STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF ELISSABETH HALABICKY, by DOUGLAS HALABICKY, Personal Representative,

Plaintiff-Appellant,

v

LAPEER COUNTY MEDICAL CARE, doing business as LAPEER COUNTY HUMAN SERVICES, and LAPEER COUNTY MEDICAL CARE, doing business as LAPEER COUNTY,

Defendants,

and

LAPEER COUNTY MEDICAL CARE FACILITY, also known as SUNCREST NURSING HOME, SARAH HICKS, and MARI RUPP,

Defendants-Appellees.

UNPUBLISHED
June 17, 2021

No. 352793
Lapeer Circuit Court
LC No. 17-051486-NO

Before: REDFORD, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

Plaintiff Douglas Halabicky, as personal representative for the estate of Elissabeth Halabicky, appeals as of right the trial court's order granting summary disposition in favor of defendants.[1] Plaintiff argues on appeal that the trial court erred by concluding that the alleged

[1] On April 2, 2018, Lapeer County Medical Care, doing business as Lapeer County Human Services and Lapeer County, was dismissed as party to this action. Throughout this opinion, Lapeer County Medical Care Facility will be referred to as Suncrest. When referring to all defendants, Lapeer County Medical Care Facility, Sarah Hicks, and Mari Rupp, we will refer to them collectively as "defendants."

claims sound in medical malpractice, not ordinary negligence, and therefore dismissing the case on the ground that plaintiff had failed to comply with the procedural requirements for filing a medical malpractice action. For the reasons set forth in this opinion, we affirm in part and reverse in part.

I. FACTUAL BACKGROUND

On November 17, 2016, Elissabeth Halabicky was admitted to Lapeer County Medical Care Facility, also known as Suncrest Nursing Home (Suncrest), for long-term care. Elissabeth was 26 years old, was nonverbal, and had severe intellectual disabilities, cerebral palsy, and a seizure disorder. As part of Elissabeth's admission to Suncrest that day, her parents discussed with the staff that Elissabeth was able to move finger foods from her hand to mouth, could use a spoon, and was often assisted with eating by her parents. They also discussed the need for cutting Elissabeth's food into bite-sized pieces and that Elissabeth would sometimes swallow food without adequately chewing.

That evening, Elissabeth had her first meal at Suncrest after her parents left. Sarah Hicks, a certified nursing assistant (CNA) at Suncrest, testified that she and India Walker, another CNA at Suncrest, prepared Elissabeth for dinner and brought her to the dining hall. Elissabeth's dining ticket, which Suncrest used to denote the meal which the patient would be eating and their dietary restrictions, indicated "assist feed in p.m., finger foods as able, cut food into small, bite-size pieces." Consulting the dining ticket for each resident was part of the process for serving meals to the residents.

Walker assisted Elissabeth with eating her dinner, and Walker recalled that Elissabeth's food was cut up into pieces. Joe Lewicki, who was the cook that evening, remembered that Elissabeth had needed her polish sausage cut into bite-sized pieces and reported that he had cut Elissabeth's polish sausage into slices that were approximately a quarter to half an inch thick. Walker fed Elissabeth a piece of polish sausage that Elissabeth chewed and swallowed, a sip of chocolate milk that Elissabeth swallowed, a bite of broccoli that Elissabeth chewed and swallowed, and a bite of macaroni and cheese that Elissabeth swallowed but did not chew. Walker stopped feeding Elissabeth, told Elissabeth that she needed to chew her food, told other staff members that Elissabeth was not chewing her food, and fed another patient who was sitting on the other side of Walker. When Walker turned her attention back to Elissabeth, Walker noticed that Elissabeth was choking. Walker yelled out that Elissabeth was choking and Mari Rupp, a licensed practical nurse (LPN) at Suncrest ran to assist Elissabeth.

Rupp unsuccessfully performed the Heimlich maneuver, had Elissabeth transferred to her room, and paged for additional staff. After getting a suction machine, Rupp and other nursing staff unsuccessfully attempted to dislodge the food caught in Elissabeth's airway by doing the Heimlich maneuver and using the suction machine. As Elissabeth was being attended to by the nursing staff, 911 was called. When EMS arrived, they used forceps to remove a 1 to 1½-inch piece of hot dog or sausage from Elissabeth's throat. Elissabeth was transported to the hospital and died later that night.

Two other CNAs at Suncrest, Brianna Stewecki and Taylor Yax, indicated that they saw the pieces of sausage on Elissabeth's plate after Elissabeth had started choking. Stawecki stated

that the sausage pieces were approximately 1 inch and that she would have cut them again. Yax stated that the sausage pieces were "big," "like a coin," and that she would have cut them in half.

Plaintiff filed this action against defendants claiming that defendants' negligence and gross negligence resulted in Elissabeth's death. Defendants filed a motion for summary disposition and argued that plaintiff's claims had to be dismissed because the claims sounded in medical malpractice, not ordinary negligence, and plaintiff failed to comply with the procedural requirements of filing a medical malpractice action. Following a hearing on the motion, the trial court issued an opinion concluding that plaintiff's claims sounded in medical malpractice, not ordinary negligence. The trial court entered an order granting summary disposition in favor of defendants because plaintiff's claims sounded in medical malpractice and plaintiff failed to comply with the procedural requirements of filing a medical malpractice action. This appeal followed.

II. ORDINARY NEGLIGENCE OR MEDICAL MALPRACTICE

Plaintiff argues that the trial court erred in concluding that all of plaintiff's asserted claims sound in medical malpractice rather than ordinary negligence.

A. STANDARD OF REVIEW

This Court reviews de novo as a question of law whether a claim sounds in ordinary negligence or medical malpractice. *Trowell v Providence Hosp and Med Ctrs, Inc*, 502 Mich 509, 517; 918 NW2d 645 (2018). This Court also reviews de novo the trial court's decision to grant summary disposition. *Pontiac Police and Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac*, 309 Mich App 611, 617; 873 NW2d 783 (2015). "Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, . . . MCR 2.116(C)(10) is the appropriate basis for review." *Silberstein v Pro-Golf of America*, 278 Mich App 446, 457; 750 NW2d 615 (2008). This Court considers all of the evidence submitted by the parties in the light most favorable to the nonmoving party when reviewing a motion for summary disposition granted under MCR 2.116(C)(10). *Id*. Summary disposition may be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

B. ANALYSIS

In *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004), our Supreme Court explained the test for distinguishing between ordinary negligence and medical malpractice claims:

> [A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the

affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

The parties in this case do not dispute that plaintiff's claims pertain to actions that occurred within the course of a professional relationship. The issue to resolve is whether plaintiff's claims raise questions of medical judgment beyond the realm of common knowledge and experience. The *Bryant* Court set for the standard for making this determination as follows:

> After ascertaining that the professional relationship test is met, the next step is determining 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. If 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, a medical malpractice claim is involved. [*Id*. at 423.]

Plaintiff argues on appeal, as was claimed in the complaint, that defendants were negligent for (1) allowing Elissabeth to eat without supervision, (2) failing to prevent Elissabeth from ingesting a 1½-inch long piece of sausage, (3) allowing Elissabeth to have access to food that was not cut into small, bite-sized pieces, and (4) failing to call 911 immediately upon realizing Elissabeth was choking.[2]

Regarding the first claim, plaintiff alleged that Elissabeth should have been more closely supervised and monitored as she was eating. To evaluate such a claim, the jury would be required to know how a patient like Elissabeth who has cerebral palsy, severe cognitive disabilities, and a seizure disorder should be properly supervised and assisted. Generally, "allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury." *Trowell*, 502 Mich at 522-523. In *Trowell*, the Michigan Supreme Court concluded that "a jury could not determine, relying merely on 'common knowledge and experience,' what would constitute proper supervision for a patient like plaintiff, who was admitted to the ICU after suffering an aneurysm, a stroke, and cardiac arrest." *Id*. at 523 (citation omitted).

