S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CASSANDRA DAVIS, Personal Representative of the Estate of ELSIE BAXTER, Deceased, Plaintiff-Appellant, v BOTSFORD GENERAL HOSPITAL, Defendant-Appellee.	UNPUBLISHED May 24, 2005 No. 250880 Oakland Circuit Court LC No. 2003-049054-NO

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(7). We affirm in part, reverse in part, and remand for further proceedings.

I. Ordinary Negligence versus Medical Malpractice

Plaintiff, the decedent's personal representative, filed a negligence action against defendant hospital alleging that defendant's failure to provide adequate and competent care resulted in decedent's death. On appeal, plaintiff first argues that the trial court improperly determined that her claims sounded in medical malpractice.

A. Standard of Review

We review de novo whether the nature of a claim sounds in ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 419; 684 NW2d 864 (2004).

B. Analysis

Plaintiff specifically identifies the following allegations of her complaint as sounding in ordinary negligence:

> h. The defendant failed to adequately and competently provide proper hygiene for plaintiff's decedent in that defendant failed to bathe plaintiff's

decedent on a regular basis and failed to properly clean and change her after she soiled herself;

i. The defendant failed to adequately and competently keep plaintiff's decedent's surroundings clean and sterile as necessary for a patient in plaintiff's decedent's medical condition;

j. The defendant failed to adequately and competently change and clean plaintiff's decedent's bed linens and clothes as is necessary for a patient in plaintiff's decedent's medical condition . . . ;

There is no dispute concerning the existence of a professional relationship, thus whether the allegations sound in medical malpractice or ordinary negligence turns on "whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant*, *supra* at 422. In *Bryant*, our Supreme Court addressed whether four claims sounded in ordinary negligence or medical malpractice. The court found that one of the plaintiff's claims, that the defendant "'fail[ed] to assure that plaintiff's decedent was provided with an accident-free environment,'" actually sounded in strict liability. *Id.* at 425-426. The court found that the plaintiff's claim that the defendant "failed to train its staff 'to assess the risk of potential asphyxia,'" sounded in medical malpractice because of the patent need for expert testimony. *Id.* at 428-429. The court then determined that the plaintiff's claim that the defendant is liable for "'[n]egligently and recklessly failing to inspect the beds, bed frames and mattress to assure that the risk of positional asphyxia did not exist for plaintiff's decedent,'" sounded in medical malpractice because "[t]he restraining mechanisms appropriate for a given patient depend upon the risks and benefits of using and maintaining a particular set of restraints in light of a patient's medical history and treatment goals," thus, requiring expert testimony. *Id*. at 429-430. However, the court did find that the plaintiff's claim that defendant "[n]egligently and recklessly fail[ed] to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress[,]" sounded in ordinary negligence. The court emphasized that:

> . . . no expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed that Ms. Hunt was at risk of asphyxiation. Professional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff's allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant's agents noticed that Ms. Hunt was in peril. [*Id*. at 431 (emphasis in original).]

We hold that the trial court properly concluded that the allegations "i" and "j" sound in medical malpractice. Similar to the second, and particularly the third, medical malpractice claims in *Bryant*, those allegations would require assessment of the risks and benefits of the level of sterility and cleanliness needed for a patient "in decedent's medical condition." Thus, expert testimony would be needed to establish the applicable standard of care for a patient "in decedent's medical condition."

However, in regard to allegation "h," we conclude that it sounds in ordinary negligence. Unlike the previous allegations, plaintiff's claim that defendant failed to bathe plaintiff's

decedent on a regular basis, and particularly, in failing to properly clean and change her after she soiled herself, does not require expert testimony. As in the "fail to take steps" claim in *Bryant*, "the fact finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce the a known risk of . . . harm to one of its charges." *Bryant, supra* at 431. Further, "no expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed" the conditions plaintiff claims existed. *Id*. at 431. While the causation and damages elements of plaintiff's claim may require medical-expert testimony, it is the element of "risk assessment" that is determinative of whether an action sounds in medical malpractice or ordinary negligence, i.e., whether medical judgment is necessary to determine if there was a breach of duty. See *Bryant*, *supra* at 429-430. Therefore, we conclude that allegation "h" sounds in ordinary negligence.

II. Leave to Amend Complaint

Plaintiff next argues that the trial court should have granted her leave to amend her original complaint. We disagree. This Court reviews for an abuse of discretion a trial court's decision denying a motion to amend a complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Plaintiff specifically argues that trial court erred by not allowing the complaint to be amended to reflect "that some of her allegations were based on ordinary negligence, not medical malpractice." However, this Court examines "the substance of the underlying tort complaint and the basis for the injuries, rather than simply the nomenclature in the complaint." *AutoClub Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2001). "An amendment to a complaint is futile if it merely restates the allegations already made . . ." *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Here, we agree with the trial court that allowing plaintiff to amend her complaint to "clarify" that it was based on ordinary negligence is merely to restate the factual allegations of plaintiff's complaint in a different light. Therefore, the trial court properly denied plaintiff leave to amend her complaint.

