STATE OF MICHIGAN

COURT OF APPEALS

CARLA KALOGERIDIS, Personal Representative of the ESTATE OF ANTHONY KALOGERIDIS,

Plaintiff-Appellant,

v

PHYSICIAN HEALTHCARE NETWORK, PC, and JESSE BAYUDAN, D.O.,

Defendants,

and

MCLAREN PORT HURON, CARDIOLOGY ASSOCIATES OF PORT HURON, PC, and ELIAS SKAF, M.D.,

Defendants-Appellees.

UNPUBLISHED
November 22, 2022

No. 357478
St Clair Circuit Court
LC No. 20-000607-NH

Before: MURRAY, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] the order granting summary disposition to defendants, Cardiology Associates of Port Huron, PC (CAPH), and Dr. Elias Skaf, M.D. On appeal, plaintiff argues that the trial court erred by granting summary disposition to defendants because plaintiff provided sufficient evidence of a physician-patient relationship to impose a duty of care on Dr. Skaf. We reverse and remand for further proceedings.

[1] *Estate of Kalogeridis v Physician Healthcare Network PC*, unpublished order of the Court of Appeals, entered November 24, 2021 (Docket No. 357478).

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of decedent's presentation to an urgent care clinic, and subsequent presentation to defendant McLaren Port Huron Hospital's emergency room, with complaints of difficulty breathing, fatigue, and difficulty swallowing. At the urgent care clinic, an electrocardiogram (EKG) was performed, indicating decedent was suffering from an acute myocardial infarction, which led the urgent care physician to send decedent to the hospital. Decedent submitted to another EKG at the hospital. The hospital's emergency room doctor in charge of decedent's care, defendant, Dr. Jesse Bayudan, D.O, found the EKG "questionable" and requested a consult from Dr. Skaf, the on-call cardiologist. Dr. Skaf, however, was at the time performing a medical procedure on another patient. However, Dr. Skaf briefly listened to Dr. Bayudan's description of decedent's situation and asked that new EKG results be sent to him. The EKG results were faxed to Dr. Skaf, who paused the procedure to review them. Dr. Skaf instructed the manager of the cardiac catheterization lab to inform Dr. Bayudan that he would go to the emergency room to evaluate decedent once he finished the procedure. Dr. Bayudan's emergency room note on decedent stated: "EKG was immediately faxed over to on call [sic] cardiologist Dr. Skaf who agreed that code STEMI should not be activated." Dr. Skaf denies agreeing with Dr. Bayudan's determination or instructing Dr. Bayudan not to activate a code STEMI.

Plaintiff filed suit, alleging vicarious liability against defendants, Physician Healthcare Network, PC (PHN), the hospital, and CAPH. The complaint also alleged medical negligence against Dr. Skaf and Dr. Bayudan. Dr. Skaf submitted an affidavit of noninvolvement, asserting he was not involved in decedent's care, because he was performing a medical procedure on another patient.

After a series of depositions of the parties and various experts regarding the factual circumstances and proper standards of care, defendants moved for summary disposition under MCR 2.116(C)(10). Defendants argued they should be dismissed because Dr. Skaf was not sufficiently involved in decedent's care to establish a physician-patient relationship. Defendants further argued that even if the trial court believed a physician-patient relationship existed, plaintiff failed to establish a breach of the standard of care or proximate cause. Specifically, regarding the existence of a physician-patient relationship, defendants asserted, "a cardiac consultation consists of gathering pertinent history, performing a physical exam and reviewing any pertinent diagnostic studies including laboratory results before deciding if someone should be subjected to an invasive cardiac procedure." Because Dr. Skaf did not do any of these things and had no actual contact with decedent, Dr. Skaf did not form a physician-patient relationship with decedent. The hospital concurred with defendants' motion for summary disposition, asserting that it was entitled to summary disposition on any claims premised upon its vicarious liability for Dr. Skaf.

Plaintiff took the position that Dr. Skaf did form a physician-patient relationship with decedent because Dr. Skaf analyzed decedent's EKG results "and felt confident enough in his decision to direct other doctors not to activate a code STEMI." Plaintiff further asserted: "Dr. Skaf was involved in [decedent's] care when he chose to analyze [decedent's] EKG, review additional information from Dr. Bayudan, and participate in the patient's diagnosis and treatment." To that, defendants responded that in *Oja v Kin*, 229 Mich App 184, 190-191; 581 NW2d 739 (1998), this Court ruled that telephone calls between physicians were insufficient to establish a physician-patient relationship when a physician had no contact with the patient, which was precisely what

happened here. Dr. Skaf did not have the chance to physically examine decedent, and did not bill for the telephone call with Dr. Bayudan.

After setting forth the facts, the trial court explained that a physician-patient relationship was contractual and required consent of both parties. The trial court noted in *Hill v Kokosky*, 186 Mich App 300, 304; 463 NW2d 265 (1990), this Court established that a physician who only listens to another physician's description of a patient's problem and offers their professional opinion on treatment does not create a physician-patient relationship. The trial court also noted that Dr. Skaf's status as the on-call physician was insufficient to imply his consent to a physician-patient relationship with decedent. Due to the lack of physical contact with decedent and lack of evidence establishing that Dr. Skaf directed decedent's treatment, the trial court concluded there was no physician-patient relationship between Dr. Skaf and decedent. The trial court granted summary disposition to defendants.

II. PRESERVATION AND STANDARD OF REVIEW

"Generally, to preserve a claim of error for appellate review, the party claiming the error must raise the issue in the trial court." *Redmond v Heller*, 332 Mich App 415, 430; 957 NW2d 357 (2020). The issue of whether Dr. Skaf entered into a physician-patient relationship with decedent was raised before the trial court, and is preserved for appellate review. However, defendants' argument on appeal that Dr. Bayudan's note could not be considered by the trial court when determining whether to grant defendants' motion for summary disposition because it was hearsay was not raised in the trial court proceedings, and is not preserved for appellate review. Additionally, plaintiff's argument that Dr. Skaf owed a duty to decedent as the hospital's agent was not raised in the trial court and, therefore, is unpreserved.

"We review de novo decisions on summary disposition motions." *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139; 753 NW2d 591 (2008) (quotation marks and citation omitted). "A motion under [MCR 2.116(C)(10)] tests the factual sufficiency of the complaint." *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 777; 910 NW2d 666 (2017) (quotation marks and citation omitted). "A court reviewing a motion under MCR 2.116(C)(10) must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *White*, 482 Mich at 139 (quotation marks and citation omitted).

> Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. 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. [*West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).]

"[A] trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

> Although this Court need not address an unpreserved issue, it may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. [*Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010).

III. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition to defendants because plaintiff provided sufficient evidence that a physician-patient relationship existed between Dr. Skaf and decedent.

As a preliminary matter, defendants argue plaintiff did not provide sufficient admissible evidence of a physician-patient relationship to survive summary disposition because Dr. Bayudan's note was hearsay. Because defendants' argument is a question of law for which all necessary facts are provided in the record, this Court may address it. *Gen Motors Corp*, 290 Mich App at 387. "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). Defendants' interpretation of MCR 2.116(G)(6) is too limited. While a trial court, when considering a motion for summary disposition, may only consider substantively admissible evidence, "it does not have to be in admissible form." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009).

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802[.]" *Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998).

Regardless of the availability of the declarant, exceptions to the hearsay rule exist for:

> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> * * *
>
> (4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection with Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.
>
> * * *

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [MRE 803(1), (4) and (6).]

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." MRE 805.

Regarding the note itself, this Court has held that although documents that were not substantiated were not, at the time, admissible under MRE 803(6), "[w]ith a proper foundation, the [documents] *would* be admissible as records of regularly conducted activity." *Barnard*, 285 Mich App at 373-374. Similarly, here, while there is no record plaintiff properly substantiated Dr. Bayudan's note, plaintiff could render the note admissible by providing the proper foundation from Dr. Bayudan. Therefore, the trial court was not barred from considering the note under MCR 2.116(G)(6).

The next question is whether the statement within the note regarding Dr. Skaf's alleged agreement regarding activating a code STEMI is hearsay and, if so, whether it qualifies for an exception. The statement in question, that Dr. Skaf agreed not to activate a code STEMI, was not being offered for the truth that decedent was not suffering from a STEMI, but for the fact it was made, and its impact on the listener, Dr. Bayudan, in directing decedent's care. "Statements offered to show that they were made or to show their effect on the listener are not hearsay." *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998), abrogated in part on other grounds by *Molloy v Molloy*, 247 Mich App 348, 349-350; 637 NW2d 803 (2001), aff'd in part, vacated in part on other grounds 466 Mich 852 (2002). The statement in question is not hearsay, and because the note itself can be admitted under MRE 803(6) at the time of trial, MCR 2.116(G)(6) is satisfied. The note was properly considered by the trial court when determining whether to grant summary disposition to defendants.

The primary argument on appeal is whether a physician-patient relationship was formed between Dr. Skaf and decedent that would impose a legal duty to decedent upon Dr. Skaf, which "is a question of law for the court to decide." *Oja*, 229 Mich App at 187. "Without the existence of a legal duty, there can be no actionable negligence." *Id.* "In medical malpractice actions, the duty owed by a physician arises from the physician-patient relationship." *Id.* "Thus, a physician-patient relationship is a legal prerequisite to a medical malpractice cause of action." *Id.*

"A physician-patient relationship is contractual and requires the consent, express or implied, of both the doctor and the patient." *Id.* at 190. Typically, the "physician-patient relationship exists where a doctor renders professional services to a person who has contracted for such services." *Id.* at 187 (quotation marks and citation omitted). A doctor's consent to this relationship can, however, be implied. "[A]n implied consent to a physician-patient relationship may be found only where a physician has done something, such as participate in the patient's diagnosis and treatment, that supports the implication that she consented to a physician-patient relationship." *Id.* at 191 (footnote and citation omitted). "[S]uch participation is necessary for, but by itself does not establish, an implied physician-patient relationship." *Id.*

The quantum of participation in a patient's treatment sufficient to create an implied relationship with the patient is not insignificant. We have held that "merely listening to another physician's description of a patient's problem and offering a professional opinion regarding the proper course of treatment" is not legally sufficient to establish the physician's implied consent. *Id.* at 190. In that situation, the doctor "is simply offering informal assistance to a colleague." *Id.* at 190-191. "At the other end of the spectrum, a doctor who is on call and who, on the phone or in person, receives a description of a patient's condition and then essentially directs the course of that patient's treatment, has consented to a physician-patient relationship." *Id.* at 191. In *Oja*, we addressed the relationship between an on-call physician and an emergency room patient by quoting from, and agreeing with, an Ohio Court of Appeals decision:

> We therefore hold, and in doing so are mindful that we are elaborating in the field of medical malpractice, that a physician-patient relationship can exist by implication between an emergency room patient and an on call physician who is consulted by the patient's physician but who has never met, spoken with, or consulted the patient when the on call physician (1) participates in the diagnosis of the patient's condition, (2) participates in or prescribes a course of treatment for the patient, and (3) owes a duty to the hospital, staff or patient for whose benefit he is on call. Once an on call physician who has a duty to the hospital, its staff or patients is contacted for the benefit of an emergency room patient, and a discussion takes place between the patient's physician and the on call physician regarding the patient's symptoms, a possible diagnosis and course of treatment, a physician-patient relationship exists between the patient and the on call physician. [*Id*. at 189-190, quoting *McKinney v Schlatter*, 118 Ohio App 3d 328, 336-337; 692 NE2d 1045 (1997).]

Here, we recognize that Dr. Skaf did not have the opportunity to perform a consult with the decedent, as he was first contacted about the decedent when he was performing a catheterization. That being said, performing a full consult is not required under *Oja*. Instead, what is critical is that Dr. Skaf was the on-call cardiologist when decedent presented to the emergency room, and that he was contacted twice about decedent's situation. To that end, the record indicates Dr. Skaf received a call from Dr. Bayudan during the catheterization, and according to Dr. Skaf, he was told that decedent "presented with shortness of breath for about a week," but was currently "chest pain-free." Dr. Skaf was told decedent's EKG would be faxed down to him.

The EKG was sent, Dr. Skaf reviewed it, and according to Dr. Bayudan, agreed not to activate a code STEMI. Furthermore, regardless of whether Dr. Skaf affirmatively agreed or

simply did not direct Dr. Bayudan to activate a code STEMI, Dr. Skaf admitted he reviewed the EKG and informed Dr. Bayudan he would be down immediately after his procedure was over. Had Dr. Skaf believed a code STEMI was necessary, he had the opportunity to indicate that. Additionally, Dr. Skaf testified that he received enough information to at least determine that decedent did not require an emergency catheterization. The evidence, viewed in a light most favorable to plaintiff, is sufficient to establish Dr. Bayudan sought out on behalf of decedent Dr. Skaf's expertise, as the on-call cardiologist, in treating decedent. This was not an informal telephone call between physicians. Rather, it was a targeted call from the treating physician to the on-call cardiologist seeking direction for decedent's care. Plaintiff has provided sufficient evidence that Dr. Skaf was on-call, was informed in part about the decedent's condition, and was minimally involved in directing decedent's treatment, and, therefore, consented to a physician-patient relationship. *Oja*, 229 Mich App at 191.[2]

IV. CONCLUSION

The trial court erred by granting summary disposition on the basis that there existed no physician-patient relationship between decedent and Dr. Skaf. That order is therefore reversed, and the matter is remanded for further proceedings consistent with this opinion. No costs to either side. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron

[2] We recognize that Dr. Skaf was involved in a surgical procedure throughout the time the emergency room communicated to him about the decedent, which may have limited his ability to gain complete information about decedent's condition and to think about the proper treatment. But we have found no case law or objective principle that we can rely upon to hold that an on-call physician who agrees to receive and does receive a call about another patient—while the physician is actively treating another patient—cannot as a matter of law be found to have impliedly consented to a patient-physician relationship.