

STATE OF MICHIGAN
COURT OF APPEALS

HARVEY GROESBECK, guardian of LORETTA
GROESBECK, a protected person,

UNPUBLISHED
February 26, 2013

Plaintiff-Appellee,

v

No. 307069
Macomb Circuit Court
LC No. 2009-003523-NO

HENRY FORD HEALTH SYSTEM, d/b/a
HENRY FORD BI-COUNTY HOSPITAL, d/b/a,
HENRY FORD MACOMB HOSPITAL, d/b/a
DETROIT OSTEOPATHIC HOSPITAL,

Defendant-Appellant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

BECKERING, J. (*concurring in part and dissenting in part*).

I concur in part and dissent in part. At the heart of this appeal is whether plaintiff has stated claims that sound in ordinary or medical negligence associated with 86-year-old Loretta Groesbeck's fall while undergoing physical rehabilitation at defendant's facility. Plaintiff claims that physical therapist Esther Karunakar acted negligently in several distinct ways: (1) by allowing Groesbeck to walk for a gait assessment despite her present physical condition, (2) by failing to secure or hold Groesbeck to prevent her from falling as she walked, and (3) by failing to catch or assist Groesbeck when she became dizzy and fell. The majority concludes that plaintiff's claim that Karunakar negligently allowed Groesbeck to walk for a gait assessment sounds in medical malpractice. I agree. The majority further concludes that plaintiff's claims that Karunakar negligently failed to secure or hold Groesbeck and to catch or assist Groesbeck when she became dizzy and fell likewise sound in medical malpractice. I respectfully disagree. Resolution of the issue of whether Karunakar acted reasonably when she failed to hold Groesbeck securely and allowed her to fall onto the floor is within an ordinary juror's common knowledge and experience and, thus, sounds in ordinary negligence.

It is well established that "[t]he fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 421; 684 NW2d 864 (2004). To determine whether a claim sounds in ordinary negligence or medical malpractice, a court must consider two questions: "(1) whether the claim

pertains to an action that occurred within the course of a professional relationship and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience.” *Id.* at 422. If both questions are answered affirmatively, then the claim sounds in medical malpractice. *Id.* “If the reasonableness of the health care professionals’ action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence.” *Id.* at 423.

In *Bryant*, our Supreme Court concluded that a single count of ordinary negligence can contain both ordinary-negligence and medical-malpractice claims. See *id.* at 414, 417-418, 424-432. On the day before the decedent’s injury in *Bryant*, nurses discovered the decedent, who had no control over her locomotive skills and, therefore, was at risk for suffocation by positional asphyxia, lying in her bed very close to the bed rails and tangled in her restraining vest, gown, and bed sheets. *Id.* at 415-416. The nurses untangled the decedent and attempted to position bed wedges onto the decedent’s bed; however, the bed wedges would not work properly, so the nurses informed their supervisor. *Id.* at 416. The next day, the decedent slipped between the bedrails such that the lower half of her body was on the floor and her neck was wedged between the rail and the mattress, which prevented her from breathing and ultimately caused her death by positional asphyxia. *Id.* at 417. In a single count of ordinary negligence, the plaintiff alleged that the defendant was negligent in four distinct ways:

(1) by failing to provide “an accident-free environment” for [the decedent]; (2) by failing to train its Certified Evaluated Nursing Assistants (CENAs) to recognize and counter the risk of positional asphyxiation posed by bed rails; (3) by failing to take adequate corrective measures after finding [the decedent] entangled in her bedding on the day before her asphyxiation; and (4) by failing to inspect plaintiff’s bed arrangements to ensure “that the risk of positional asphyxia did not exist for plaintiff’s decedent.” [*Id.* at 414.]

The Court first concluded that the plaintiff’s accident-free-environment claim sounded neither in ordinary negligence nor in medical malpractice but, rather, in strict liability. *Id.* at 425. The Court then concluded that plaintiff’s claims for failures to train and inspect sounded in medical malpractice because they required a fact finder to rely on expert testimony where both claims involved a risk assessment of positional asphyxiation posed by bed rails and other restraints, which is beyond the realm of common knowledge. *Id.* at 428-430. However, the Court concluded that the failure-to-take-corrective-measures claim sounded in ordinary negligence. *Id.* at 430. The Court explained,

No expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed that [the decedent] was at risk of asphyxiation. Professional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff’s allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant’s agents noticed that [the decedent] was in peril. [*Id.* at 431.]

The majority discusses *Bryant* at length but, in my view, fails to appreciate that plaintiff's single count of ordinary negligence can and does contain both ordinary-negligence and medical-malpractice claims. More specifically, the majority opines that

plaintiff hastily notes in his appellate brief that the "crux of this lawsuit" is that Karunakar "failed to carefully hold Ms. Groesbeck to prevent her from falling." However, a clear reading of the complaint belies that notion. Plaintiff plainly takes issue with Karunakar's decision to conduct the gait assessment in the first place.

Although the majority is correct that a clear reading of plaintiff's complaint demonstrates that plaintiff takes issue with Karunakar's decision to conduct the gait assessment, which I conclude as the majority does is a claim sounding in medical malpractice, plaintiff's allegation that Karunakar negligently decided to conduct the gait assessment does not make plaintiff's ordinary-negligence count sound entirely in medical malpractice. See *id.* at 414, 417-418, 424-432. Rather, plaintiff's claims that Karunakar failed to hold Groesbeck securely and allowed her to fall onto the floor must be evaluated separately from plaintiff's claim regarding Karunakar's decision to conduct the gait assessment to determine whether it sounds in medical malpractice or ordinary negligence. See *id.* at 424-425.

In evaluating plaintiff's claims that Karunakar failed to hold Groesbeck securely and allowed her to fall onto the floor, I find instructive this Court's opinion in *Sheridan v West Bloomfield Nursing & Convalescent Center, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 272205). Although *Sheridan* is unpublished and, thus, not binding on this Court, MCR 7.215(C)(1), I consider it to have great persuasive value given its factual similarity to this case, and I would apply this Court's reasoning in *Sheridan* when evaluating plaintiff's claims, see *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). In *Sheridan*, the plaintiff alleged that the defendants were negligent "when two nurse assistants dropped plaintiff's decedent while moving her from her bed to a wheel chair using a 'gait belt.'" *Sheridan*, unpub op at 2. The plaintiff did not challenge the defendants' decision to move the decedent, the decision to use a gait belt, or the manner in which the gait belt was fastened to the decedent. *Id.* Rather, the only claim of negligence raised by the plaintiff was whether the defendants, after they decided to use the gait belt and secured the decedent with it, "acted reasonably when they failed to maintain a secure grip on plaintiff's decedent and dropped her or allowed her to fall on the floor." *Id.* This Court concluded that the plaintiff's claim sounded in ordinary negligence, explaining that "[r]esolution of this issue is within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment." *Id.*

Similar to the plaintiff's claim against the nurse assistants in *Sheridan*, plaintiff's claims in this case are whether Karunakar acted reasonably when she failed to hold Groesbeck securely and allowed her to fall onto the floor. As in *Sheridan*, resolution of these claims is "within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment." *Id.* When Groesbeck entered defendant's facility, she was 86 years old, weighed just over 110 pounds, and had just suffered a minor stroke. On the morning of her first day with defendant, she was vomiting, dizzy, and had difficulty standing. Several hours later, she was able to move in a wheelchair and stand for a

short period of time. Karunakar then decided to allow Groesbeck to walk with a pyramid walker for a gait assessment. She fastened a gait belt around Groesbeck's waist and held the belt with one hand while dragging a wheelchair in her other hand. After taking three steps, Groesbeck stated that she was dizzy, fell to the floor, and hit her head. Expert testimony is not required for an ordinary juror to determine whether Groesbeck acted negligently by failing to hold Groesbeck securely and allowing her to fall onto the floor. See *id.*; see also *Fogel v Sinai Hosp of Detroit*, 2 Mich App 99, 101-102; 138 NW2d 503 (1965) (claim sounds in ordinary negligence where hospital patient falls while walking to the bathroom with a nurse's assistance); *Gold v Sinai Hosp of Detroit, Inc*, 5 Mich App 368, 369-370; 146 NW2d 723 (1966) (claim sounds in ordinary negligence where nauseated and dizzy hospital patient falls while being assisted from a seated position onto an examination table by a nurse who braced the patient from behind).

The majority opines that *Sheridan* is distinguishable from the present case in one critical respect: the plaintiff in *Sheridan* was not challenging the decision to move the decedent, the decision to use the gait belt, or the manner in which the gait belt was fastened. I fail to see the critical nature of this distinguishing fact. Indeed, it is irrelevant to whether plaintiff's claims that Karunakar failed to hold Groesbeck securely and allowed her to fall onto the floor sound in medical malpractice or ordinary negligence. As previously discussed, *Bryant* makes clear that a plaintiff's single count of ordinary negligence can contain both ordinary-negligence and medical-malpractice claims. *Bryant*, 471 Mich at 414, 417-418, 424-432. Thus, plaintiff's claim that Karunakar was negligent by allowing Groesbeck to walk for a gait assessment has no bearing on whether plaintiff's claims that Karunakar failed to hold Groesbeck securely and allowed her to fall onto the floor sound in medical malpractice or ordinary negligence; the claims must be evaluated separately. See *id.* at 424-425.

The majority also opines that plaintiff's claims that Karunakar negligently failed to hold Groesbeck securely and allowed her to fall onto the floor are a claim that Karunakar failed to take "adequate or reasonable precautions to prevent [Groesbeck] from falling during the assessment." According to the majority, Karunakar exercised medical judgment when deciding what precautions to take when allowing Groesbeck to walk, i.e., what guarding method to implement when executing the gait assessment. Thus, the majority concludes that Karunakar's use of knowledge beyond the realm of common knowledge and experience establishes that plaintiff's claims sound in medical malpractice. I agree that a physical therapist exercises medical judgment when deciding what guarding method to implement, including whether a gait belt should be used. And, I also agree that a physical therapist exercises medical judgment when conducting a gait assessment. However, I disagree for several reasons with the majority's conclusion that plaintiff's claims sound in medical malpractice on this basis. First, aside from plaintiff's claim that Karunakar negligently allowed Groesbeck to walk, the remaining claims in plaintiff's ordinary-negligence count raise the same allegation as the plaintiff did in *Sheridan*: negligence by failing to hold a patient securely and allowing the patient to fall. None of the claims in plaintiff's ordinary-negligence count take issue with Karunakar's decision to use the gait belt as a precaution for Groesbeck. Second, plaintiff's claims that Karunakar failed to hold Groesbeck securely and allowed her to fall onto the floor do not sound in medical malpractice simply because Karunakar exercised medical judgment during the gait assessment. Rather, the appropriate inquiry is whether the reasonableness of Karunakar's action can be evaluated by lay jurors on the basis of their common knowledge and experience. See *id.* at 423. The fact that a health-care professional exercises medical judgment when committing a negligent act does not

prohibit lay jurors from evaluating on the basis of common knowledge and experience the reasonableness of the health-care professional's action; for example, surgeons certainly exercise medical judgment while performing surgery, but, "if a foreign object is left within the body of a patient on whom an operation has been performed, to his injury, laymen may properly decide the question of negligence without the aid of experts." *Roberts v Young*, 369 Mich 133, 138; 119 NW2d 627 (1963), citing *Wood v Vroman*, 226 Mich 625, 198 NW 228 (1924); *LeFaive v Asselin*, 262 Mich 443, 247 NW 911 (1933); *Taylor v. Milton*, 353 Mich 421, 92 NW2d 57 (1958). Finally, although Karunakar used medical judgment for the gait assessment, lay jurors using common knowledge and experience can determine without expert testimony whether Karunakar acted unreasonably by holding onto Groesbeck—an 86-year-old, 110-pound, first-day-rehabilitation patient who had just suffered a minor stroke and had a history just several hours earlier of vomiting, dizziness, and difficulty standing—with only one hand as Groesbeck walked and by allowing Groesbeck to fall.

For these reasons, I respectfully dissent from the majority's holding that plaintiff's ordinary-negligence count sounds entirely in medical malpractice.

/s/ Jane M. Beckering