III. Extension for Filing Affidavit of Merit

Plaintiff next argues that the trial court should have allowed her an extension to file an affidavit of merit because of defendant's failure to allow her access to the decedent's medical records. We disagree.

A. Standard of Review

The trial court's factual findings are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

B. Analysis

MCL 600.2912d(3) provides that:

> If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

Here, there was evidence that defendant allowed plaintiff access to the decedent's medical records. An affidavit executed by plaintiff's investigator, Julie Herman, states that she was allowed to review the decedent's medical records at defendant hospital. Plaintiff claims that defendant did not send complete hospital records because of the cost involved. However, MCL 600.2912d does not require defendant to send copies of a plaintiff's medical records, but only requires defendant to "allow access" to medical records. Plaintiff was allowed access, and the trial court's finding with respect to this issue is not clearly erroneous.

IV. Tolling of Statute of Limitation

Plaintiff next argues that the period of limitations should be tolled because plaintiff's status as personal representative was revoked for a period of six months. We disagree.

A. Standard of Review

Plaintiff did not raise this issue below, and it is not preserved for review. *Kosch v Kosch*, 233 Mich App 346, 353-354; 592 NW2d 434 (1999).

B. Analysis

Although this unpreserved issue need not be addressed, *Kosch, supra* at 353-354, we nonetheless conclude that plaintiff failed to establish error requiring reversal. Plaintiff's status as personal representative was revoked because she failed to file an inventory of the decedent's property. First, allowing the period of limitation to be tolled under the circumstances contravenes the express language of that MCL 600.5852, which provides that a personal representative must bring suit "within 2 years after letters of authority *are issued*." (emphasis added.) Moreover, if this Court accepted plaintiff's argument that a personal representative can toll the medical malpractice limitations period by failing to fulfill duties as a personal representative, it would contravene the Legislative intent in establishing a limitations period in MCL 600.5852.

Plaintiff also argues that equitable or judicial tolling is applicable to her medical malpractice claims under *Bryant*. In *Bryant*, our Supreme Court held that where a "[p]laintiff's failure to comply with the applicable statute of limitations is the product of understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights," tolling of the medical malpractice claims is appropriate. *Bryant, supra* at 432.

We conclude that equitable or judicial tolling is not appropriate in this case. Here, plaintiff was aware that the overwhelming majority of allegations listed in her complaint sounded in medical malpractice, not ordinary negligence. Indeed, plaintiff claims on appeal that "[t]he circuit court erred in dismissing the *entirety* of the [p]laintiff's case since there were *some aspects* of plaintiff's [c]omplaint which stated claims based on ordinary negligence, not medical malpractice" (emphasis added). Further, plaintiff filed an "emergency motion for extension of time to file affidavit of merit," in which she asserted that "due to clerical error, the complaint in this matter was filed April 15, 2003 without an affidavit of merit." Apparently, "plaintiff had retained an expert witness, Dr. David Mansfield, who reviewed the available records in this matter and prepared a report on March 22, 2003, well in advance of the filing of the complaint." However, plaintiff nonetheless attempted to file her complaint within the two-year medical

malpractice limitation period, and even attempted to secure a ninety-one day extension under MCL 600.2912d(3), and a twenty-eight day extension under MCL 600.2912d(2), in which to file the affidavit of merit. Under these circumstances, we cannot conclude that the failure to file the affidavit of merit with the complaint was the product of "understandable confusion."

V. Dismissal With Prejudice

Plaintiff next argues that the trial court erred in dismissing her medical malpractice claim with prejudice.

A. Standard of Review

"This Court reviews a circuit court's grant of summary disposition de novo." *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Whether a claim is time-barred is also reviewed de novo. *Id*. at 340-341.

B. Analysis

In *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), our Supreme Court held that dismissal with prejudice is appropriate in cases where the plaintiff has not filed a complaint with an affidavit within the applicable limitations period. *Id*. at 551-552. In the instant case, the period of limitations expired on May 31, 2003. The trial court granted plaintiff's motion for summary disposition on August 20, 2003. Thus, plaintiff had not filed a complaint with an affidavit within the applicable limitations period, and because the period of limitations is not tolled by a complaint filed without an affidavit of merit, plaintiff's claim was properly dismissed with prejudice. *Id.* at 553. To the extent that plaintiff argues that our Supreme Court's holding in *Scarsella* is incorrect, this Court is nonetheless bound by precedent. *Edwards v Clinton Valley Center*, 138 Mich App 312, 313; 360 NW2d 606 (1984).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette