STATE OF MICHIGAN

COURT OF APPEALS

SANDRA WILLIAMS,

Plaintiff-Appellant,

v

HUTZEL HOSPITAL, a Michigan corporation, ELLIOTT C. ROBERTS, M.D., THEODORE B. JONES, M.D., and DAMON CLINICAL LABORATORIES,

Defendants-Appellees.

UNPUBLISHED
October 11. 1996

No. 181694
LC No. 93-325064

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

PER CURIAM.

Plaintiff appeals as of right orders of the circuit court granting summary disposition to defendants pursuant to MCR 2.116(C)(10) on plaintiff's claim of medical malpractice. We reverse and remand.

This Court reviews de novo a lower court's ruling on a motion for summary disposition. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993).

On appeal, plaintiff first argues that the lower court erred in finding no genuine issue of material fact whether plaintiff had established a definite and objective physical injury produced as a result of emotional distress caused by defendants' misinforming her that she was HIV positive. We agree that summary disposition was not warranted.

The Michigan Supreme Court in *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970), held:

> "[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a

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

> properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock.

The plaintiff's burden in proving sufficient physical harm to satisfy the definite and objective physical injury standard is minimal. In *Daley*, *supra*, at 15, our Supreme Court held that evidence of the plaintiff's "sudden weight loss, her inability to perform ordinary household duties, her extreme nervousness, and irritability" was sufficient to withstand a directed verdict motion. In *Toms*, *supra* at 657, we held that evidence of depression, "withdrawal from normal forms of socialization," and the inability of the plaintiff "to function as she did previously" was sufficient to withstand a motion for summary disposition. It is in light of these holdings that we look to the case at bar.

In support of her claim, plaintiff submitted reports of two doctors. Dr. Michael Abramsky stated that after being informed she was HIV positive and that the fetus she was carrying was also likely to contract the disease, plaintiff went through an acute psychiatric period for approximately five months, which manifested itself as depression with obsessive thoughts, biological signs and pessimism about the future. Dr. Saul Forman diagnosed plaintiff with acute situation reaction with depression, in partial remission. We conclude that viewing the evidence in a light most favorable to plaintiff, a factual issue has been developed, and the lower court erred in granting summary disposition.

Next, plaintiff challenges the 1986 version of MCL 600.1483; MSA 27A.1483 which places a cap on the noneconomic damages recoverable by a plaintiff in a medical malpractice action. The statute provides that in "an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000 shall not be awarded."

In the trial court, plaintiff challenged the cap on grounds that it was unconstitutional. However, on appeal, plaintiff has opted not to take issue with the trial court's ruling that the cap is constitutional and accordingly we do not address this issue. What plaintiff does challenge is the trial court's ruling that the $225,000 cap applies to defendants jointly, or in other words, to the action as a whole, as opposed to per defendant. The trial court's ruling was rendered in response to defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (no genuine issue of material fact).

This issue is not appropriately decided by means of summary disposition. A more appropriate method of deciding the issue may have been declaratory relief, or a ruling by the trial court when, and if, the jury found defendants liable and awarded damages in excess of $225,000. If declaratory relief was sought, the trial court would have to abide by MCR 2.605 which makes such relief discretionary. This Court, in turn, would review the trial court's decision de novo. *Englund v State Farm Mutual Automobile Ins Co*, 190 Mich App 120, 121 (1991). Declaratory relief is not proper if it is in essence, "a decision, in advance, about a right before it has been actually asserted and tested, or judgment upon some matter which, when rendered, for any reason cannot have practical legal effect upon the then existing controversy." *Southfield Police Officers Ass'n v City of Southfield*, 162 Mich App 729, 735 (1987). In this case, such relief may not be proper because any right plaintiff has to

damages in excess of the cap has not yet even been determined, let alone asserted and tested. Plaintiff's rights will not be infringed upon by the cap unless a jury concludes that defendants are liable and plaintiff is entitled to damages in excess of the cap. If a jury concludes that defendants are not liable, or that defendants are liable and plaintiff is entitled to damages less than the cap, then plaintiff's rights will not be affected. Summary disposition was not intended to dispose of issues such as this.

In any event, although the issue presented is one of law, we decline to decide it because, in this case, the issue is not yet ripe for adjudication. When we balance the need for further factual development to determine liability on the part of defendants, and uncertainty as to whether plaintiff will actually suffer future injury, i.e., whether the jury will determine that plaintiff is entitled to damages in excess of the cap, with the lack of potential hardship of denying anticipatory relief, we feel it would not be prudent for us to render a decision. *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 412-413; 455 NW2d 1 (1980). This issue is simply not ripe until we are presented with a legally sustainable finding that defendants are liable. *Stockdale v Jamison*, 416 Mich 217, 232-233; 330 NW2d 389 (1982) (Ryan, J., concurring in part, dissenting in part), rev'd on other grounds 433 Mich 525, 543-544 (1989). Until then, any decision by this Court would be "an advisory opinion on the measurement of damages." *Id*. at 233.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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