

STATE OF MICHIGAN
COURT OF APPEALS

CARRIE BACON,

Plaintiff-Appellant,

v

JOHN ZAPPIA, M.D., MICHIGAN EAR
INSTITUTE, JOCELYN GEORGE, and
PROVIDENCE HOSPITAL AND MEDICAL
CENTER, d/b/a PROVIDENCE PARK
HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
November 17, 2015

No. 323570
Oakland Circuit Court
LC No. 2013-133905-NH

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(5) and dismissing her medical malpractice claim without prejudice. We reverse and remand.

I. BACKGROUND

In May 2013, plaintiff commenced this cause of action alleging medical malpractice against defendants stemming from the negligent administration of her anti-seizure medications during her hospitalization. While they use different words, the parties agree that it became apparent during a December 2013 deposition that plaintiff had difficulty understanding questions and communicating her answers.

In January 2014, plaintiff's boyfriend filed petitioned the probate court requesting the court to appoint him as plaintiff's guardian and conservator. The petition for guardianship stated that the appointment of a guardian was necessary because plaintiff "lack[ed] sufficient understanding or capacity to make or communicate informed decisions because of mental deficiency and physical illness or disability." The petition for conservatorship also stated that the appointment of a conservator was necessary because plaintiff was "unable to manage her property and business affairs effectively because of mental deficiency, physical illness or disability." The petition recited plaintiff's long medical history and pled that she was unable to handle her finances, and needed constant care. At the probate court hearing regarding the petitions, the guardian ad litem recommended granting the petitions due to plaintiff's physical conditions or disability "that prohibit her from being able to essentially conduct her own affairs

and make her own decisions at this time.” In March 2014, the probate court granted the petitions and appointed plaintiff’s boyfriend as her full guardian and conservator.

After the probate court granted the petitions, defendants moved for summary disposition and dismissal of plaintiff’s malpractice claim arguing that plaintiff was incompetent to bring suit at the time she filed her complaint in May 2013 because the same conditions supporting her legal incompetency in March 2014 also existed in May 2013, and thus, plaintiff lacked the capacity to sue under MCR 2.201(E). According to defendants, pursuant to MCR 2.201(E), plaintiff was required to bring her lawsuit through a conservator or next friend, and thus she lacked standing to sue in her individual capacity, warranting dismissal of her claim. Plaintiff opposed defendants’ motion, arguing that, since plaintiff was not adjudicated legally incompetent by the probate court at the time she filed her complaint, her complaint was not defective. The trial court granted defendants’ motion for summary disposition and dismissed plaintiff’s claim without prejudice, pursuant to MCR 2.116(C)(5), concluding that plaintiff lacked the capacity to sue due to her mental incompetency at the time she commenced her cause of action, and thus lacked standing to pursue her claim.

II. STANDARD OF REVIEW

“This Court reviews decisions regarding motions for summary disposition de novo.” *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). In considering a motion for summary disposition under MCR 2.116(C)(5), this Court reviews “the record to determine whether the movant was entitled to judgment as a matter of law because the party asserting the claim did not have legal capacity to sue.” *Id.* In so deciding, this Court considers affidavits, pleadings, depositions, and any other documentary evidence submitted by the parties. *Id.* “Whether an individual is the real party in interest is a question of law that we review de novo.” *Rottenberg v Lipsitz*, 300 Mich App 339, 354; 833 NW2d 384 (2013) (citation omitted). Further, this Court reviews interpretation of statutes and court rules de novo. *In re Estate of Leete*, 290 Mich App 647, 655; 803 NW2d 889 (2010). Statutes and court rules are interpreted according to their plain and ordinary meaning. *Id.* at 655-656 (citations omitted).

III. CAPACITY AND STANDING TO SUE

MCR 2.201 governs a party’s capacity to pursue a cause of action. “An action must be prosecuted in the name of the real party in interest[.]” MCR 2.201(B); MCL 600.2041. “Any natural person may sue or be sued in his own name.” MCL 600.2051(1); MCR 2.201(C)(1). Pursuant to MCR 2.201(E), however, minors and incompetent persons are precluded from bringing lawsuits on their own. *Klida v Braman*, 278 Mich App 60, 72; 748 NW2d 244 (2008) quoting *Cameron v Auto Club Ins Ass’n*, 476 Mich 55, 94-95; 718 NW2d 784 (2006) (CAVANAGH, J., dissenting). Instead, a minor or an incompetent person may institute and prosecute a cause of action in his own name provided he has an appointed representative to act on his behalf as provided under MCR 2.201(E). *Buckholz v Leveille*, 37 Mich App 166, 169-170; 194 NW2d 427 (1971). “Under that rule, minors and incompetents who wish to pursue a cause of action have no choice but to be represented by a conservator or next friend.” *Klida*, 278 Mich App at 72, quoting *Cameron*, 476 Mich at 94-95 (CAVANAGH, J., dissenting). MCR 2.201(E) provides, in part:

(E) Minors and Incompetent Persons. This subrule does not apply to proceedings under chapter 5.

(1) *Representation.*

(a) If a minor or incompetent person has a conservator, actions may be brought and must be defended by the conservator on behalf of the minor or incompetent person.

(b) If a minor or incompetent person does not have a conservator to represent the person as plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the next friend is responsible for the costs of the action.

(c) If the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, who is not responsible for the costs of the action unless, by reason of personal misconduct, he or she is specifically charged costs by the court. It is unnecessary to appoint a representative for a minor accused of a civil infraction.

