STATE OF MICHIGAN

COURT OF APPEALS

NANCY FALVO, Personal Representative of the Estate of ODIS A. LAWSON, Deceased,

Plaintiff-Appellant,

v

MUNSON MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
July 29, 1997

No. 193308
Grand Traverse Circuit Court
LC No. 95-013358-NI

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiff, personal representative of the estate of Odis A. Lawson, appeals as of right from the trial court's order granting defendant summary disposition. We reverse and remand.

Lawson was admitted into defendant Munson Medical Center for "observation of a mild closed head injury with possible intracerebral hemmorrhage." His physician, Dr. Christopher Schiaberger, issued numerous orders for Lawson's care including the following directions: "PATIENT TO BE CONFINED TO BED;" "POSEY RESTRAINTS AT ALL TIMES;" "RESTRAIN UPPER EXTREMITIES AND/OR LOWER EXTREMITIES PRN[1]."

On January 10, 1993, Lawson fell out of bed and was injured. The accident allegedly occurred when a nurse entered Lawson's room to check his vital signs, and was then called across the hall. When the nurse returned Lawson was on the floor. Lawson apparently had crawled to the end of the bed and fallen, striking his head on a nearby chair. Lawson died nine days after the fall, allegedly as a result of the injuries sustained in the fall.

On November 1, 1994, plaintiff, Lawson's sister, served a notice of intent to file a claim against defendant. After defendant failed to respond within the required statutory period of 154 days[2], plaintiff filed a complaint on April 7, 1995. In the complaint, plaintiff alleged that defendant breached certain duties, including: failure to properly restrain the decedent; failure to properly care for the decedent by ensuring that he was adequately restrained; failure to utilize proper methods and means then available to

comply with his physician's orders that he be restrained at all times; failure to exercise reasonable care in the diagnosis and treatment of the decedent; failure to ensure that its agents and employees were reasonably competent and skillful; and, failure to make necessary and reasonable observations of the decedent. The complaint did not state whether plaintiff's claims sounded in ordinary negligence, medical malpractice, or both.

Defendant filed a motion for summary disposition under MCR 2.116(C)(7), arguing that the lawsuit was barred by the two-year statute of limitations for medical malpractice actions. In a supplemental brief, defendant also argued that there was no genuine issue of material fact as to plaintiff's ordinary negligence claims.

The trial court ultimately granted defendant summary disposition as to plaintiff's original complaint. The trial court found that plaintiff's complaint was brought under ordinary negligence, but it was based on professional negligence; yet, the complaint failed to sufficiently plead medical malpractice. The trial court also denied plaintiff's motion for leave to amend her complaint to properly plead medical malpractice. The trial court concluded that the amendment would be futile given the applicable two-year statute of limitations for medical malpractice actions. The court found that the notice of intent to file a claim did not toll the two- year limitation period.

Before the trial court ruled on plaintiff's motion for leave to amend her complaint, defendant moved to disqualify plaintiff's affidavit of merit accompanying the motion to amend. Defendant argued that the affiant did not satisfy the requirements of MCR 2.109(B) and MCL 600.2912d; MSA 27A.2912(4). The trial court did not address this issue below.

I

Plaintiff first argues that the trial court erroneously granted defendant summary disposition upon a finding that plaintiff's complaint should have been brought as a medical malpractice claim rather than an ordinary negligence claim. We review a trial court's grant of summary disposition de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition under MCR 2.116(C)(10) may be granted when, giving the benefit of reasonable doubt to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In determining whether a claim sounds in professional malpractice or ordinary negligence, a court must read the complaint as a whole and focus on the type of interest allegedly harmed. *Adkins v Annapolis Hospital*, 116 Mich App 558, 563; 323 NW2d 482 (1982). Medical malpractice has been defined as:

> [T]he failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality,

in light of the present state of medical science. [*Id.* at 564, quoting *Cotton v Kambly*, 101 Mich App 537, 540-541; 300 NW2d 627 (1980).]

Expert testimony is typically required to establish the standard of care unless the alleged negligence involved actions that are within the common knowledge and experience of a layperson. *Starr v Providence Hospital*, 109 Mich App 762, 765; 312 NW2d 152 (1981), citing *Lince v Monson*, 363 Mich 135, 139; 108 NW2d 845 (1961).

We recognize that a cause of action can arise for ordinary negligence on the part of a hospital or hospital personnel. Plaintiff's allegations as pled in this case, however, fall squarely within the definition of medical malpractice. The crux of the plaintiff's complaint is that the medical attention rendered by defendant's staff to the decedent breached the standard of care practiced in the medical community. Plaintiff's complaint contains numerous allegations that suggest a failure to comply with a professional standard of care, including the alleged breach of duties to properly restrain the decedent, to utilize proper methods and means then available to comply with his physician's orders that he be restrained at all times, to exercise reasonable care in the diagnosis and treatment of the decedent, and to make necessary and reasonable observations of the decedent.