Likewise, in the present case, a lay juror could not be expected to know from common knowledge and experience how to properly supervise, assist, or feed a person with Elissabeth's conditions and individualized medical needs. Accordingly, a jury could only assess the reasonableness of these actions "after having been presented the standards of care pertaining to the medical issue before the jury explained by experts," and medical judgement beyond the realm of common knowledge and experience was therefore involved with respect to this claim. *Bryant*, 471 Mich at 422-423. Accordingly, the trial court did not err by concluding that plaintiff's claims

[2] Plaintiff does not raise any argument on appeal related to the claims of gross negligence. We therefore do not address those claims. We understand plaintiff's appeal to be limited solely to the asserted claims of ordinary negligence.

regarding defendants' supervision and assistance of Elissabeth sound in medical malpractice, not ordinary negligence.

Similarly, for the jury to determine whether defendants properly rendered aid to Elissabeth, including the timing of the 911 call, also implicates medical judgment because such a determination requires consideration of Elissabeth's individualized medical needs and knowledge of the proper medical response to an individual with Elissabeth's conditions when choking. To determine the reasonableness of defendants' actions of attempting to dislodge the piece of food caught in Elissabeth's airway by performing the Heimlich maneuver and using suction prior to calling 911 raises questions of medical judgment that are beyond the realm of common knowledge and experience. To make this determination the jury would have to know the manner of assistance appropriate when considering Elissabeth's individualized needs, abilities, and the fact that she is nonverbal. Therefore, "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," and this claim sounds in medical malpractice. *Bryant*, 471 Mich at 423. The trial court did not err by reaching this conclusion.

Turning to plaintiff's remaining claims, these essentially entail an allegation of negligence premised on the theory that despite defendants' awareness that Elissabeth required her food to be cut into bite-sized pieces, she was negligently provided with pieces of food that were not bite-sized, particularly a 1½-inch long piece of polish sausage. There is abundant evidence in the record that defendants had been informed of Elissabeth's need to have her food cut into bite-sized pieces, and the record reflects that this requirement was included in the special instructions on Elissabeth's dining ticket that was to be consulted as part of serving each of her meals. Thus, the pertinent question is whether Elissabeth's food was *actually cut* into pieces small enough to be considered bite-sized and *not* whether her various medical conditions *actually required* her food to be bite-sized because that determination had already been made.

Assessing whether a piece of food is bite-sized merely involves an ordinary estimation of size that is well within the common knowledge and experience of the average lay person; countless numbers of people make such determinations multiple times a day, whether for themselves or others in their care. It does not require any special medical knowledge. Thus, this claim presents one of alleged ordinary negligence because it is a situation where the reasonableness of the actions at issue "can be evaluated by lay jurors, on the basis of their common knowledge and experience." *Bryant*, 471 Mich at 423.

In reaching this conclusion, we are guided by our Supreme Court's statements indicating that the determination whether a particular claim sounds in medical malpractice or ordinary negligence is highly fact-specific and not subject to strict categorical classifications. See *Bryant*, 471 Mich at 426 ("That is not to say, however, that *all* cases concerning failure to train health care employees in the proper monitoring of patients are claims that sound in medical malpractice. The pertinent question remains whether the alleged facts raise questions of medical judgment or questions that are within the common knowledge and experience of the jury."). "The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury

or, alternatively, raise questions involving medical judgment." *Bryant*, 471 Mich at 423-424 (quotation marks and citation omitted).

Here, the narrow issue whether the food served to Elissabeth was actually cut into bite-sized pieces when defendants were aware of this need does not present an issue outside the common knowledge and experience of a lay juror. Walker, after noticing that Elissabeth had swallowed food without chewing, stopped feeding Elissabeth and reported the issue but apparently did not take any steps to cut Elissabeth's food smaller or ensure that it was actually bite-sized. This factual scenario is analogous to the hypothetical example of ordinary negligence in a nursing home situation given by the *Bryant* Court:

> Suppose, for example, that two CENAs employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.
>
> If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the . . . standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Bryant*, 471 Mich at 431.]

Similarly, in this case, a jury can rely on common knowledge and experience to determine whether defendants' response with respect to the size of the pieces of food served to Elissabeth was sufficient. *Id*. Because no medical judgment was involved, this is a claim of ordinary negligence. *Id*. at 422. The trial court erred by concluding otherwise, and we reverse the trial court's ruling with respect to this claim

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither side having prevailed, no costs are awarded. MCR 7.219.

/s/ James Robert Redford
/s/ Stephen L. Borrello
/s/ Jonathan Tukel