(2) *Appointment of Representative.*

(a) Appointment of a next friend or guardian ad litem shall be made by the court as follows:

(i) if the party is a minor 14 years of age or older, on the minor's nomination, accompanied by a written consent of the person to be appointed;

(ii) if the party is a minor under 14 years of age or an incompetent person, on the nomination of the party's next of kin or of another relative or friend the court deems suitable, accompanied by a written consent of the person to be appointed; or

(iii) if a nomination is not made or approved within 21 days after service of process, on motion of the court or of a party.

(b) The court may refuse to appoint a representative it deems unsuitable.

(c) The order appointing a person next friend or guardian ad litem must be promptly filed with the clerk of the court.

* * *

(4) *Incompetency While Action Pending.* A party who becomes incompetent while an action is pending may be represented by his or her conservator, or the court may appoint a next friend or guardian ad litem as if the action had been commenced after the appointment.

Thus, MCR 2.201(E) clearly contemplates that a conservator will generally bring a cause of action on an incompetent person's behalf. See MCR 2.201(E)(1)(a) (an incompetent person's conservator may bring actions on behalf of the incompetent person). However, in the event the incompetent person does not have a conservator to represent him, the trial court must appoint a

next friend or guardian ad litem to represent the incompetent person as plaintiff. MCR 2.201(E)(1)(b).

Plaintiff claims that MCR 2.201(E), requiring a conservator or next friend to prosecute a civil action on behalf of an incompetent person, applies only where an individual has already been adjudicated mentally incompetent by the probate court at the time the individual commenced the cause of action. We agree.

This Court has explained that, “MCR 2.201(E) governs the appointment of a guardian ad litem for a person who has already been adjudicated legally incapacitated.” *Redding v Redding*, 214 Mich App 639, 644; 543 NW2d 75 (1995) (emphasis added). In so concluding, this Court implicitly recognized that an “incompetent person,” requiring a conservator or next friend to act in a representative capacity as plaintiff pursuant to MCR 2.201(E), is “a person who has already been adjudicated legally incapacitated.”¹ *Id.* Noting that “[t]he probate court has exclusive legal and equitable jurisdiction [over] . . . proceedings concerning guardianships, conservatorships, and protective proceedings,” this Court in *Redding* further found that “[t]he proper remedy where a question of mental competency arises is a petition in probate court for a finding of incapacity and appointment of a guardian under MCL 700.443(1) [repealed; now MCL 700.5303].”² *Redding*, 214 Mich App at 643-645. As such, “the appropriate practice where a circuit court questions the competency of an adult is to refer the matter to the probate court for an appropriate determination about possible guardianship.” *Id.* at 643-644.

¹ The Estates and Protected Individuals Code (“EPIC”) defines “legally incapacitated individual” as “an individual, other than a minor, for whom a guardian is appointed under this act or an individual, other than a minor, who has been adjudged by a court to be an incapacitated individual.” MCL 700.1105(i). The EPIC defines an “incapacitated individual” as “an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.” MCL 700.1105(a). Thus, the statutory definition of a legally incapacitated individual necessarily implicates an individual’s mental competency.

² MCL 700.1302(c) grants the probate court exclusive legal and equitable jurisdiction over a proceeding that concerns a guardianship, conservatorship, or protective proceeding. The EPIC provides specific procedures for determining whether an individual is legally incompetent, including provisions providing for the appointment of a guardian ad litem to represent the allegedly incapacitated individual upon the filing of the petition, MCL 700.5303(3); requiring the court to conduct a hearing on the issue of incapacity, MCL 700.5303(3); entitling the alleged incapacitated individual to secure his own independent evaluation, to be present at the hearing, to be represented by legal counsel, to present evidence and cross-examine witnesses, and to a trial by jury, MCL 700.5304(2), (4) & (5); and providing that the court “may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual[.]” MCL 700.5306(1). See also, MCL 700.5306a specifying the rights of an individual for whom guardianship is sought. See MCL 700.5406 for similar provisions regarding a petition to appoint a conservator for an allegedly incapacitated individual.

At the time plaintiff commenced this cause of action in her individual capacity she had not yet been adjudicated legally incapacitated by the probate court. Instead, the question of plaintiff's competency to continue to pursue her claim was not presented to any court until several months after she commenced this cause of action. Defendants' motion ascribed to the circuit court the power to determine the question of incompetency. This power is reserved exclusively to the probate court. Thus, the circuit court lacked jurisdiction to make a fact finding that the plaintiff was incompetent as of March 2013. See *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992) ("When there is a want of jurisdiction over the parties or the subject matter, no matter what formalities may have been taken by the trial court, the action is void because of its want of jurisdiction.")

MCR 2.201(E) does not provide for the dismissal of a suit brought by a plaintiff, as here, who was adjudicated legally incompetent after the filing of the complaint and while the action was pending. Substitution of plaintiff's appointed conservator as named plaintiff and allowing the conservator to continue to pursue her claim on her behalf, in accordance with MCR 2.201(E)(4), comports with "the whole object and purpose of the rule of common law and principles of equity" underlying the rule requiring representation of minors and incompetent persons. That purpose is to have the court protect the rights of individuals who are unable to protect themselves. *Great Lakes Reality Corp v Peters*, 336 Mich 325, 332-333; 57 NW2d 901 (1953) quoting *Cohen v Home Life Insurance Co*, 273 Mich 469, 481; 263 NW 857 (1935) (POTTER, C.J., dissenting); see also, *McDaniel*, 68 Mich at 333.

Having resolved this issue, we decline to address plaintiff's remaining arguments, which were not properly preserved for our review because the trial court did not decide them. "Appellate review is limited to issues actually decided by the trial court." *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994).

Reversed and remanded for reinstatement of plaintiff's claim. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray