STATE OF MICHIGAN

COURT OF APPEALS

DOLORES Y. JOHNSON,

Plaintiff–Appellant,

v

HENRY FORD HOSPITAL, THOMAS FOX, M.D., PAUL MATTHEW TENDER, M.D., and M. LITTLE, L.P.N.,

Defendants–Appellees.

UNPUBLISHED
September 20, 1996

No. 181296
LC No. 93-314896

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Plaintiff appeals by right the orders which granted summary disposition in defendants' favor in this medical malpractice case. We reverse.

On June 16, 1992, plaintiff underwent a colonoscopy. Several months prior to the colonoscopy, plaintiff was diagnosed as suffering from multiple personality disorder as a result of severe childhood physical and sexual abuse. The colonoscopy was performed using a sedative as opposed to general anesthetic. During the colonoscopy, plaintiff allegedly suffered severe psychological trauma by reverting to one of her alter personalities and experiencing the colonoscopy as a recurrence of her childhood abuse. Although plaintiff's primary personality has no recollection of the colonoscopy, it was later informed of what took place by her alter personalities. Plaintiff claims that if she had been given a general anesthetic and rendered unconscious, she would not have suffered the mental trauma.

Plaintiff first argues that the lower court erred in concluding that the failure to use a general anesthetic could not be a proximate cause of plaintiff's injuries where plaintiff had no recollection of the colonoscopy procedure. We agree.

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

On appeal, the lower court's grant of summary disposition will be reviewed de novo. This Court must review the record to determine whether the defendant was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding a motion for summary disposition, the lower court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in a light most favorable to the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). The lower court must determine whether a record might be developed which would leave open an issue upon which reasonable minds could differ. *Farm Bureau Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

Proof of a medical malpractice claim requires evidence of the following: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) injury to the plaintiff; and (4) proximate cause between the alleged breach and the injury. MCL 600.2912a; MSA 27A.2912(1); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). See also *Cudnick v William Beaumont Hospital*, 207 Mich App 378, 381-383; 525 NW2d 891 (1994). In order to survive a motion for dismissal, the plaintiff must make a prima facie showing regarding each of the four elements. *Locke, supra* at 222. Although during her deposition, plaintiff stated that she had no recollection of the colonoscopy procedure and that she was not conscious, she stated that her "alters," Little Dee, Margaret and Jenny, were conscious and told her what had happened. Because there is no separating plaintiff from her alters, it cannot be said that plaintiff was not injured just because she herself was not conscious and had no recollection of the procedure. The gravamen of plaintiff's complaint was that defendants did not render her completely unconscious and that as a result she reverted to an alter personality in order to deal with the trauma of undergoing the colonoscopy in a semi-conscious state. Defendants cannot now assert that plaintiff was not injured because an alter experienced the procedure while she was "unconscious." The fact that plaintiff reverted to an alter in order to deal with the trauma of the procedure was exactly the injury she wanted to avoid by being rendered totally unconscious through a general anesthetic. As such, it is the opinion of this Court that the lower court erred in finding that plaintiff was not injured here. Reasonable minds could differ as to whether plaintiff was injured as a result of defendants' failure to render her completely unconscious through the use of a general anesthetic.

Next, plaintiff contends that the lower court erred in finding that a general anesthetic during the procedure was not required under the applicable standard of care. We agree.

Plaintiff's expert stated that the lowest possible dose of medication should generally be used to sedate a patient undergoing a colonscopic procedure. However, he stated that although using a general anesthetic while performing the procedure is not the norm, it can be used where there are reasons for doing so. Had plaintiff been placed under a general anesthetic, she may have had no recall whatsoever of the procedure and not have reverted to her alter states as a way of dealing with the trauma of the procedure. As such, there was a reason for using a general, rather than a local, anesthetic. Because there was evidence that under certain circumstances a colonoscopy can, and should, be performed under a general anesthetic, the lower court erred in granting summary disposition on this ground.

Further, whether it would have made any difference had plaintiff been placed under a general anesthetic, rather than a sedative, was a question of fact for the jury.

Plaintiff also argues that the lower court erred in concluding that plaintiff could not establish that, but for the use of the sedative, her injuries would not have occurred. We agree.

Plaintiff's expert testified that out of thousands of patients he had treated with a general anesthetic, only two have had any recall of the procedure they endured while under the anesthetic. He also stated that a patient would be more likely to obviate any recall of the pain experienced during the procedure, or of the procedure itself, if one used a general anesthetic rather than a sedative. He conceded, however, that he had no scientific knowledge or information on the effect that a general anesthetic versus a sedative had on patients with multiple personality disorders and did not know if a general anesthetic would have an amnesiac effect on people with multiple personality disorders. Conversely though, he had no information that a general anesthetic would *not* have alleviated the problems plaintiff experienced. Because there was a question of fact as to whether a general anesthetic was required in this situation, and because there was a question as to whether a general anesthetic would have had a complete amnesiac effect on plaintiff so as to have prevented her from reverting to her alter personalities, the lower court erred in granting defendants' motion for summary disposition on this ground.

Finally, plaintiff asserts that the lower court erred in finding that plaintiff did not withdraw her consent to the procedure and thus did not suffer a battery. We agree.

A competent adult has the right to decline any and all forms of medical treatment, including life-saving or life-prolonging treatment. *Werth v Taylor*, 190 Mich App 141, 145; 475 NW2d 426 (1991) (citing *Cruzan v Director, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990)). If a physician treats or operates upon a patient without their consent, the physician has committed an assault and battery. *Id.* at 146. As well, if consent is given, but the scope of consent is exceeded, an assault and battery has been committed. *Banks v Wittenberg*, 82 Mich App 274, 279-280; 266 NW2d 788 (1978). Consent is implied where a patient seeks treatment or otherwise manifests an intent to submit to the procedure. *Werth, supra* at 146 (citing *Young v Oakland Gen Hosp*, 175 Mich App 132, 139; 437 NW2d 321 (1989)); *Banks, supra* at 280.

A friend of plaintiff's, who attended the procedure with her, stated that shortly after the procedure commenced plaintiff, as one of her alters, asked that "Daddy" stop hurting her and yelled "stop, stop" while waving her hand at the tube as it was being inserted, as if to try and halt the procedure herself. Defendant Fox admitted that he heard plaintiff say "stop" but that he continued the procedure on the ground that most patients say such things when they are in a drug induced state. Based on this evidence, a genuine issue of material fact existed as to whether plaintiff withdrew her consent to have the procedure continue and thus whether defendants committed an assault and battery upon her when they continued with the procedure after plaintiff asked them to stop. Because a genuine issue of material fact existed, the lower court erred in granting summary disposition on this claim.

Reversed.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin