

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES DENNIS, Personal Representative of
the Estate of RUTH DENNIS,

UNPUBLISHED
September 29, 2005

Plaintiff-Appellant,

v

SPECIALTY SELECT HOSPITAL-FLINT and
KAY M. SCHMIDT,¹

No. 262649
Genesee Circuit Court
LC No. 04-078397-NH

Defendants-Appellees.

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motions for summary disposition and dismissing this case without prejudice. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent Ruth Dennis was a patient at Specialty Select when Schmidt, an unlicensed student nurse from the University of Michigan, incorrectly administered a dose of Nystatin, an antibiotic, to her intravenously rather than orally. Nystatin is toxic if administered intravenously, and decedent died soon after receiving the medication.

Plaintiff filed suit alleging that Schmidt committed ordinary negligence by failing to properly read and understand decedent's physician's order and to administering the Nystatin orally. Plaintiff alleged vicarious liability against Specialty Select. Plaintiff filed a separate suit in the Court of Claims alleging ordinary negligence and vicarious liability against the University of Michigan Board of Regents. The cases were consolidated in the trial court.

Specialty Select and Schmidt filed separate motions for summary disposition pursuant to MCR 2.116(C)(8),² arguing that plaintiff's claim sounded in medical malpractice rather than

¹ Schmidt's first name is listed incorrectly in the pleadings, and is actually "Karri."

² The University of Michigan Board of Regents also moved for summary disposition pursuant to MCR 2.116(C)(8), which the trial court granted. Plaintiff has not appealed that order.

ordinary negligence because decisions regarding the administration of medication to a hospitalized patient involved medical judgment. Defendants asserted that they were entitled to summary disposition because plaintiff failed to file a notice of intent to file a medical malpractice action, MCL 600.2912b,³ and to submit an affidavit of merit, MCL 600.2912d. The trial court granted defendants' motions and dismissed plaintiff's complaint without prejudice. The trial court determined that plaintiff's claim arose in the course of a professional relationship and pertained to the proper administration of medication, areas beyond the realm of common knowledge and experience.⁴

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A medical malpractice claim arises from the course of a professional relationship and involves questions of medical judgment beyond the scope of common knowledge and experience. A claim of ordinary negligence raises issues within the common knowledge and experience of a factfinder. In determining whether a claim sounds in medical malpractice or ordinary negligence, a court must consider: (1) whether the claim pertains to an action that occurred in the context of a professional relationship; and (2) whether the claim raises questions of medical judgment that are beyond the realm of common knowledge and experience. If both questions are answered in the affirmative, the claim sounds in medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). A professional relationship exists in a case in which health care professionals, a health care facility, or the agents or employees of a facility were subject to a contractual duty to render professional health care services. *Id.* If a jury can evaluate the reasonableness of an action only after the presentation of expert testimony, the claim sounds in medical malpractice. *Id.* at 423.

For a claim to sound in medical malpractice, it must pertain to actions that occurred in the course of a professional relationship. *Id.* at 422. The parties did not dispute that decedent had a professional relationship with Specialty Select. Schmidt, a student who at the time the incident occurred was not required to be licensed to practice the health profession of nursing, MCL 333.16171, was providing services to patients at Specialty Select. We conclude that because Schmidt was acting on behalf of Specialty Select when the incident occurred, she was an agent of Specialty Select and could be subject to a claim for malpractice. MCL 600.5838a; *Bryant, supra* at 420-421. The trial court correctly found that plaintiff's claim pertained to actions that occurred in the course of a professional relationship.

³ MCL 600.2912b(1) provides in part that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

⁴ Subsequently, plaintiff filed a second suit against Schmidt with a notice of intent and an affidavit of merit. That action is pending in the trial court.

Plaintiff alleged that Schmidt's failure to read, understand, and implement decedent's physician's order to give Nystatin orally constituted ordinary negligence. Plaintiff's allegations closely resemble the claim in *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250; 506 NW2d 562 (1993) that a pharmacist's act of dispensing the wrong medication constituted ordinary negligence. The *Simmons* Court disagreed, holding that the claim stated a cause of action for medical malpractice. *Id.* at 253-254. The reasons why Nystatin must be administered orally rather than intravenously are beyond the common knowledge of lay jurors. A lay jury could evaluate the reasonableness of Schmidt's actions only after the presentation of expert testimony. Consequently, the trial court correctly found that plaintiff's claim sounded in medical malpractice. *Bryant, supra* at 423.

Plaintiff's claim was one of medical malpractice. He was required to file both a notice of intent to file a medical malpractice action and an affidavit of merit with his complaint. Because plaintiff did not comply with the statutory requirements for filing a medical malpractice claim, the trial court correctly granted defendants' motions for summary disposition.

We affirm.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane E. Markey