

STATE OF MICHIGAN
COURT OF APPEALS

DENISE BRYANT, as Personal
Representative of the Estate of
CATHERINE HUNT, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

OAKPOINTE VILLA
NURSING CENTRE, INC.,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED
May 21, 2002

No. 228972
Wayne Circuit Court
LC No. 98-810412-NO

DENISE BRYANT, as Personal
Representative of the Estate of
CATHERINE HUNT, Deceased,

Plaintiff-Appellee,

v

OAKPOINTE VILLA
NURSING CENTRE, INC.,

Defendant-Appellant.

No. 234992
Wayne Circuit Court
LC No. 01-104360-NH

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. I would affirm in Docket No. 228972 and reverse in Docket No. 234992.

In these consolidated appeals, plaintiff appeals as of right the lower court's June 16, 2000, order granting summary disposition in favor of defendant, and defendant appeals by leave granted the lower court's June 5, 2001, order denying its motion for summary disposition regarding plaintiff's subsequent medical malpractice action. I would affirm the original grant of

summary disposition and reverse the subsequent denial of defendant's motion for summary disposition.

These cases have a somewhat lengthy history. Plaintiff originally filed suit (Docket No. 228972) against defendant in April 1998 for the death of plaintiff's decedent, Catherine Hunt, who while a resident of defendant's skilled-nursing facility died of asphyxiation after becoming wedged in the bed rail of her bed. After the original complaint was filed, defendant filed a motion for summary disposition claiming that plaintiff's suit was based in medical malpractice and plaintiff failed to comply with the tort reform requirements for the filing of a medical malpractice action. Plaintiff responded by arguing that the complaint was grounded in ordinary negligence. The lower court initially denied defendant's motion, concluding that the action was grounded in ordinary negligence and thus plaintiff was not required to follow the tort reform procedures for filing a medical malpractice action. Plaintiff subsequently amended her complaint to bring further allegations and defendant responded by filing a second motion for summary disposition. Thereafter, the circuit court granted defendant's motion, holding that plaintiff's claims against defendant were grounded in medical malpractice and plaintiff failed to adequately plead vicarious liability for any claims of negligence against defendant arising out of the conduct of defendant's Certified Evaluated Nursing Assistants (CENAs).

On February 7, 2001, plaintiff filed a new complaint against defendant; plaintiff's new complaint (Docket No. 234992) specifically alleged medical malpractice. Defendant again brought a motion for summary disposition. The basis for defendant's motion in the second case was that the action was barred by the statute of limitations. The court denied the motion, ruling that the statute of limitations had been tolled.

The first issue before this Court is whether plaintiff's complaint in the first case was, as the trial court held, grounded in medical malpractice or based in ordinary negligence. The grant or denial of a motion for summary disposition is reviewed de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997).

"A complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), citing *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997), citing *MacDonald v Barbarotto*, 161 Mich App 542; 411 NW2d 747 (1987). The key to medical malpractice claims is whether they allege that the negligence occurred within the course of a professional relationship. *Dorris, supra* at 45. As our Supreme Court stated:

The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. [*Id.* at 46.]

The determination of which law to apply depends on the theory actually pleaded when the same set of facts can support either of two distinct causes of action. *Adkins v Annapolis Hosp*, 116 Mich App 558; 323 NW2d 482 (1982), *aff'd* 420 Mich 87 (1984). It is well settled in Michigan

that expert testimony is required in an action for malpractice. *Starr v Providence Hosp*, 109 Mich App 762, 765; 312 NW2d 152 (1981).

In the first case, plaintiff's amended complaint alleged that defendant, "as [a] skilled care nursing facility," owed a duty to plaintiff's decedent to provide an "accident-free" environment and to assure that she was not abused, neglected, or subjected to unreasonable risk of harm.¹

Ordinary negligence is the breach of the duty to use *ordinary care*. CJI2d 10.02 and cases cited in comment. By definition, ordinary care does not include the higher duty to provide an "accident-free" environment. Accordingly, the heightened duty alleged in the amended complaint must have arisen from the professional relationship between plaintiff's decedent and defendant — a "*skilled*" facility.

Plaintiff's amended complaint further alleged a claim of negligent infliction of emotional distress for defendant's alleged failure to inform plaintiff that Hunt had been found entangled in

¹ Plaintiff's first amended complaint alleges the following legal duty and acts of negligence:

5. That defendant Oakpointe Villa, as [a] skilled care nursing facility, owed a legal duty to provide an accident-free environment to plaintiff's decedent Catherine Hunt and to further assure that she was not abused, neglected or subjected to unreasonable risk of harm, injury or death.

