STATE OF MICHIGAN

COURT OF APPEALS

KURT A. LOCKWOOD, as personal representative of the ESTATE OF JERRI LOCKWOOD,	FOR PUBLICATION June 7, 2011 9:00 a.m.
Plaintiff-Appellee,	
v	No. 295931 Saginaw Circuit Court
MOBILE MEDICAL RESPONSE, INC.,	LC No. 09-006260-NO
Defendant-Appellant.	Advance Sheets Version

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

K. F. KELLY, J.

Defendant, Mobile Medical Response, Inc., appeals by leave granted the trial court's order denying its motion for summary disposition. On appeal, defendant argues that the trial court erred by failing to grant its motion for summary disposition because plaintiff, Kurt Lockwood, as the personal representative of the estate of Jerri Lockwood (the decedent), filed a medical-malpractice complaint without following the procedures governing medical-malpractice claims. We agree and reverse the trial court's order.

I. BASIC FACTS AND PROCEDURE

On September 12, 2004, the decedent was playing softball in the city of Saginaw when she became sick and began having difficulty breathing. A call was made to a 911 operator, and defendant's ambulance was dispatched to the scene at 1:48 p.m. Defendant's ambulance, containing a paramedic and an emergency medical technician (EMT), was en route to the scene at 1:49 p.m. and arrived at the scene at 1:57 p.m. Upon arrival, the paramedic and EMT found police officers performing CPR on the decedent and discovered that the decedent was "pulseless and apneic." They used a defibrillator on the decedent, intubated her, and transported her in the ambulance to Covenant Hospital, leaving the scene at 2:13 p.m. and arriving at the hospital at 2:25 p.m. Ultimately, the decedent was never revived and she died of arteriosclerotic heart disease.

More than four years later, on August 27, 2009, plaintiff filed a complaint against defendant, alleging that defendant was negligent by failing to timely respond to the 911 call and failing to timely provide transportation for the decedent to the hospital. Plaintiff contended that

the decedent died as a result of defendant's failures. Plaintiff asked the trial court to enter a judgment on his behalf.

Instead of filing an answer to plaintiff's complaint, defendant's first responsive pleading was a motion for summary disposition, filed on October 9, 2009. Defendant moved pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff's complaint should be dismissed with prejudice because plaintiff's complaint alleged medical malpractice and plaintiff failed to meet the procedural requirements to sustain a medical-malpractice action.

On November 16, 2009, plaintiff filed a response in opposition to defendant's motion for summary disposition. Plaintiff denied that his claim sounded in medical malpractice on the basis that his complaint did not question the quality of medical care provided by defendant. Instead, the complaint merely addressed the reasonableness of defendant's response time, a question that does not involve medical care, but is analogous to questioning the reasonableness of the time it takes for a fire department to respond to a fire. Plaintiff argued that he properly pleaded an ordinary negligence claim.

A hearing was held on defendant's motion for summary disposition on December 7, 2009. Defendant argued that plaintiff's claim sounded in medical malpractice because it related to a professional relationship between the decedent and defendant and the claim concerned a matter of medical judgment. Defendant contended that its response time involved a question outside the common knowledge of the jury because the standard governing response time for EMTs was delineated in guidelines issued by the Saginaw Valley Medical Control Authority (SVMCA) and required explanation by a medical expert. In response, plaintiff posited that there was no case on point finding that a complaint regarding the transportation services of EMTs sounded in medical malpractice. Plaintiff further argued that his complaint specifically excluded any references to medical judgment. According to plaintiff, the only issue pleaded was the reasonableness of the time it took for defendant to respond to the call made to 911. The trial court denied defendant's motion for summary disposition under MCR 2.116(C)(7) and (8), holding that "plaintiff's complaint as pled sounds in ordinary negligence, and not medical malpractice." The trial court issued a written order reflecting its ruling on December 21, 2009.

Defendant filed an application for leave to appeal the trial court's decision on January 8, 2010. This Court, O'CONNELL and M. J. KELLY, JJ. (BORRELLO, P.J., dissenting), granted defendant's application for leave to appeal on April 28, 2010. *Lockwood v Mobile Med Response, Inc*, unpublished order of the Court of Appeals, entered April 28, 2010 (Docket No. 295931).

II. MEDICAL MALPRACTICE

Defendant argues that the trial court erred by denying its motion for summary disposition after holding that plaintiff's complaint sounded in ordinary negligence and not medical malpractice and by failing to dismiss plaintiff's complaint with prejudice on the basis that plaintiff did not comply with the procedural requirements for a medical-malpractice claim and the period of limitations had run. We agree.

A. STANDARD OF REVIEW

A motion for summary disposition is reviewed de novo, and the evidence with regard to each issue is viewed in the light most favorable to the nonmoving party. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Under MCR 2.116(C)(7), summary disposition should be granted if the claim is barred as a matter of law, including by a relevant statute of limitations. *Vance v Henry Ford Health Sys*, 272 Mich App 426, 429; 726 NW2d 78 (2006). In reviewing a motion for summary disposition alleging that the claim is barred, we consider the affidavits, pleadings, and other documentary evidence presented by the parties and accept as true the plaintiff's well-pleaded allegations except those contradicted by documentary evidence. *Id.* at 429; *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006).

A motion for summary disposition based on the failure to state a claim under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). A motion should be granted under MCR 2.116(C)(8) "only if no factual development could possibly justify recovery." *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). In reviewing the decision on the motion, we must consider only the pleadings and "accept the factual allegations in the complaint as true . . . ." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

B. MEDICAL MALPRACTICE VERSUS ORDINARY NEGLIGENCE

Defendant contends that plaintiff's claim is, by definition, a medical-malpractice claim and not an ordinary negligence claim. A medical-malpractice complainant cannot avoid the procedural requirements for a malpractice action by framing its claim in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999). A medical-malpractice claim is defined as a claim that arises during the course of a professional relationship and involves a question of medical judgment. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). A professional relationship exists when

> a licensed health care professional, licensed health care facility [or agency], or the agents or employees of a licensed health care facility [or agency], [are] subject to a contractual duty that require[s] that professional, that facility [or agency], or the agents or employees of that facility [or agency], to render professional health care services to the plaintiff. [*Id.*]

See MCL 600.5838a(1). A claim concerns common knowledge and not a question of medical judgment if lay jurors can evaluate the reasonableness of the defendant's actions using their common knowledge and experience. *Bryant*, 471 Mich at 423. "If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented [through expert testimony with] the standards of care pertaining to the medical issue . . . , a medical malpractice claim is involved." *Id.*

The events at issue in plaintiff's complaint occurred during the course of a professional relationship. Defendant is a licensed health-care agency under the Public Health Code. MCL 333.20920; MCL 600.5838a(1)(a). The EMT and the paramedic were acting as defendant's agents when they responded to the call.[1] Additionally, the events at issue occurred at a time when defendant had a contractual obligation to provide medical services to the decedent. A 911 call was made and defendant's agents were dispatched to the scene for the purpose of providing medical services to the decedent. Accordingly, the first prong of the test for a medical-malpractice claim, that the claim arose from a professional relationship, was met.

Furthermore, the complaint alleged a claim involving a question of medical judgment. Plaintiff contended that defendant "held itself out as competent, capable and sufficiently equipped and staffed to respond when dispatched to transport qualified medical personnel to an emergency medical situation." Plaintiff alleged in the complaint that defendant breached the duty to timely respond to the 911 call and that the breach resulted in the decedent's "untimely death . . . ." Although plaintiff does not explicitly define the standard of care governing the duty to timely respond, plaintiff refers to the guidelines promulgated by the SVMCA, an agency charged by state law[2] with overseeing the provision of emergency medical services in Saginaw and Tuscola counties, and indicates that defendant violated those guidelines. A lay juror would require the testimony of an expert to understand the SVMCA guidelines and to determine whether defendant's agents acted reasonably under the circumstances. Without an expert, a lay juror would be unable to know what a timely response to a 911 call would be, given the nature and the seriousness of the decedent's medical emergency.

Plaintiff argued at the hearing on the motion for summary disposition that his claim against defendant did not concern defendant's medical judgment, but only involved the response time of the ambulance. He analogized his claim to challenging the time it takes a fire department to respond to a fire. We disagree, and conclude that this claim involves medical judgment. By citing the SVMCA guidelines in the complaint, plaintiff conceded that ambulance response time is governed by a professional standard of care and not by the ordinary-person standard of care. Moreover, whether defendant was timely in arriving at a scene depends in large part on the nature of the medical emergency. Whether an ambulance arrives in a timely manner when the call concerns a broken bone is a very different question from whether an ambulance is timely when the medical emergency is a cardiac arrest. As a result, the issue in plaintiff's complaint

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[1] Defendant contends that the paramedic and the EMT that drove in the ambulance to the scene and provided medical care to the decedent were "licensed medical providers" for purposes of medical-malpractice claims. However, for purposes of the tort-reform statute, paramedics and EMTs are not "licensed health care professionals" because they are not licensed under article 15 of the Public Health Code, but are licensed instead under article 17 of the Public Health Code. MCL 600.5838a(1)(b); MCL 333.20950. Still, the paramedic and the EMT were acting as agents of a licensed-health care agency, and therefore, can still be the subjects of a malpractice claim. MCL 600.5838a(1).

[2] See MCL 333.20919.

was not just a matter of timing, but concerns what is timely in the context of the decedent's specific medical emergency. Timeliness within the context of a medical emergency would not be easily understood and evaluated by lay jurors without expert testimony regarding the medical issue. As a result, plaintiff's complaint sounds in medical malpractice, not ordinary negligence.

C. PROCEDURAL REQUIREMENTS

Defendant further argues that because plaintiff's complaint amounted to a medical-malpractice claim, plaintiff was required to meet the procedural requirements for filing a medical-malpractice claim, including the provision of notice and the filing of an affidavit of merit. According to defendant, plaintiff's failure to conform to those procedural constraints should have resulted in dismissal of the claim. We agree.

Generally, a medical-malpractice claimant must provide to proposed defendants notice of his or her intent to sue at least 182 days before commencing an action. MCL 600.2912b(1); *Driver v Naini*, 287 Mich App 339, 345; 788 NW2d 848 (2010). A medical-malpractice claim may not be asserted against a health professional or health facility unless written notice is provided before the action is commenced. MCL 600.2912b(1); *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). Generally, the notice will toll the applicable statute of limitations. *Id.* at 686. The sanction for the failure to give notice of intent to claim medical malpractice is dismissal of the complaint without prejudice. *Dorris*, 460 Mich at 47.

In addition to the notice of intent, a plaintiff alleging medical malpractice or the plaintiff's attorney must file with the complaint "an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . ." MCL 600.2912d(1). The affidavit of merit must certify:

> [T]he health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

"When a medical malpractice complaint is filed without an affidavit of merit, the complaint is ineffective and fails to toll the limitations period." *Vanslembrouck v Halperin*, 277 Mich App

558, 561; 747 NW2d 311 (2008). Moreover, the sanction for failing to file an affidavit of merit is dismissal without prejudice. *Dorris*, 460 Mich at 47.

Plaintiff failed to provide any notice of intent to sue defendant, failed to wait the statutory period before filing his complaint against defendant, and failed to file an affidavit of merit with his complaint. As a result, plaintiff could not assert his medical-malpractice claim and did not toll the relevant statute of limitations, and defendant was entitled to dismissal with prejudice. Generally, in cases where the statute of limitations has not run, a plaintiff who fails to file notice of intent to sue and/or an affidavit of merit is entitled to dismissal without prejudice and is allowed to file a notice of intent to toll the statute of limitations and then refile a complaint with the attached affidavit. *Id.* However, plaintiff was unable to refile his complaint because the applicable period of limitations had run. Generally, the period of limitations for a medical-malpractice claim is two years. MCL 600.5805(6). Still, the period can be extended for the personal representative of a decedent. MCL 600.5852. A personal representative of a decedent must file a medical-malpractice claim within two years of receiving his or her letters of authority, but not more than three years after the original period of limitations has run. MCL 600.5852. The original period of limitations ran on September 12, 2006, and more than three years passed before defendant filed its motion for summary disposition. As a result, at the time defendant's motion for summary disposition was filed on October 9, 2009, plaintiff's claim was barred as a matter of law under MCR 2.116(C)(7) by the statute of limitations, and the trial court erred by denying defendant's motion for summary disposition.

Reversed. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell