

STATE OF MICHIGAN
COURT OF APPEALS

WOODWARD NURSING HOME, INC,

Plaintiff-Appellee,

v

MEDICAL ARTS, INC, and KAREN DROZ,

Defendants-Appellants.

UNPUBLISHED

January 24, 2006

No. 262794

Wayne Circuit Court

LC No. 04-431549-CK

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendants¹ appeal by leave granted the trial court order denying their motion for summary disposition. We reverse.

Plaintiff alleges that in late May 2003, defendants agreed in a written contract to provide prescription medications and supplies for plaintiff's nursing home residents. Plaintiff contends that it sent defendant a prescription order on August 11, 2004, but that defendants failed to process or deliver the prescription for more than twelve days. According to plaintiff, defendants then lied in an effort to conceal their nonperformance, allegedly stating that the prescription order had been illegible or indecipherable. Plaintiff alleges that, in fact, defendants had merely lost or misplaced the prescription order. Plaintiff asserts that defendants' delay in filling the prescription caused it to lose a valuable Medicaid program certification.

Plaintiff filed its complaint asserting four claims against defendants. Plaintiff alleged breach of contract (count I), negligence (count II), malpractice (count III), and fraud (count IV). Defendants moved for summary disposition, arguing that all four claims actually alleged medical malpractice and that because plaintiff had not filed a notice of intent or an affidavit of merit, the claims should be dismissed. The trial court denied defendants' motion, finding that plaintiff's breach of contract claim was not one of malpractice. The trial court did not address plaintiff's remaining claims.

¹ Defendant Droz was the director of operations for defendant Medical Arts, Inc.

Because the trial court only addressed plaintiff's breach of contract claim, defendants' arguments on appeal are unpreserved with respect to plaintiff's remaining claims. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 341; 632 NW2d 525 (2001). Nonetheless, we will consider defendants' arguments because they present questions of law, and the facts necessary for resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

To determine the true legal nature of an action brought against a health care provider, we examine the claim as a whole and look beyond mere procedural labels. *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005). To do this, we ask two fundamental questions regarding the substance of the claim: (1) does the claim pertain to an action that occurred within the course of a professional relationship and (2) does the claim raise questions of medical judgment beyond the realm of common knowledge and experience. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). "If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions." *Id.* Although the *Bryant* Court adopted this two-part test in the context of differentiating between medical malpractice and ordinary negligence claims, "the test succinctly sets forth the 'two defining characteristics' of a medical malpractice claim." *Tipton, supra* at 34. Thus, the *Bryant* test applies equally to differentiating between claims of medical malpractice and those based on other theories of recovery. *Id.*

Plaintiff's claim of malpractice (count III) sounds in medical malpractice. A pharmacy is a health care provider for purposes of our medical malpractice statutes. *Simmons v Apex Drug Stores*, 201 Mich App 250, 253; 506 NW2d 562 (1993). A professional relationship between plaintiff and defendants in this case was created through their contract. *Bryant, supra* at 425 (a professional relationship for the purposes of medical malpractice may be established by a contractual duty). Plaintiff alleged in count III that defendants owed the professional duties "to timely fill a doctor's prescription order and to deliver the prescribed medicine in a timely manner to Woodward," and "to be familiar with, and/or allow for the dangers, effects, and alternatives in the course of pharmaceutical management undertaken, including the risk of improper filling or not filling of a doctor's prescription order in a timely fashion." Questions concerning the dispensing of prescription drugs require the exercise of professional judgment and are outside the realm of common understanding. *Simmons, supra* at 253; see also *Becker v Meyer Rexall Drug Co*, 141 Mich App 481, 485; 367 NW2d 424 (1985). Therefore, count III of plaintiff's complaint sounded in malpractice. *Bryant, supra* at 422.

A plaintiff in a medical malpractice action must file a written notice of intent not less than 182 days before filing the complaint, MCL 600.2912b, and must file an affidavit of merit concurrently with the complaint, MCL 600.2912d. Plaintiff did not file either a notice of intent or an affidavit of merit in this case. The statute of limitations for medical malpractice claims is two years. MCL 600.5805(6). Plaintiff's claim accrued in August 2004, when defendants allegedly failed to properly fill the order for prescription medication. Leave to appeal was granted in this case on July 27, 2005. A limitation period is tolled during the pendency of an appeal. *Morrison v Dickinson*, 217 Mich App 308, 319; 551 NW2d 449 (1996). Thus, the applicable limitation period has not yet expired.

When the underlying statute of limitations has not expired, the proper remedy for a plaintiff's noncompliance with the notice-of-intent requirement of MCL 600.2912b is dismissal without prejudice. *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997). Similarly, the proper remedy for a plaintiff's failure to file an affidavit of merit under MCL 600.2912d when the underlying statute of limitations has not yet expired is dismissal without prejudice. *Scarsella v Pollak*, 461 Mich 547, 551-552; 607 NW2d 711 (2000). Because plaintiff did not file an affidavit of merit or a notice of intent in this case, count III of plaintiff's complaint is dismissed without prejudice. *Id.* at 551-552; *Neal, supra* at 715.

Contrary to defendants' contention, plaintiff is the proper party in interest to prosecute a malpractice claim. Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in someone else. *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hospital*, 221 Mich App 301, 311; 561 NW2d 488 (1997). "The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship." *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652; 438 NW2d 276 (1989). The contract for pharmaceutical services created a professional relationship between plaintiff and defendants. Therefore, the true right of action belonged to plaintiff, a party to the professional relationship. Plaintiff is the proper party to maintain a malpractice claim on the facts of this case. MCR 2.201(B).

Plaintiff's remaining claims should have been dismissed for failure to state a claim. MCR 2.116(C)(8). Count II of plaintiff's complaint asserts a claim of negligence. Upon close examination of the pleadings, it is apparent that plaintiff was attempting to set forth a claim for *negligent performance of the contract*. Michigan courts recognize that actionable negligence may arise from a contractual relationship, the theory being that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). But a nonparty to the contract cannot assert a tort claim based on the negligent performance of the contractual obligation unless the nonparty was owed a duty "separate and distinct from the defendant's contractual obligations." *Fultz, supra* at 467. When a party to the contract brings a claim of negligent performance, the courts distinguish between misfeasance (negligent action) and nonfeasance (inaction) of the contractual duty; complete nonfeasance is actionable only in contract. *Id.* at 465-466.

Here, plaintiff is a party to the contract. Plaintiff does not allege that defendants were merely negligent in filling the prescription order. Instead, plaintiff alleges defendants *wholly failed* to process the prescription order. Thus, the conduct plaintiff alleges constitutes nonfeasance; it cannot support a tort action. *Id.* at 466. Plaintiff's allegations in count II fail to state an actionable claim of negligent performance of a contract. MCR 2.116(C)(8).

Plaintiff sets forth a claim of breach of contract (count I). When an action is based on a written contract, it is necessary to plead and attach a copy of the contract to the complaint. MCR 2.113(F). The requirement that a written contract be attached to the pleadings is mandatory. *Stocker v Clark Refining Corp*, 41 Mich App 161, 165; 199 NW2d 862 (1972) (interpreting an identical provision of former GCR 1963, 113.4). Under MCR 2.113(F), the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).

MCR 2.113(F)(2); *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

Although plaintiff purported to reproduce certain contractual language in the text of the complaint, plaintiff did not attach a copy of the actual written contract to any pleading submitted to the trial court. Nor did plaintiff provide any reasons for not attaching the written contract. See MCR 2.113(F)(1). Because plaintiff did not comply with the mandatory language of MCR 2.113(F), failing to attach evidence of a written contract and failing to provide any reasons why the contract was not produced, plaintiff's pleadings were legally insufficient to state a claim of breach of contract. MCR 2.116(C)(8); *Liggett Restaurant Group, supra* at 133.

Plaintiff's claim of fraud (count IV) was also legally insufficient. The elements of a claim for fraud are: (1) a material representation, (2) the representation was false, (3) when the party made the representation, the party knew that it was false, or the party made it recklessly, without knowledge of its truth, and as a positive assertion, (4) the party made the representation intending that the plaintiff should act on it, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury as a result of his reliance on the representation. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000). A party must plead a claim of fraud with particularity. MCR 2.112(B)(1). General allegations of fraud are insufficient to state a claim are legally insufficient to overcome a motion for summary disposition. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

Plaintiff's complaint alleged that defendants lied about the legibility of the prescription order in an attempt to conceal the fact that they had lost or misplaced it. Plaintiff also alleged that if the order had been truly illegible, defendants would have simply contacted plaintiff to clarify it. Plaintiff alleged defendants made no other misrepresentations. Thus, when viewed in a light most favorable to plaintiff, the pleadings contain no allegations of the fourth or fifth elements of a fraud claim. Because plaintiff has not alleged all the necessary elements, its complaint is legally insufficient to state a claim of fraud. MCR 2.116(C)(8).

Plaintiff's claims of negligent performance and fraud are dismissed with prejudice. *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh*, 223 Mich App 559, 563; 567 NW2d 456 (1997). Plaintiff's breach of contract claims are dismissed without prejudice to a future claim that complies with MCR 2.113(F).² Plaintiff's claim of medical malpractice is dismissed without prejudice. *Scarsella, supra* at 551-552. In light of our disposition of these

² Although plaintiff did not respond in the trial court to this issue, it attached as an exhibit to its answer to defendant's application for leave to appeal what purports to be a copy of a written pharmacy agreement and a copy of a written pharmacy consultant agreement.

issues, we need not reach defendant's alternative grounds for reversal.

We reverse and remand for entry of judgment for defendants. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

I concur in result only.

/s/ Joel P. Hoekstra