STATE OF MICHIGAN

COURT OF APPEALS

MARGARET COBB, individually and as personal representative of the Estate of ALLEN E. COBB,

Plaintiff-Appellant,

v

BEATTY CHIROPRACTIC CLINIC and JOHN BEATTY, D.C.,

Defendants-Appellees.

UNPUBLISHED
January 31, 1997

No. 187421
Livingston Circuit Court
L C. No. 91 11189 NO

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We reverse.

According to the first amended complaint, plaintiff's decedent came to the Beatty Chiropractic Clinic (the clinic) on January 7, 1991, complaining of pain in his left shoulder and arm. Plaintiff alleged that "a reasonable and prudent chiropractic clinic would have performed a physical examination of Plaintiff's Decedent" and "referred the deceased to a medical doctor or other physician trained in diagnosing cardiac emergencies," and that the clinic and its employees were negligent in failing to do so. With respect to defendant John Beatty, the first amended complaint alleged that a reasonable and prudent chiropractor would have: (1) "notified or consulted with an emergency room physician or cardiac surgeon, or cardiologist as to the Plaintiff's Decedent's condition, based on his complaints in the left shoulder and arm"; (2) "recognized the presenting signs and symptoms as a medical emergency"; (3) "recognized the fact that he is not trained or competent to treat the medical emergency that the deceased presented with, and would have immediately referred the deceased to a medical doctor"; (4) "warned the deceased, Allen Cobb, that he was not allowed by statute to diagnose or treat any condition other than subluxation"; and (5) recognized that the Plaintiff [sic] may have been suffering from

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

a medical condition other than subluxation and, therefore, he had a duty to refer the deceased Allen Cobb, to a physician."[1]

The trial court granted summary disposition pursuant to MCR 2.116(C)(8) in favor of defendants because "the Plaintiff's complaint fails to state a duty recognized by law . . . ." We agree with plaintiff that the trial court erred in determining that defendants did not owe plaintiff a duty.

> Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Duty is a question of law. The term "malpractice" denotes a breach of the duty owed by one rendering professional services to a person who has contracted for such services; in medical malpractice cases, the duty owed by the physician arises from the physician-patient relationship. [*Malik v Beaumont Hosp*, 168 Mich App 159, 168; 423 NW2d 920 (1988).]

The duty in the present case arises from the chiropractor-patient relationship. As early as 1925, our Supreme Court implicitly recognized the existence of a duty based on this relationship in *Janssen v Mulder*, 232 Mich 183; 205 NW 159 (1925), in which the Court reversed a directed verdict entered in favor of the defendant.

Although the trial court's opinion purported to analyze the issue of "duty", the court's reasoning seems to concern plaintiff's inability to establish that defendant Beatty breached the standard of care.

> The Plaintiff contends that the Defendants owed a duty to refer Mr. Cobb to an emergency room physician or a cardiac specialist. Prior to such referral, the Plaintiff's complaint logically requires and explicitly alleges that the Defendants owed a duty to conduct a general physical examination which would have identified Mr. Cobb's symptoms as requiring treatment by an emergency room physician or a cardiac specialist.
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> The *Wengel* [*v Herfert*, 189 Mich App 427; 473 NW2d 741 (1991)] Court found that general physical examinations and diagnosis of anything other than spinal subluxations or misalignments were beyond the scope of the chiropractic act.[2] Moreover, the *Wengel* Court barred testimony by an opposing expert which criticized a chiropractor for failure to take action in a manner not permitted by the act. To accept the Plaintiff's theory of this case, the Court would be forced to permit expert testimony supporting a standard of care which required a chiropractor to perform a general physical examination and to diagnose conditions beyond spinal subluxations or misalignments. It is the opinion of this Court that, as a matter of law, the Defendants owed no duty to the Plaintiff to conduct a general physical examination which would have resulted in a referral of Mr. Cobb's case to a [sic] emergency room physician or a cardiac specialist. Absent such a duty, summary disposition is appropriate under MCR 2.116(C)(8).

In *Wengel*, this Court reversed a judgment entered in favor of the plaintiff and against a chiropractor and his clinic. The plaintiff claimed that the defendants' employees falsely represented that chiropractic manipulation could help plaintiff's diabetes and that the chiropractor's "failure to properly diagnose and treat [the plaintiff] aggravated a preexisting but asymptomatic condition in his back." *Id.* at 429. At trial, the plaintiff's expert criticized the chiropractor for, among other things, failing to conduct a thorough physical examination "to rule out other causes of the purported back pain . . . ." *Id.* at 430. This Court agreed with defendants that a new trial was required:

> While the chiropractic act does not and should not be interpreted as setting forth a standard of care, it does set the parameters of the practice of chiropractic. Nowhere in the act is there language suggesting that chiropractors are licensed to conduct general physical examinations or laboratory tests or to diagnose, by x-ray or otherwise, anything other than spinal subluxations or misalignments. Both this Court and the Michigan Supreme Court have specifically so ruled. Defendant was bound by the statute at the time plaintiff was treated and cannot be held accountable for failing to do that which the act prohibited. [*Id.* at 430-431. (Citations omitted.)]

Contrary to the trial court's analysis, *Wengel* does not indicate that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(8). The trial court correctly determined that, in accordance with *Wengel*, plaintiff is precluded from establishing that defendants breached the standard of care (e.g. were negligent) by not performing a thorough physical examination. However, this conclusion has no bearing on the issue of defendants' duty to plaintiff's decedent and does not mean that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(8). Plaintiff contends that she will be able to establish a breach of the standard of care because, during the course of the chiropractic examination, Beatty should have suspected that plaintiff's decedent was suffering from a serious medical condition and referred plaintiff's decedent for medical care. Whether she will succeed in this effort must be determined by a jury, unless defendants can establish that there is no genuine issue of material fact in this regard.

Defendants suggest that, in the event that we conclude summary disposition was not proper under MCR 2.116(C)(8), this Court consider whether they were entitled to summary disposition pursuant to MCR 2116(C)(10). According to defendants' brief, "the absence of any record of a breach of duty provides an alternative basis for this Court to affirm the trial court's correct result, even if it is determined that it was based on the wrong reason." It is true that this Court will not reverse where the trial court has reached the right result for the wrong reason, *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). However, the argument presented in this section of defendants' brief on appeal was not presented in defendants' motion for summary disposition filed April 4, 1995, on which the trial court ruled in the opinion and order appealed. A similar argument was raised in an earlier motion for summary disposition filed by defendants on April 28, 1992, which the court denied. The 1992 motion, brought pursuant to MCR 2.116(C)(8) and (10), was not supported by documentary evidence as required by MCR 2.116(G)(3)(b). *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).[3] Because the argument raised by defendants on appeal as an alternative

basis for affirmance was not presented to the trial court in the form of a properly supported motion, we decline to consider it further.

The trial court's opinion and order granting defendants' motion for summary disposition is reversed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick

[1] The complaint also named Frank Detterbeck, M.D. and Ready Care Walk-In Service as defendants as a result of Detterbeck's misdiagnosis of plaintiff's condition when he was examined on January 7, 1991. Plaintiff, Detterbeck and Ready Care have settled and these defendants are not parties to this appeal.

[2] MCL 333.16401 *et seq.;* MSA 14.15(16401)(1)(b) *et seq*.

[3] The brief in support of defendants' motion cites the deposition testimony of Dr. Alan Kravitz, plaintiff's expert cardiologist. On appeal, defendants' brief confirms that the pages of Dr. Kravitz' deposition that were cited by defendants in the brief in support of the 1992 motion were not provided to the trial court and were not part of the lower court record.