Furthermore, the standard of care for diagnosing, treating, observing and restraining plaintiff's decedent would not fall within the common knowledge and experience of a layperson. The proper use and selection of restraints for the decedent was a matter of professional judgment. See *Starr*, *supra*. For example, the nature and proper use of a Posey vest would not be a matter of common knowledge. In addition, the physician's orders contained the qualification "PRN," which suggests that certain types of restraints should only be used as needed. This qualification grants discretion to defendant's staff; thus, expert testimony would be required as to the appropriate exercise of that judgment. The trial court did not err in granting defendant summary disposition on plaintiff's ordinary negligence claim upon a finding that the claim should have been brought as a medical malpractice claim.[3]

II

Plaintiff further argues that the trial court erred in denying her motion for leave to amend her complaint to properly plead medical malpractice upon a finding that such an amendment would be futile based on the two-year statute of limitations for medical malpractice actions. We agree. Defendant concedes that, pursuant to *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996), this was an improper basis to deny plaintiff's motion to amend her complaint.

A court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2); *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Id.* However, the interpretation of a statute is a question of law which we review de novo. *Morrison, supra* at 311.

Plaintiff's cause of action arose on January 10, 1993, when Lawson was injured by his fall.[4] On November 1, 1994, plaintiff served a notice of intent to file a claim on defendant as required by MCL 600.2912b; MSA 27A.2912(2). After defendant failed to respond within 154 days, plaintiff filed a complaint on April 7, 1995, as authorized by MCL 600.2912b(8); MSA 27A.2912(2)(8). Absent some tolling provision, plaintiff's action for medical malpractice was required to be filed within two years of January 10, 1993.[5] However, pursuant to MCL 600.5852; MSA 27A.5852, the appointment of plaintiff as personal representative of Lawson's estate on March 3, 1993, extended the statute of limitations to March 3, 1995.

The limitations period is tolled for up to 182 days where the claim would otherwise be barred due to compliance with the notice requirement applicable to medical malpractice claims. MCL 600.5856(d); MSA 27A.5856(d); *Morrison*, *supra* at 317-318. The *Morrison* Court recently held that the statutory tolling provision is effective for any case that arose prior to October 1, 1993, but was subject to the notice provision because it was filed after that date.

Here, plaintiff's case arose on January 10, 1993, but was filed on April 7, 1995. Therefore, the limitations period was tolled for 154 days from the date of notice, November 1, 1994, until April 4, 1995. By virtue of this tolling, the statute of limitations was extended to September 5, 1995. Plaintiff's action was therefore timely filed on April 7, 1995. Accordingly, plaintiff's proposed amendment of her complaint to properly plead medical malpractice would not have been futile on the grounds that the claim was barred by the applicable statute of limitations and an amendment should have been allowed.

III

Plaintiff also argues that the trial court's decision denying her motion to amend her complaint should not be affirmed for the alternate reason, as argued by defendant, that the amendment was not accompanied by a valid affidavit of merit. We need not address this issue because it was not addressed by the trial court nor raised by defendant on cross-appeal; therefore, it is not preserved and its resolution is not necessary to our disposition of this case. *Environair v Steelcase,* 190 Mich App 289, 295; 475 NW2d 366 (1991).[6]

Reversed and remanded. We do not retain jurisdiction.

/s/ Maureen P. Reilly
/s/ Harold Hood
/s/ William B. Murphy

[1] The term "PRN" is a medical abbreviation for "as required" or "when necessary."

[2] MCL 600.2912b(7) and (8); MSA 27A.2912(2)(7) and (8).

[3]We note that the cases relied upon by plaintiff, *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), and *Gold v Sinai Hospital of Detroit*, 5 Mich App 368; 146 NW2d 723 (1966), involved issues of ordinary negligence and are distinguishable from this case. Both cases involved patients who fell while being assisted by nurses. A layperson is capable of determining whether a health care professional reasonable responded to a patient's request for aid in walking.

[4]MCL 600.5838a(1); MSA 27A.5838(1)(1).

[5] MCL 600.5805(4); MSA 27A.5805(4).

[6]We note that this Court recently held that MCL 600.2912d; MSA 27A.2912(4), conflicted with MRE 702, which governs qualifications of experts, and thus was unconstitutional. *McDougall v Eliuk*, 218 Mich App 501, 507; 554 NW2d 56 (1996). Accordingly, an expert witness only must meet the requirements of MRE 702. *Id.* Despite the contrary conclusion of the majority in *Golden v Baghdoian*, 222 Mich App 220; ___ NW2d ___ (1997), *McDougall* governs as a conflict panel was denied by this Court's order of March 20, 1997, and the application for leave to appeal in *McDougall* was dismissed by order of the Supreme Court (by stipulation) on May 23, 1997.