STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA CROZIER, Guardian of LAWRENCE CROZIER, a Legally Incapacitated Person, Plaintiff-Appellant, v HENRY FORD HOSPITAL, also known as HENRY FORD HEALTH SYSTEM, JOHN DOE and RON ROE, Defendants-Appellees.	UNPUBLISHED December 11, 2008 No. 279924 St. Clair Circuit Court LC No. 07-001309-NO

Before: Zahra, P.J., Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted an order dismissing plaintiff's ordinary and gross negligence claims against defendants. We reverse.

I. Basic Fact and Proceedings

Lawrence Crozier received a liver transplant in August of 2005. In April of 2006, Crozier "became fatigued, shaky and confused . . . ." He was transported to the Port Huron Hospital Emergency Department and then to the Henry Ford Hospital.[1] Plaintiff alleges that, "due to a pharmacy error, Mr. Crozier was taking 5 mg of ProGraf instead of 0.5 mg, which was the prescribed amount." Plaintiff alleged that defendant hospital employed the pharmacist or pharmacist technician responsible for the error and overdose. Plaintiff also alleged that the overdose caused Crozier to suffer "diffuse impairments in cognitive functioning."

On March 15, 2007, plaintiff commenced the instant two-count claim in the Wayne Circuit Court alleging ordinary negligence and gross negligence.[2] On June 4, 2007, defendant hospital moved to dismiss plaintiff's negligence complaint on the grounds that her complaint

[1] The opinion will refer to Henry Ford Hospital and Henry Ford Health Systems simply as defendant hospital.

[2] The parties later stipulated to change venue to the St. Clair Circuit Court.

sounded in medical malpractice and that plaintiff had failed to file a complaint in conformity with the statutory rules governing the filing of medical malpractice actions. Plaintiff responded that her claim could not be brought as a medical malpractice action because the act performed negligently did not require medical judgment.

The circuit court heard arguments on the motion on July 2, 2007. The parties iterated the above arguments, and plaintiff added that the motion to dismiss was premature because discovery had yet to disclose the circumstances surrounding the dispensing of this prescription and, therefore, those circumstances remained unknown to plaintiff. The circuit court granted the motion from the bench, opining:

> I'm in agreement with the defense. I believe that this was the act of a health care professional. It was an act of an individual in the health care facility where they were providing for the needs of a patient. And it did require the exercise of both professional knowledge and judgment in order to provide this service. This is something that is beyond the level of common knowledge and experience and therefore the matter should be filed in that manner.

The judge effectuated his bench ruling by order of dismissal entered on July 16, 2007. This appeal ensued.

I. Ordinary Negligence or Medical Malpractice

Plaintiff challenges the circuit court's determination that plaintiff's claim "raises questions of medical judgment beyond the realm of common knowledge and experience."

This Court determines de novo whether the nature of the claim asserted sounds in ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). Such claims are appropriately raised under MCR 2.116(C)(7) and, therefore, this Court is to consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Id*.

In regard to this criterion, our Supreme Court in *Bryant* explained that:

> [i]f the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, the claim sounds in medical malpractice." [*Bryant, supra* at 423.]

We initially note that our Supreme Court recently decided a case both parties cite, *Kuznar v Raksha Corp*, 481 Mich 169; 750 NW2d 121 (2008). The facts of *Kuznar* are similar to the instant case. In *Kuznar*, the plaintiff went to a pharmacy refill a prescription for Mirapex, 0.125 mg. A pharmacy employee refilled the prescription with 1 mg tablets of Mirapex. The plaintiff sued claiming ordinary negligence. The defendant responded claiming the plaintiff failed to follow the medical malpractice statute. Our Supreme Court affirmed this Court's holding that

pharmacies are not licensed health facilities. *Id.* at 172. However, the Supreme Court expressed that because "the professional relationship test is not satisfied, we need not consider whether the complaint poses questions of medical judgment that would require expert testimony." *Id*. at 173. Thus, *Kuznar*, while factually similar, cannot be relied on to address questions of medical judgment.

There are other cases addressing whether a complaint alleging injury caused by a pharmacist's negligent dispensing of the wrong medication was governed by the medical malpractice statutory requirements. In *Simmons v Apex Drug Stores*, Inc, 201 Mich App 253; 506 NW2d 562 (1993), mod by *Patterson v Kleiman*, 447 Mich 429, 433-435 (1994) and *Becker v Meyer Rexall Drug Co*, 141 Mich App 481; 367 NW2d 424 (1985), this Court held that complaints alleging injury caused by a pharmacist's negligent dispensing of the wrong medication were governed by the malpractice statutory requirements. See also, *Woodward Nursing Home, Inc, v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, released January 24, 2006 (Docket No. 262794), slip op at 2 ("Questions concerning the dispensing of prescription drugs requires the exercise of professional judgment and are outside the realm of common understanding.").[3] However, both *Simmons, supra* and *Becker, supra* were decided before our Supreme Court decided *Bryant, supra*. Neither *Simmons, supra* nor *Becker, supra* mentions the phrase "medical judgment" and both simply rely on undisputed evidence that the negligence occurred within the course of a professional relationship. *Bryant, supra,* casts doubt on the application of *Simmons, supra,* and *Becker, supra* to the facts presented in this case. Again, *Bryant* provides that "[i]f the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence." *Id*. at 423.

Here, we conclude that the "the reasonableness of the employee's conduct in this regard is something which can be evaluated by lay jurors without resorting to expert testimony." Plaintiff's complaint essentially alleges that defendants' employee(s) failed to acknowledge a decimal point in the dosage resulting in a much greater dosage, which caused harm. Medical means "of or pertaining to the practice of medicine." Random House Webster's College Dictionary, 2nd ed. Judgment means "the an act or instance of judging, the ability to judge, make a decision, or form an opinion objectively or wisely; good sense; discernment," or "the demonstration or exercise of such capacity, the forming of an opinion, estimate, notion, of conclusion, as from circumstances presented to the mind." *Id*.

Here, the alleged negligence sounds as a simple failure to acknowledge a decimal point while filling a prescription. There is no real dispute that the instant case involved the refill of a properly marked prescription, which at all times stated the proper dosage. Regardless of who filled the prescription, the act of filling five-milligram pills instead of .5-milligram pills sounds as a clerical error rather than a mistake in medical judgment.

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[3] As an unpublished opinion, *Woodward Nursing Home* is not binding precedent. MCR 7.215(C)(1). Further, *Woodward Nursing Home* involved a delay in filling a prescription, which is factually inapposite to the instant case.

We are not persuaded by defendants' attempt to explain the need for expert testimony in this case. Defendants claim that expert testimony would be necessary at trial because "the description of a given medication is not within the lay knowledge of a jury or court." We question whether an expert witness is required to describe, ostensibly the physical appearance, of medication. Further, as indicated in *Bryant*, expert testimony in a medical malpractice case relates to the "standards of care pertaining to the medical issue." Defendants' assumed expert testimony pertains to fact evidence not the standard of care. Defendants also argue that,

> pharmacists can and do call physicians regarding prescriptions, even on refills. The statutory requirements of the pharmacist are lengthy. It may be that a physician is overprescribing, is prescribing something with interactions with another medication, or that a patient is getting the same medication from multiple physicians. That the fact situation here did not involve a challenge or question to a prescription, does not mean that the refilling of the prescription is not a professional activity requiring judgment.

The above proposed expert testimony may be relevant in other cases, but here there is no indication that a pharmacist called a physician or was concerned that plaintiff had a problem with multiple drug interactions or multiple prescriptions for the same medication. Thus, defendants' claim that expert testimony would be necessary is not persuasive. Accordingly, we reverse the circuit court's order dismissing plaintiffs' claim for ordinary negligence.

Given this disposition we need not address plaintiff's additional argument on appeal.

Reversed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter