

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CATHERINE STENGER,

Plaintiff-Appellant,

v

GENESYS REGIONAL MEDICAL CENTER,

Defendant-Appellee.

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UNPUBLISHED

September 27, 2005

No. 262157

Genesee Circuit Court

LC No. 03-075809-NH

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff Catherine Stenger appeals as of right the trial court's order granting defendant Genesys Regional Medical Center's motion for summary disposition pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

On March 31, 2000, plaintiff, who was then forty-three years old, visited the office of Dr. Alexander Austria, a resident with defendant medical center, for a comprehensive physical examination.<sup>1</sup> At that appointment, a mammogram was scheduled for plaintiff for April 17, 2000.<sup>2</sup> Plaintiff was also advised to return in two weeks for a Pap smear and follow-up visit. Before the mammogram, a nurse employed by defendant contacted plaintiff about the missing results of a mammogram performed in 1986. Plaintiff and the nurse both attempted to locate the mammogram before plaintiff rescheduled her appointment for September of 2000.<sup>3</sup> Plaintiff

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<sup>1</sup> Plaintiff brought suit against defendant alleging that it was vicariously liable for the negligence of its agent.

<sup>2</sup> Throughout the lower court and appellate proceedings, plaintiff has contended that she asked Dr. Austria to order a mammogram due to a hard, muscle-type mass in her left breast. In her deposition, plaintiff asserted that she had read about the importance of having a baseline mammogram and, therefore, requested a referral. Dr. Austria, however, asserts that he ordered the mammogram of his own initiative due to plaintiff's age.

<sup>3</sup> Plaintiff testified at her deposition that an employee of defendant called her to cancel the April  
(continued...)

never returned to defendant's facility for her follow-up appointment and Pap smear and cancelled her September mammogram for personal reasons without rescheduling it. Plaintiff did not visit a doctor again until February of 2002, when she visited an emergency room with a "blister" on her left breast and pain in her left side. Plaintiff was thereafter diagnosed with breast cancer and underwent chemotherapy sessions in the summer of 2002.<sup>4</sup>

Plaintiff filed her complaint on March 6, 2003, alleging that Dr. Austria's failure to order a mammogram precluded an earlier diagnosis.<sup>5</sup> Specifically, plaintiff alleged that she suffered diminished life expectancy, probable loss of life, denial of a cure, pain and suffering, emotional anxiety, and denial of social pleasure and enjoyment as a result of this negligence. Following discovery, plaintiff filed an amended complaint on January 12, 2005, asserting that Dr. Austria breached his standard of care by failing to follow up with her regarding the mammogram. The trial court subsequently granted defendant's motion for summary disposition of plaintiff's claims. The court found that plaintiff failed to raise an issue of material fact that Dr. Austria failed to order a mammogram, and that her claim that Dr. Austria failed to follow up was untimely and failed to create an issue of fact. Additionally, the court ruled that the complaint alleged only speculative future damages of loss of an opportunity to survive.

## II. Failure to Order Mammogram

Plaintiff first contends that the trial court improperly dismissed her claim that Dr. Austria was negligent for failing to order a mammogram pursuant to MCR 2.116(C)(10). We review a trial court's determination regarding a motion for summary disposition de novo.<sup>6</sup> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.<sup>7</sup> "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."<sup>8</sup> Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.<sup>9</sup>

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mammogram due to the missing 1986 mammogram. However, upon further questioning, plaintiff admitted that she and the nurse agreed to attempt to locate the previous mammogram before rescheduling the current mammogram.

<sup>4</sup> There is no information in the record regarding plaintiff's subsequent medical treatment.

<sup>5</sup> Plaintiff also raised claims of negligence against various doctors she visited between 1995 and 1999. The trial court dismissed those claims pursuant to MCR 2.116(C)(7) as they were untimely or failed to state sufficient grounds for recovery. Plaintiff does not appeal that order.

<sup>6</sup> *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

<sup>7</sup> *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

<sup>8</sup> *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

<sup>9</sup> *MacDonald, supra* at 332.

Plaintiff contends that Dr. Austria did not “order” her mammogram because she requested the test on her own initiative. Even taking that allegation as true, the record evidence clearly reveals that Dr. Austria ordered the mammogram. Dr. Austria noted in plaintiff’s medical chart that she was to have a mammogram performed in two weeks. He instructed his office staff to schedule the mammogram. Plaintiff left Dr. Austria’s office that day with a mammogram scheduled on April 17, 2000, and was given a referral sheet to take to the test. Plaintiff’s own expert witnesses testified in deposition that Dr. Austria did, in fact, order a mammogram and, therefore, did not breach the standard of care in that regard. Accordingly, plaintiff’s claim has no merit and the trial court properly dismissed it.

### III. Failure to Follow Up on Mammogram

Plaintiff also contends that the trial court improperly granted defendant’s motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10) of her claim raised in her amended complaint that Dr. Austria was negligent in failing to follow up with plaintiff to ensure that she actually attended her scheduled mammogram. Plaintiff alleges that she would have rescheduled her September of 2000 mammogram if her physician had informed her of its importance. As previously noted, we review de novo a trial court’s determination regarding a motion for summary disposition. We also review de novo a trial court’s determination that a claim was not brought within the applicable statute of limitations.<sup>10</sup>

Arguably, the trial court erred in dismissing plaintiff’s claim as untimely. “An amendment that adds a claim . . . relates back to the date of the original pleading if the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading.”<sup>11</sup> As long as the amended claim “arises from the same transactional setting” as the original claims, the amended complaint can include new facts, theories, and causes of action.<sup>12</sup> Plaintiff’s claims in both the original and amended complaint pertain to Dr. Austria’s standard of care in ordering a mammogram to diagnose breast cancer.<sup>13</sup> However, we need not determine if plaintiff was precluded from asserting claims omitted from her original affidavits of merit and notice of intent as the trial court properly dismissed plaintiff’s claim pursuant to MCR 2.116(C)(10).

Plaintiff’s expert witnesses testified that a doctor should either call a patient or schedule a follow up appointment to ensure that ordered tests have been performed. Plaintiff admitted that she requested a mammogram knowing that it was an important test. She admitted that she failed to return to the office for her follow-up appointment and Pap smear. She also admitted that she made no attempt to reschedule her mammogram after canceling her second appointment. In fact,

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<sup>10</sup> *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 701 NW2d \_\_\_ (2005).

<sup>11</sup> MCR 2.118(D).

<sup>12</sup> *Doyle v Hutzler Hosp*, 241 Mich App 206, 212-213; 615 NW2d 759 (2000).

<sup>13</sup> See *id.* at 219 (finding that additional claims alleging pre- and post-operative negligence arise from the same transactional setting as claimed negligence during surgery).

plaintiff admits that she did not visit any doctor for two years after her appointment with Dr. Austria. Dr. Austria ordered a mammogram and may have been able to diagnose plaintiff's breast cancer had this test been conducted. While this is a tragic result, plaintiff was unable to create an issue of fact that her injuries were caused by any negligence on the part of Dr. Austria. Accordingly, we need not address the other claims of error alleged in her complaint.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jessica R. Cooper

/s/ Kirsten Frank Kelly