* * *

11. That the defendant Oakpointe Villa, by and through its employees, breached the duties set forth [in] Paragraph 5 as a result of the following negligent acts and/or omissions:

(a) Negligently and recklessly failing to assure that plaintiff's decedent was provided with an accident-free environment;

(b) Negligently and recklessly failing to assess the risk of positional asphyxia by plaintiff's decedent;

(c) Negligently and recklessly failing to assess the risk of positional asphyxia despite having received specific warnings by the United States Food and Drug Administration about the dangers of death caused by positional asphyxia in bed rails;

(d) Negligently and recklessly failing to take steps to protect the plaintiff's decedent when she was, in fact, discovered on March 1 entangled between the bed rails and the mattress;

(e) Negligently and recklessly failing to inspect the beds, bed frames and mattresses to assure that the risk of positional asphyxia did not exist for plaintiff's decedent.

the bed rails on the day before she was found asphyxiated. Plaintiff's amended complaint also asserted a claim of gross negligence for the CENA's failure to report finding Hunt entangled in the bed rails on the day before she was found asphyxiated.

Plaintiff argues that this is not a case involving the use of bed rails, but instead a case involving a defective bed and defendant's failure to provide a safe environment. However, the issue whether defendant provided plaintiff's decedent with a safe environment encompasses the question whether bed rails were appropriate for this particular resident. Under Michigan law, a patient or resident is entitled to be free from physical restraints and the attending physician must authorize any necessary restraints in writing. MCL 333.20201. Further, if bed rails are to be used in a nursing home setting, consent must be given and a written order by the attending physician is necessary. MCL 333.21734. This Court has acknowledged that the degree of supervision of a patient and the adequacy or necessity of restraints involve professional judgment. *Starr, supra* at 766; *Waatti v Marquette General Hosp, Inc*, 122 Mich App 44, 49; 329 NW2d 526 (1982). Whether bed rails were appropriate or necessary for Hunt was an issue involving professional judgment. Further, whether defendant failed to properly supervise Hunt, failed to provide the appropriate attendant care, or failed to properly train its CENAs also involve issues of medical judgment. See *Dorris, supra* at 45; *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647; 438 NW2d 276 (1989). Thus, plaintiff's action was grounded in malpractice.

Plaintiff also argues that because CENAs are not licensed professionals, any claim against defendant due to their negligence must be based in ordinary negligence. The lower court dismissed any claims regarding the negligence of the CENAs on the basis that vicarious liability had not been sufficiently pleaded. However, because the instant claim is against the nursing facility, only, and because defendant's aides were "engaged in or assisting in medical treatment" of Hunt, the entire action sounds in medical malpractice. See *Regalski v Cardiology Associates PC*, 459 Mich 891; 587 NW2d 502 (1998).²

Plaintiff next contends that the lower court's grant of summary disposition was in error because a predecessor judge had previously denied a similar motion. Under MCR 2.116(E)(3) and (F), a party may file more than one motion as long as the motion is not filed in bad faith. Because the predecessor judge recused herself and the case was reassigned to a successor judge,

² In *Regalski, id.*, the Supreme Court held:

In the present action, the plaintiff has alleged Elisabeth Regalski was injured because the defendant's technician was negligent in assisting the patient's movement out of a wheelchair and onto the examination table where the technician then performed the cardiac test for which the defendant had been consulted. Like the trial judge, the Supreme Court is persuaded that the technician was "engaging in or otherwise assisting in medical care and treatment" in the performance of the act that is the basis of the lawsuit and that the case, therefore, is governed by the two-year period of limitations applicable to medical malpractice claims.

the successor judge had authority to render any necessary judgments or orders. *People v Herbert*, 444 Mich 466, 471-472; 511 NW2d 654 (1993).

In Docket No. 234992, defendant raises the issue whether the lower court erred in ruling that the statute of limitations on plaintiff's subsequent malpractice action was tolled. Our Supreme Court in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), held that the filing of a complaint in a medical malpractice action without the requisite affidavit of merit is insufficient to commence the action, and further, a complaint filed without an affidavit of merit does not toll the period of limitations. See also *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000). Thus, I would hold the statute of limitations was not tolled for the present medical malpractice action; consequently, plaintiff's medical malpractice action was barred by the statute of limitations, and the lower court erred in denying defendant's motion for summary disposition.

I would affirm in Docket No. 228972 and reverse in Docket No. 234992.

/s/ Richard Allen Griffin