moved for summary disposition pursuant to MCR 2.116(C)(4), (8) and (10). CICA argued in part that plaintiff cannot establish a duty on the part of CICA.[2] CICA argued that no contractual relationship existed between plaintiff and CICA, and there is no other basis for finding that CICA owed her a duty. CICA also argued that the "complaint fails to set forth any allegations of fact which would support a finding that CICA voluntarily undertook to provide services for Plaintiff's benefit . . . . The pleadings and evidence establish nothing more than that CICA simply fulfilled its role as the worker's compensation carrier for Mrs. Blackwell's employer."

In response to CICA's motion, plaintiff argued that summary disposition for failure to state a claim would be inappropriate because the complaint alleged that CICA "owed to Plaintiff certain duties" and "did break the aforesaid duties" and "as a direct and proximate result of the activities of defendant CITIZENS", plaintiff incurred damages. Plaintiff also argued that summary disposition pursuant to MCR 2.116(C)(10) should not be granted, and attached the affidavit of an expert in the insurance industry. The affidavit states in part that CICA violated the "standard of care of a professional claims administrator" by failing to "promptly direct that medical attention be afforded to claimant," by providing plaintiff a copy of Dr. Sahn's report "without defining or telling her the seriousness of RSD or directing her that treatment must be initiated immediately", by directing plaintiff to give a copy of the report to the physician "knowing that that physician was not of the specialized field who treat and would be cognizant of RSD and its specific treatment requirements", by not requesting additional tests or evaluations after learning of the RSD diagnosis, by "ignor[ing] their [sic] obligation as a worker's compensation carrier to provide medical care to the claimant by referral to physicians who specifically treat this disease, including Dr. Sahn."

The trial court denied CICA's motion, explaining its ruling as follows:

> Plaintiff says the ordinary negligence in this case, according to those portions of the complaint that were attached, and according to argument was actually the mishandling of the claim over a long period of time by the defendant.
>
> The affidavit of the expert of the plaintiff said that pursuant to the Michigan Unfair Trade and Practices[3] that was a violation of the standard of practice in the insurance industry and there were duties that were breached by the handling of this file and claim, and that that does constitute negligence and, therefore, the Court is going to deny the motion of the defendant.

On appeal, CICA argues that the trial court erroneously denied its motion pursuant to MCR 2.116(C)(8).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews a trial court's decision under MCR 2.116(C)(8)

> de novo and determines "if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. In a negligence action, summary disposition is proper under MCR 2.116(C)(8) if it is determined that the defendant owed no duty to the plaintiff under the alleged facts. [Citations omitted. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261; 532 NW2d 88 (1995).]

The concept of duty concerns the relation between individuals which imposes upon one a legal obligation for the benefit of the other. *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). The duty of care may arise out of a contractual relationship,

> the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that negligent performance constitutes a tort as well as a breach of contract. But it must be kept in mind that the contract creates only the relation out of which arises the common-law duty to exercise ordinary care. Thus in legal contemplation the contract merely creates the state of things which furnishes the occasion of the tort. This being so, the existence of a contract is ordinarily a relevant factor, competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common-law duty on which the tort is based. [*Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).]

We agree with CICA that it did not owe plaintiff the duties alleged in the complaint. Plaintiff does not contend that CICA failed to perform the obligations required by the contract with plaintiff's employer. She has not suggested that the contract required CICA to notify her of a diagnosis, and to warn her of the need for prompt treatment and the dangers of a failure to receive prompt treatment. She does not argue that what was meant by the allegation that CICA failed "to follow and conform medical treatment" amounted to a failure to fulfill obligations under the contract. Rather, plaintiff seeks to impose obligations on the part of CICA beyond those it agreed to provide. Although *Clark* recognized that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done", there is no basis for the law to impose a duty on CICA to perform more than the contract required.

We also agree with CICA's argument in support of its motion for summary disposition that the "complaint fails to set forth any allegations of fact which would support a finding that CICA voluntarily undertook to provide services for Plaintiff's benefit." As explained in *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981), under certain circumstances, an actor who undertakes, gratuitously or for consideration, to render services to another is liable to foreseeable third persons for negligence. However, the actor must have "assumed an obligation or intended to render services for the

benefit of another. Evidence demonstrating merely that a benefit was conferred upon another is not sufficient to establish an undertaking which betokens a duty." *Id.* at 717. In this case, the facts that plaintiff alleged do not support an undertaking creating the duties that plaintiff claims were breached. Although CICA sent plaintiff for an independent medical examination by Dr. Sahn, that conduct is consistent with a primary purpose on the part of CICA to benefit itself and does not establish an undertaking to render services. *Id.* at 718.

In conclusion, we agree with CICA that it did not owe plaintiff a duty and that it was entitled to summary disposition pursuant to MCR 2.116(C)(8). Accordingly, the order denying CICA's motion for summary disposition is reversed.

Reversed.

/s/ Peter D. O'Connell
/s/ Maureen Pulte Reilly

[1] Because plaintiff Donald Blackwell's claim is derivative, references to "plaintiff" will mean Cynthia Blackwell.

[2] CICA also argued that the claim "actually sounds in medical malpractice" and cannot be maintained because there was no patient-physician relationship between CICA and plaintiff; and that the action is barred by the exclusive remedy provision of the worker's disability compensation act. CICA does not assert on appeal that it was entitled to summary disposition on these bases.

[3] The court seems to be referring to the Uniform Trade Practices Act, MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.*, a part of the Insurance Code, MCL 500.100 *et seq.*; MSA 24.1100 *et seq.* prohibiting unfair trade practices. In general, a violation of the Uniform Trade practices Act does not give rise to a private cause of action. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 17; 527 NW2d 13 (1994), citing *Young v Mich Mutual Ins Co*, 139 Mich App 600, 604-606; 362 NW2d 844 (1984).