STATE OF MICHIGAN

COURT OF APPEALS

STACEY VAN BUREN, Plaintiff-Appellant,	UNPUBLISHED January 5, 2012
V	No. 297019 Saginaw Circuit Court LC No. 09-006787-NI
COVENANT HEALTHCARE SYSTEM, CARLOTTA MARESCA, M.D., ADARSH HIREMATH, M.D., KENNETH D. ROOT, P.A.C., LYNN E. GAUTHIER, R.N., SUSAN SCHMEIGE, R.N., RAY A. MULLINS, R.N., TERRY L. STARKE, R.N., REBECCA R. KOEPF, C.R.N.A., and PERLITA P. ILEM, M.D., Defendants-Appellees.	

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff brought a negligence action seeking damages for a double-mastectomy that was performed despite the fact that a biopsy had revealed that she did not have breast cancer. Plaintiff's complaint included various alternative allegations as to how the surgery went forward despite the negative biopsy finding, including a failure of clerical employees or medical employees to transmit and/or file the biopsy report as well as assertions that the surgeon conducted the surgery without requesting and/or reviewing the biopsy report. The defendants did not file an answer but instead, immediately after service of the complaint, filed a motion for summary disposition asserting that all of plaintiff's claims arise solely in medical malpractice. The trial court granted the motion and dismissed the case.

We reverse and remand for further proceedings because the trial court acted prematurely in determining the nature of the claims without the benefit of any discovery or other factual development.

I. BACKGROUND

Plaintiff, Stacy Van Buren, alleges that on July 27, 2009, at age 34, she was seen for a suspicious lump in her left breast by defendant surgeon, Dr. Maresca. Plaintiff's first amended complaint alleges that after conducting a physical examination Dr. Maresca concluded that a fine needle aspiration biopsy should be conducted in order to determine if the lump was cancerous.

She performed the fine needle aspiration and sent the resulting sample to the hospital's pathology department for analysis. According to the complaint, at that same office visit, Dr. Maresca told Van Buren that she believed the lump was cancerous and strongly recommended surgery as soon as possible. Dr. Maresca recommended a left breast mastectomy and, given the diagnosis, as well as Van Buren's personal and family medical histories, also recommended a prophylactic removal of the right breast. Plaintiff agreed to the procedures and surgery was scheduled for August 5th.

Two days after this office visit and one week before the planned surgery, the specimen obtained by the fine needle aspiration was analyzed by a pathologist in defendant hospital's pathology department. The pathologist's report stated—contrary to Dr. Maresca's clinical impression—that the specimen was not cancerous.

The complaint alleges, *inter alia*, that "the results of the fine needle aspiration taken of the lump in plaintiff's left breast . . . was misfiled, misidentified, and/or otherwise not physically placed in plaintiff's medical or hospital chart prior to the mastectomy surgery." It further states that "a copy [of the pathology report] . . . should have been sent, routed and/or otherwise made available to [Dr.] Maresca." It asserts that as a result of the hospital's "agents, servants and/or employees[']" failure to transmit the report and/or place it in plaintiff's file, Dr. Maresca remained unaware of the pathologist's findings and so proceeded with the surgery during which she removed both of Ms. Van Buren's breasts. The complaint makes other allegations including that Dr. Maresca had an independent duty to seek out and/or obtain the biopsy report, to postpone the surgery until she had seen the report and once the report was reviewed, to cancel the surgery until she had notified plaintiff of the pathology findings and, if the doctor still believed the surgery was advisable, to obtain plaintiff's consent given the new information.

Despite the varying scenarios set out in the complaint and the absence of any discovery, the trial court granted defendants' motion for summary disposition. Although the trial court recognized in its opinion that "plaintiff says her claims are about 'miscommunication and clerical error,'" the court found that the suit alleged what could only be considered medical malpractice claims.

Defendants' motion was filed pursuant to MCR 2.116(C)(7) and (8). A motion filed pursuant to MCR 2.116(C) may not be granted unless "no factual development could possibly justify recovery." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).[1] We review de novo a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

II. ANALYSIS

[1] Defendants' (C)(7) motion is simply an argument that if plaintiff's claim sounds exclusively in medical malpractice it must be dismissed because plaintiff did not mail a medical malpractice pre-suit Notice of Claim as required by MCL 600.2912(b). However, if plaintiff's complaint sounds in negligence, the (C)(7) argument has no basis since a negligence claim does not require a Notice of Claim. Thus, the two grounds for summary disposition turned on the identical issue: whether plaintiff's complaint states a case in negligence.

