STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY WEISENBACH and DAVID WEISENBACH, minor,

Plaintiffs-Appellants,

v

DOO SUP LAH, M.D., a/k/a DAVID D. LAH,

Defendant-Appellee,

and

HILLS AND DALES GENERAL HOSPITAL and H. T. DONAHUE, M.D.,

Defendant.

UNPUBLISHED
June 25, 1996

No. 173866
LC No. 92-11478 NH

Before: O'Connell, P.J., and Hood and C.L. Horn, * JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right the order granting summary disposition in favor of defendant Doo Sup Lah, MD. We affirm.

On October 12, 1982, plaintiff Shirley Weisenbach, pregnant and experiencing contractions, was admitted to Hills and Dales General Hospital. She gave birth to plaintiff David Weisenbach early the next morning. The delivery was marred by severe complications. Defendant Lah, a pediatrician, was contacted within minutes of David's birth. He soon arrived and began to administer treatment to the infant. David was later transported to Saginaw General Hospital, where he was treated for complications of meconium aspiration syndrome and hypoxic ischemic encephalopathy. David was discharged on November 5, 1982.

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

David Weisenbach was later diagnosed as suffering from cerebral palsy. Plaintiffs brought suit, alleging that various negligent acts or omissions of defendant in the treatment of David caused his injuries. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the "Good Samaritan" statute, MCL 691.1502(1); MSA 14.563(12)(1), rendered him immune from liability because he had been under no obligation to provide care, but had voluntarily done so. Defendant's motion was granted pursuant to MCR 2.116(C)(7), with the court agreeing that defendant enjoyed immunity from suit.[1] Plaintiffs now appeal.

Summary disposition pursuant to MCR 2.116(C)(7) is appropriate where, among other reasons, a claim is barred by immunity granted by law. Such a motion "may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence." *Vermilya v Dunham*, 195 Mich App 79, 81; 500 NW2d 468 (1992); see also MCR 2.116(G)(3)(a) and (5). Our review of orders granting or denying motions for summary disposition is de novo. *Gentry v Allstate*, 208 Mich App 109, 112; 527 NW2d 39 (1994).

The Good Samaritan statute, MCL 691.1502(1); MSA 14.563(12)(1), provides, in relevant part, as follows:

> In instances where the actual hospital duty of that person did not require a response to that emergency situation, a physician . . . who in good faith responds to a life threatening emergency or responds to a request for emergency assistance in a life threatening emergency within a hospital . . . shall not be liable for any civil damages as a result of an act or omission in the rendering of emergency care, except an act or omission amount to gross negligence or wilful and wanton misconduct.

The language of the Good Samaritan statute indicates that the partial immunity afforded by the statute does not apply to persons whose actual function is to respond to emergency situations. *Pemberton v Dharmani*, 207 Mich App 522, 530; 525 NW2d 497 (1994). In contrast, physicians who are off duty, not on call, and who have no duty to respond fall within the protection of the statute. *Gordin v William Beaumont Hosp*, 180 Mich App 488, 494; 434 NW2d 878 (1989).

Here, we agree with the trial court's conclusion that plaintiffs failed to present evidence indicating that defendant had an "actual hospital duty" to respond to the emergency situation in issue. As indicated above, defendant became involved in the Weisenbach delivery when he was contacted shortly after David Weisenbach was born. The parties agree that defendant was not an employee of the hospital, that he had no physician-patient relationship with Shirley Weisenbach, that he was at home when he was contacted, and that he was not on duty when he received the emergency call. Plaintiffs have presented no positive evidence that defendant was under any type of duty or obligation to respond to the emergency call. While it is true that defendant wore a pager and customarily responded when contacted concerning pediatric emergencies, this falls far short of evidence demonstrating an *actual duty*. In other words, the evidence suggested that defendant was always available to be called, not that he was "on call." Therefore, finding that plaintiff has failed to present evidence that defendant was on

duty, on call, or had some duty to respond, *Gordin*, *supra*, we agree with the trial court that summary disposition pursuant to MCR 2.116(C)(7) was merited.

While we agree with the ruling of the trial court, we do not find, despite the urging of defendant, that plaintiffs' appeal constitutes a vexatious appeal. See MCR 7.216(C)(1). Accordingly, we find no basis for the assessment of costs.

Affirmed.

/s/ Peter D. O'Connell
/s/ Harold Hood
/s/ Carl L. Horn

[1] While the court mistakenly stated that defendant's motion was brought pursuant to MCR 2.116(C)(8), our review of the record indicates that the motion was, in fact, granted pursuant to MCR 2.116(C)(7).