

STATE OF MICHIGAN
COURT OF APPEALS

LEONORA MCIVER,

Plaintiff-Appellant,

v

ST. JOHN MACOMB OAKLAND HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

October 2, 2012

No. 303090

Oakland Circuit Court

LC No. 2010-111263-NO

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

GLEICHER, P. J., (*concurring*).

I fully concur with the majority opinion. I write separately to respectfully respond to the arguments advanced by the dissent.

The dissent posits that because McIver’s “ordinary negligence claim remains inextricably tied to an assessment of plaintiff’s underlying medical condition” it “necessarily raises ‘questions of medical judgment requiring expert testimony . . .’ and therefore sounds exclusively in medical malpractice.” *Post* at 7, quoting *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 423; 684 NW2d 864 (2004). According to the dissent, expert testimony is required to prove that a patient in McIver’s condition should not have been seated in a chair placed on the wet floor of a hospital bathroom, and left there unattended. *Post* at 7.

In my view, the dissent has conflated a care provider’s *observation* of a patient’s condition with a medical *diagnosis*. In so doing, the dissent distorts *Bryant*’s holding. In *Bryant*, the Supreme Court specifically acknowledged the several medical diagnoses (multi-infarct dementia, diabetes, and strokes) that caused Catherine Hunt’s debility. *Bryant*, 471 Mich at 415. The Court pointed out that as a result of those conditions, Hunt “had no control over her locomotive skills” and “various physical restraints” were needed to prevent her from becoming entangled in the bed rails. *Id.* at 415-416. Nursing home personnel observed that Hunt had become entangled in the restraining devices, but did not intervene to rectify the problem. *Id.* at 430. Regardless of the medical origins of Hunt’s debility, her limitations were obvious to her care providers. The Supreme Court held that the nursing home’s failure to act upon its agents’ awareness of “a known risk of imminent harm” supported a claim sounding in ordinary negligence. *Id.* at 430-431. The “known risk of imminent harm” derived from Hunt’s obvious inability to disentangle herself from her restraints rather than any evaluation flowing from knowledge of her actual diagnoses.

The diagnoses of Catherine Hunt’s “underlying medical condition” played no role in the *Bryant* Court’s determination that her care providers were potentially negligent. Nursing home personnel had no need to understand Hunt’s diagnoses because it was obvious that she was unable to remove herself from tangled restraints. In other words, Hunt’s care providers knew or should have known of Hunt’s peril based on their observations, not because they should have extrapolated harm from her multi-infarct dementia, diabetes, and strokes. Similarly, knowledge of McIver’s medical diagnoses bears no relevance to whether she should have been seated on a chair placed on a wet floor.

McIver alleges that she suffered from “severe debility” and her medical records bear out that claim. The nursing notes recorded during McIver’s hospitalization document her “weakness,” “confusion,” and her “unsteady gait.” These are not diagnoses; they are observable facts. If McIver’s “severe debility” was apparent to her care providers, a jury evaluating McIver’s claim would have no need to understand the technical medical reasons for her condition to conclude that she should not have been seated in the chair. Alternatively, if the testimony establishes that McIver appeared hale and hearty, a jury could reasonably decline to find that seating her in the chair constituted negligence. As in the hypothetical scenario sketched out in *Bryant*, if the care providers “recognize that the [patient’s] medical condition is such that” she is likely to fall from a chair placed on a wet floor, the case implicates ordinary negligence. *Id.* at 431. Contrary to the dissent, the details of McIver’s underlying medical condition are simply irrelevant to her chair-related claim.

The dissent similarly errs by injecting notice into the analysis of whether a claim sounds in ordinary or professional negligence. The dissent asserts (with no evidentiary support) that because “there was no notice of any hazard, no known risk of imminent harm,” this case is distinguishable from *Bryant*. *Post* at 9. The dissent misconstrues the legal issue presented here: whether McIver’s complaint sets forth an ordinary negligence claim. Notice of McIver’s physical condition and the risk of putting her in the chair will inform the jury’s determination of whether hospital personnel behaved reasonably. In this sense, notice is a necessary component of McIver’s negligence claim. But “notice” of McIver’s condition has nothing to do with whether the complaint “raise[s] issues that are within the common knowledge and experience” of the factfinder. *Bryant*, 471 Mich at 422. The answer to that question flows from the nature of the allegations, not the proofs. “Notice” simply does not distinguish a professional liability claim from an ordinary negligence case.

More fundamentally, the dissent misapprehends the definition of negligence. The dissent asserts that here, unlike in *Bryant*, there was “no *failure* to take any corrective action.” *Post* at 9 (emphasis added). The dissent continues: “Unlike the narrow exception of *Bryant*, plaintiff here is asking this Court to evaluate the propriety of the extent of the safety measures taken . . . not the complete *lack of action* taken by defendant in the face of a known risk.” *Id.* (emphasis added). By suggesting that *Bryant*’s holding concerns only cases alleging a “failure to take corrective action” the dissent misreads that case and disregards elementary tort principles.

Jurors in a negligence case are routinely instructed: “Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use.” M Civ JI 10.02. This jury instruction continues: “Therefore, by ‘negligence,’ I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably

careful person would not do, under the circumstances that you find existed in this case.” By definition, negligence may arise from either failing to act, or from engaging in an unreasonable act. The dissent improperly reads into *Bryant* the requirement that to qualify as ordinary negligence, a defendant’s conduct must involve a failure to act. Nothing in *Bryant* suggests that only one variety of negligence is actionable, and logically this proposition is unsupportable. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170-171; 809 NW2d 553 (2011) (citation omitted) (“[T]he ‘simple idea that is embedded deep within the American common law of torts’ [provides that] if one ‘having assumed to act, does so negligently,’ then liability exists as to a third party for ‘failure of the defendant to exercise care and skill in the performance itself.’”). For example, had a nurse’s aide spilled boiling water on McIver, or dropped a heavy mug on her head, the claim would involve ordinary negligence having nothing to do with a failure to take corrective action. Alternatively, had the aide instructed McIver (or any other patient) to walk barefoot to the bathroom across a slippery floor, the ordinary negligence claim would arise from “the doing of something that a reasonably careful person would not do,” and would be actionable despite, unlike *Bryant*, that it flowed from an action rather than a failure to act.

Here, the complaint avers that defendant’s employee seated McIver in an unsafe place. The chair may have been unsafe because it lacked anti-skid contact surfaces, or it may have simply been located on a wet floor. The dissent contends that jurors are unable to understand these simple facts without help from an expert, but has posited no explanation of what an expert might say. Neither nursing nor medical standards of care shed light on whether hospital personnel should seat a debilitated patient in an unsafe chair placed on a wet floor. A jury’s common knowledge about chairs, wet floors, and debilitated persons suffices to evaluate the reasonableness of the hospital’s alleged actions. Accordingly, the majority correctly concludes that the circuit court should not have summarily dismissed McIver’s chair-related claim.

/s/ Elizabeth L. Gleicher