In *Bryant v Oakpoint Villa*, 471 Mich 411; 684 NW2d 864 (2004), our Supreme Court held that an ordinary negligence claim may be prosecuted by a patient against a medical provider where *either* of two circumstances are present: (a) the allegedly negligent actions were not taken in the course of a professional relationship; *or* (b) the claim does not require expert testimony because it does not involve questions of medical judgment beyond the realm of common knowledge and experience. *Id.* at 422.

The *Bryant* Court rejected the defendant's argument that because the decedent was a patient and the named defendant nursing home was a licensed medical provider the claim could sound only in medical malpractice. Indeed, the Court stated that even if the error was committed by an employee "engaging in medical care at the time of the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." 471 Mich at 421 (emphasis in original). The Court went on to explain that in order to make that determination the court must "determin[e] whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience."[2] The Court ultimately concluded that "no expert testimony is required here to determine whether defendant was negligent in failing to respond after its agents noticed that [decedent] was at risk of asphyxiation."

Bryant makes clear that the issue of whether the claim sounds in medical malpractice or negligence is not to be resolved through generalized descriptions of the nature of the claim, but instead, by a specific review of the facts. The instant complaint was necessarily drafted without access to proofs concerning which hospital employee was supposed to file the biopsy report, whether and when the report was actually filed and whether it was seen by or available to the surgeon. Indeed, other than knowing that her breasts were removed despite a biopsy report showing an absence of cancer, plaintiff, like the trial court, has actual knowledge of almost none of the salient facts. The complaint, accordingly, speaks broadly and encompasses both medical and non-medical personnel. Whether or not the persons ultimately responsible for the alleged miscommunication were medical professionals or clerks, secretaries or other non-medical personnel is not yet known, except perhaps to defendants. Moreover, even if some or all the relevant actions or omissions were committed by medical professionals, it was similarly premature for the trial court to determine whether those actions or omissions involved medical judgment.

[2] The relationship in *Bryant* was clearly that of patient to medical provider. The decedent was a bed-bound patient "suffer[ing] from multi-infarct dementia and diabetes, had several strokes and required twenty-four-hour-a-day care for all her needs." Given that the patient had "no control over her locomotive skills and was prone to sliding about uncontrollably [in her bedding and so] at risk for suffocation by positional asphyxia," she was restrained by use of bed rails, a restraining vest and bumper pads. *Id.* at 415. As the Court noted, the use of these restraints "must be authorized by a physician." *Id.* at 416. Several nursing assistants testified that on more than one occasion they found the patient entrapped in the bedding and restraints and reported this to their supervisor. Plaintiff alleged that despite these reports no modifications were made to plaintiff's restraints and as a result she again became entrapped and suffocated to death.

Reversed and remanded for further proceedings consistent with this opinion, without prejudice to the filing of summary disposition motions after discovery is completed. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

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MARKEY, J. (concurring).

I concur with my colleagues in this case that granting summary disposition ostensibly pursuant to MCR 2.116(C)(7) under the particular facts of this case before the parties had undertaken any discovery whatsoever was premature.

It is generally a rare case where summary disposition is granted before discovery is complete. Indeed, MCR.2116(C)(7) requires the trial court to consider the pleadings, affidavits, *depositions, admissions, and other documentary evidence submitted in a light most favorable to the non-moving party*. (Emphasis added.) So, patently, the court rule itself assumes that the parties have engaged in some discovery before moving for summary disposition.

Here, the facts and plaintiff's damages are both unique and serious and further my conclusion that summary disposition was premature. Whether this case ultimately is deemed one for medical malpractice, at this juncture, the trial court was required to view the evidence in the light most favorable to the *plaintiff*. Here, the trial court instead viewed it in the light most favorable to defendants and dismissed it essentially on the pleadings. Allowing the matter to proceed with discovery is the course of greater prudence, particularly when the facts and legal issues are close and compelling. Moreover, it strikes me that the average person might well have

little difficulty with concluding that proceeding with a double mastectomy on a 34 year old woman without having the results of a crucial laboratory results is negligent.

Consequently, under these specific facts, I agree that summary disposition was premature.

/s/ Jane E. Markey