STATE OF MICHIGAN

COURT OF APPEALS

DENITA RENEE PRICE,

Plaintiff-Appellant,

v

DR. ANGELA UNITIS MARRAS, M.D. and PROVIDENCE HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
July 23, 2020

No. 349162
Oakland Circuit Court
LC No. 2018-166104-NH

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition, pursuant to MCR 2.116(C)(7) and (8), in favor of defendants. This matter arises out of gynecological surgery performed by defendant Dr. Angela Unitis Marras (Marras) at defendant Providence Hospital (Providence) (hereinafter jointly, "defendants"). Plaintiff stated that she did not wish either of her ovaries removed "unless absolutely necessary," and Marras agreed that neither ovary would be removed "unless necessary." During the surgery, Marras removed one of plaintiff's ovaries. Plaintiff contends that she has articulated claims for battery and negligent supervision that sound in ordinary negligence, so the trial court erred in dismissing her case entirely for failure to comply with the procedures required to commence medical malpractice claims. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

As noted, this matter arises out of surgery performed by Marras, a gynecologist at Providence. Approximately five years previously, plaintiff had undergone a partial hysterectomy at another hospital. According to plaintiff, the surgeon at the time "advised that her ovaries had not been removed because they were healthy and that healthy organs should not be removed." Plaintiff then developed pelvic pain on her right-hand side. A CT scan indicated the presence of a "poorly defined" uterus. The hospital then referred her to Providence. Plaintiff discussed her prior partial hysterectomy, including the fact that her ovaries had not been removed. Plaintiff "expressly stated that she did not want to have either of her ovaries removed, and she did not consent to their removal unless absolutely necessary." According to plaintiff, "Marras assured

[plaintiff] that neither ovaries [sic] would be removed unless necessary." Marras then performed a salpingo-oophorectomy on the right side of plaintiff's body (i.e., removed plaintiff's right ovary). Plaintiff alleged that this was done "notwithstanding the fact that there was no need nor [sic] reason to do so." Plaintiff's pelvic pain was not resolved by the surgery.

Plaintiff filed a complaint against defendants, alleging six separate counts, including breach of informed consent, battery, breach of the standard of care for removing a healthy organ and for performing contraindicated surgery, vicarious liability for Providence, and negligent supervision. There is no dispute that some of those claims sounded in medical malpractice, that plaintiff did not comply with the procedural requisites for commencing a medical malpractice claim, and that as a consequence, those claims were properly dismissed. However, the parties disputed whether two of plaintiff's claims, battery and negligent supervision, actually sounded in ordinary negligence.

We note that plaintiff is understandably critical of the irregular procedure followed during that dispute. Defendant initially moved for summary disposition on the theory that plaintiff's entire action sounded in medical malpractice, and only argued about the battery and negligent supervision claims specifically for the first time in a reply brief. Nevertheless, the trial court ensured that both parties were given a full opportunity to brief the matter. Subsequently, unusual weather conditions forced the cancellation of oral arguments. Plaintiff encountered some difficulty presenting as an exhibit Marras's operative report, which, in relevant part, described both of plaintiff's ovaries and tubes as "normal-appearing." The report also indicated that "no uterus or pelvic mass" could be observed, the ovaries were also "slightly atrophic," and "The decision was made to do a right salpingo-oophorectomy as the patient had been complaining of adnexal pain and requested the structures removed if they were present."

The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8). On the basis of plaintiff's concessions regarding the failure to file an affidavit of merit (AOM) and the expiration of the statutory period of limitations, the trial court granted summary disposition with regard to the agreed-upon medical malpractice counts. Plaintiff's claims of battery and negligent supervision were found by the trial court to be controlled by *Bryant v Oakpoint Villa Nursing Ctr*, 471 Mich 411; 684 NW2d 864 (2004), and sounded in medical malpractice. The trial court noted that the parties admitted that the instant claims pertain to an action that occurred within the course of a professional relationship, satisfying the first prong of the *Bryant* test. The trial court concluded that the second prong was also met because medical judgment would be required to determine whether removal of plaintiff's right ovary was medically necessary. Therefore, because the remaining claims sounded in malpractice, necessitating an AOM, the trial court granted summary disposition to defendants for the entirety of plaintiff's complaint.

Plaintiff filed a motion for reconsideration of the trial court's order, requesting reconsideration of the trial court's dismissal of the battery and negligent supervision claims on the basis of the above-noted procedural irregularities, as well as the allegedly palpable substantive error of the ruling. The trial court denied plaintiff's motion for reconsideration. This appeal ensued. On appeal, plaintiff argues, as she did below, that her claims of battery and negligent supervision sound in ordinary negligence, so the trial court erred in granting summary disposition as to those claims.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. "Whether a claim sounds in ordinary negligence or medical malpractice is a question of law that is reviewed de novo." *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 517; 918 NW2d 645 (2018). "Questions of statutory interpretation are also reviewed de novo." *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006).

III. PROCEDURAL IRREGULARITIES

As noted, the proceedings below entailed some procedural irregularities of which plaintiff complains. Plaintiff has not, however, actually presented those irregularities to this Court for review, because they were not identified as an issue in her statement of questions presented. "Issues must be raised in the petitioner's statement of questions involved in order to be properly presented for this Court's review." *Henderson v Dep't of Treasury*, 307 Mich App 1, 30; 858 NW2d 733 (2014); see also MCR 7.212(C)(5). Nevertheless, we would not find plaintiff's concerns to be grounds for reversal. Plaintiff understandably complains about the difficulties she encountered presenting Marras's operative report to the trial court, and is further understandably concerned that the trial court never commented upon that report. However, we accept the report as part of the record for our review, and our review is de novo. Consequently, any error in its submission to the trial court is harmless. Furthermore, it is irrelevant when defendant first raised an argument under *Bryant*, because the trial court gave both parties ample opportunity to fully and thoroughly brief the issue. Again, our review is de novo. Finally, the trial court operated within its discretion to dispense with oral argument on defendants' motion for summary disposition under MCR 2.119(E)(3). See *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000). If any error occurred, it was harmless.

IV. NATURE OF PLAINTIFF'S CLAIMS

As noted, there is no dispute that four out of plaintiff's six claims were properly dismissed for failing to comply with the procedural requirements necessary to commence a medical malpractice claim, and the applicable statutory limitations period for medical malpractice actions expired when she filed her complaint. Plaintiff's argument on appeal concerns the trial court's determination that plaintiff's battery and negligent supervision claims sounded in medical malpractice and were subject to the relevant statute of limitations for medical malpractice claims.

It is long-established that the nature of a claim does not depend on how it is characterized or labeled by a party; rather, courts are obligated to analyze the substance of a pleading to determine the true nature of a claim. *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Wilcox v Moore*,

354 Mich 499, 504; 93 NW2d 288 (1958); *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006), aff'd 481 Mich 169 (2008). In *Bryant*, our Supreme Court outlined a two-prong analysis for determining whether a claim sounds in medical malpractice: "(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." *Bryant*, 471 Mich at 422. If both prongs are met, "the action is subject to the procedural and substantive requirements that govern medical malpractice actions." *Id*.

There is no dispute concerning the first prong of *Bryant*. Plaintiff concedes that "[a] professional relationship existed" and "the actionable conduct occurred within the context of a professional relationship between" the parties. The issue presented is only whether plaintiff's claims of battery and negligent supervision "raise[] questions of medical judgment beyond the realm of common knowledge and experience."

Plaintiff argues that the trial court was obligated to accept the allegations in her complaint as true, and the complaint states that Marras unnecessarily removed a healthy ovary. However, the Court accepts "well-pleaded *factual* allegations" as true. *Maiden*, 461 Mich at 119. Conclusions unsupported by factual allegations are not sufficient. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). We have some doubt that plaintiff's allegation that "there was no need nor reason" to remove plaintiff's right ovary was entirely a factual allegation. Nevertheless, the distinction is irrelevant here. "The pertinent question remains whether *the alleged facts* raise questions of medical judgment or questions that are within the common knowledge and experience of the jury." *Bryant*, 471 Mich at 426 (emphasis added). The *nature* of plaintiff's claims thus does not turn on whether either allegation is true, but whether a jury of laypersons could possibly determine whether those allegations are true in the absence of expert medical testimony.

Importantly, plaintiff did not forbid the removal of her ovaries altogether, in which case no medical judgment whatsoever would have been necessary to find their removal contrary to plaintiff's consent. Plaintiff's complaint asserts only that she agreed to the removal of her ovaries if "absolutely necessary." Determining medical "necessity" for some part of an otherwise consented-to medical procedure, or whether a "normal-appearing" but "slightly atrophic" organ actually is "healthy," simply cannot be determined by a layperson without the assistance of expert medical testimony.[1] Again, the touchstone is "whether the claim *raises questions* of medical judgment." *Bryant*, 471 Mich at 422 (emphasis added). Further, the operative report demonstrates that a medical judgment – whether right or wrong - was made: "[t]he decision was made to do a right salpingo-oophorectomy as the patient had been complaining of adnexal pain . . . "

[1] This sentence in the operative report also states that "the patient requested the structures removed if they were present." Although concerning, this does not affect the fact that plaintiff did give conditional assent to the removal of her ovaries if medically necessary, and plaintiff would still need to be able to establish whether removal of her ovary was medically necessary or unnecessary for the treatment of her pelvic pain. Again, this is not a case in which plaintiff forbade removal of her ovaries altogether.

Similarly, plaintiff's claim for negligent supervision stemmed from the contention that Providence failed to "properly vet, supervise, discipline, or terminate Dr. Marras." This argument analogizes to the plaintiff's claim in *Bryant* that a defendant hospital failed to properly train its staff to assess the risk of asphyxiation from a particular hospital bed railing. *Bryant*, 471 Mich at 426-429. Our Supreme Court in *Bryant* concluded that the failure to train claim required specialized knowledge of hospital bedding arrangements and individual patient needs, and thus implicated medical judgment. *Id*. As in the failure to train claim in *Bryant*, plaintiff's negligent supervision claim would necessarily entail expert testimony on proper methods of training physicians for treating patients with plaintiff's demonstrated pelvic pain, the appropriate method of evaluation for whether an ovary is healthy, and the standard procedure for assessing and appropriately disciplining physicians who allegedly engage in malpractice. Thus, the claim implicates medical judgment and sounds in medical malpractice.

V. CONCLUSION

The trial court did not err in granting defendants' motion for summary disposition of plaintiff's complaint in its entirety.

Affirmed.

/s/ Michael J. Riordan
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause