

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA ZIMMER, Personal Representative of
the Estate of SAMUEL F. STURGILL,

Plaintiff-Appellee,

v

HENRY FORD WYANDOTTE HOSPITAL &
MEDICAL CENTER and ALL EMPLOYEES OF
HENRY FORD WYANDOTTE HOSPITAL &
MEDICAL CENTER,

Defendants,

and

DR. MAYUR PATEL, M.D.,

Defendant-Appellant.

UNPUBLISHED
May 10, 2011

No. 296954
Wayne Circuit Court
LC No. 08-017409-NO

BARBARA ZIMMER, Personal Representative of
the Estate of SAMUEL F. STURGILL,

Plaintiff-Appellee,

v

HENRY FORD WYANDOTTE HOSPITAL
HOSPITAL & MEDICAL CENTER,

Defendant-Appellant,

and

ALL EMPLOYEES OF HENRY FORD
WYANDOTTE HOSPITAL & MEDICAL
CENTER and DR. MAYUR PATEL, M.D.,

Defendants.

No. 297106
Wayne Circuit Court
LC No. 08-017409-NO

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendants¹ appeal by leave granted from the trial court's order denying their motions for summary disposition. We reverse.

In February 2006, plaintiff's decedent underwent a colonoscopy at defendant hospital. The colonoscopy led to a surgical procedure in March 2006 that revealed malignant melanoma. As a result of the cancer diagnosis, the decedent was treated by defendant Dr. Patel with chemotherapy. The decedent did not respond well to the chemotherapy. Defendant Dr. Patel allegedly improperly recorded that the decedent's cancer had spread to the kidney and lungs because of an error with another individual's medical records. The decedent had a second surgery in June 2006, which detected malignant melanoma in the rectum. In late June 2006, the decedent's family was called to the hospital to discuss hospice arrangements. At that time, the family alleged that defendant Dr. Patel reported that there had been a typographical error and that the decedent was "cancer free." However, when the decedent's daughter began to depart from the hospital, the nursing staff advised her to meet with the patient advocate, Mary Reitzel. The family asserted that Reitzel admitted that the medical file was "screwed up."² According to the decedent's daughter, Reitzel offered to order additional tests without charge to rectify any discrepancy. Despite the disparate medical reports, the decedent did not receive any additional treatment until January 2008, when he was diagnosed with malignant melanoma in Wisconsin.

On March 7, 2008, counsel for the decedent filed a notice of intent on defendants. On December 3, 2008, a complaint alleging ordinary negligence that did not plead an alternative claim of medical malpractice or attach an affidavit of merit was filed. Defendants moved for summary disposition, alleging that plaintiff's complaint sounded in medical malpractice and the statute of limitations barred the suit. The trial court denied the motions for summary disposition, concluding that there was a "question of fact on the negligence issue" because of the assertion that the claim involved conflicting medical records. We granted the applications for leave to appeal.

¹ In Docket No. 296954, defendant Dr. Mayur Patel filed an application for leave to appeal the trial court's order denying his motion for summary disposition. In Docket No. 297106, Henry Ford Wyandotte Hospital & Medical Center and its employees filed an application for leave to appeal the trial court's order denying their motion for summary disposition. This Court granted the applications for leave to appeal and consolidated the cases.

² Reitzel contradicted specific statements that were attributed to her by the decedent's family members. Those contradictions are not relevant to the disposition on appeal.

The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). A court is not bound by the party's choice of labels for the cause of action because to do so would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). A party cannot avoid the dismissal of a cause of action by artful pleading. *Maiden*, 461 Mich at 135. The gravamen of a plaintiff's action is ascertained by examining the entire claim. *Id.* The courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim. *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987).

The statute of limitations addressing a negligence action is three years. *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995); MCL 600.5805(10). The period of limitations begins to run from the time the claim accrues, and a claim accrues when the wrong upon which the claim is premised was done regardless of when damage results. See *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001); MCL 600.5827. The statute of limitations governing a medical malpractice action is two years. *Saffian v Simmons*, 267 Mich App 297, 302; 704 NW2d 722 (2005); MCL 600.5805(6). A medical malpractice claim accrues at the time of the act or omission regardless of when the plaintiff discovers the claim. *Potter v McLeary*, 484 Mich 396, 417; 774 NW2d 1 (2009); MCL 600.5838a(1). The statute of limitations bars untimely tort claims. *Lemmerman*, 449 Mich at 63. The trial court's determination regarding the proper classification of a claim as ordinary negligence or medical malpractice is reviewed de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419, 684 NW2d 864 (2004).

In *Bryant*, the plaintiff's decedent was a resident of a nursing home that provided twenty-four hour care because of her extensive health problems. The decedent had no control over her locomotive skills, which made her prone to slide uncontrollably. This lack of control made the decedent a risk for suffocation by "positional asphyxia," a position of the body that prevents proper breathing. Because of the risk, the defendant's medical director authorized the use of various physical restraints, which included bed rails, wedges, bumper pads, and a restraining vest, to prevent the decedent from sliding out of the bed. *Id.* at 415-416. Despite these precautions, nursing assistants found the decedent lying close to the bed rails, tangled in her restraining vest, gown, and bed sheets. They untangled her, attempted to position wedges to prevent her from slipping between the mattress and bed rail, and alerted the supervisor regarding the deficiencies with the restraints. The next day, the decedent was found with the lower half of her body on the floor, and her head and neck under the bedside rail in a manner that prevented her from breathing. The decedent was transported to the hospital, but was later taken off life support and died. *Id.* at 416-417.

The plaintiff's amended complaint was premised on ordinary negligence and alleged that the defendant was liable for failing to provide an accident-free environment, failing to train its employees regarding the risk of positional asphyxiation, failing to inspect the bed and restraints, and failing to protect the decedent from harm after finding her entangled. *Id.* at 417-418. The Supreme Court held that the determination of whether a medical malpractice or ordinary negligence claim was appropriately pursued involved a two-step analysis:

A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only “ ‘within the course of a professional relationship.’ ” Second, claims of medical malpractice necessarily “raise questions involving medical judgment.” Claims of ordinary negligence, by contrast, “raise issues that are within the common knowledge and experience of the [fact-finder].” Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or 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. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Id.* at 422 (citations omitted).]

The Court then examined each of the allegations raised in the amended complaint to determine whether the action was based on medical malpractice or ordinary negligence. The Court held that the claim for failing to provide an accident free environment was an assertion of strict liability that was not recognized as a claim for medical malpractice or ordinary negligence. *Id.* at 425-426. With regard to the failure to train allegation, it concluded that a medical malpractice claim was raised because the training of employees with regard to assessing the risk of positional asphyxia involved an exercise of professional judgment. *Id.* at 427-429. The failure to inspect the bed claim also raised a claim of medical malpractice. In so holding, the Court noted that the claim was not based on the failure to check the decedent's bedding arrangement, but rather to recognize that her bedding arrangement posed a risk of asphyxiation. The risk of asphyxiation varied from patient to patient and was also contingent upon the individual patient's medical history and treatment plan. The risk assessment involved, because of the decedent's medical condition, presented an issue beyond the common knowledge, experience, and understanding of the jury. Accordingly, the claim sounded in medical malpractice, not ordinary negligence. *Id.* at 429-430.

With regard to the last claim, it was alleged that the defendant failed to take steps to protect the decedent after the first time she was discovered entangled between the bed rails and the mattress. The Court held this claim sounded in ordinary negligence because it alleged that the defendant knew of the hazard, but did not correct it. Moreover, the fact-finder could rely on common knowledge and experience to determine whether the defendant should have made an attempt to reduce a known risk of imminent harm to one of its residents. *Id.* at 430-431. Finally, the *Bryant* Court cautioned litigants that the line between ordinary negligence and medical malpractice was not easily distinguishable. Therefore, the Court advised plaintiffs to file their claims “alternatively in medical malpractice and ordinary negligence within the applicable period of limitations.” *Id.* at 432-433.

In the present case, plaintiff did not file a claim alleging an alternative claim of medical malpractice within the two-year period of limitation and comply with the affidavit of merit requirement.³ *Id.* In order to proceed on a claim of negligence, the claim must occur within the course of a professional relationship, and the claim must raise issues within the common knowledge and experience of the jury. *Id.* at 422. In the present case, plaintiff concedes that the claim occurs within the course of the professional relationship. However, with regard to the second requirement, plaintiff contends that the placement of another individual's medical records within the decedent's records is a mistake subject to the common knowledge and experience of the jury. We disagree and conclude that the claim raises questions of medical judgment beyond the realm of common knowledge and experience. A review of the complaint reveals claims of negligent treatment that did not comply with the applicable standard of care and that these deficiencies prevented the decedent from achieving a better result. Indeed, a mistaken dictation within the medical file of the decedent in isolation does not resolve plaintiff's claims. Rather, the issue for the trier of fact is whether the medical treatment of the decedent would have been different as a result of any alleged error contained in the medical documents and whether the decedent was harmed as a result. Further, the deprivation of a better result clearly presents an issue outside the common knowledge of jurors and would require expert testimony. Consequently, the trial court erred in denying defendants' motions for summary disposition by holding that the issue of negligence presented a factual dispute.⁴

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction. Defendants, as the prevailing party, may tax costs.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

³ Plaintiff does not dispute that the statute of limitations governing a medical malpractice action has expired.

⁴ In light of our holding that the trial court erred in concluding that a factual issue regarding negligence was presented, we do not address the argument that privacy rules prevent plaintiff from proving the claim.