STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of LOUISE ARVIN, Deceased.

SHARON LATZ, Personal Representative of the Estate of Louise Arvin, Deceased,

Petitioner-Appellant,

v

CARDINAL DEVELOPMENT COMPANY, d/b/a OVID HEALTHCARE CENTER,

Respondent-Appellee.

UNPUBLISHED
January 17, 2003

No. 236820
Clinton Circuit Court
LC No. 01-009281-NZ

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendant and denying plaintiff permission to file a second amended complaint. We reverse and remand for further proceedings.

Plaintiff's decedent was a resident in defendant's nursing home. During her stay, the decedent suffered various injuries, some of which required medical attention.[1] Plaintiff's original complaint was dismissed because it sounded in medical malpractice and plaintiff had failed to comply with the procedural requirements of filing a medical malpractice claim, particularly the Notice of Intent requirement. In response, plaintiff sought leave of the court to file a second amended complaint which sounded in negligence. The trial court denied the motion, concluding that the proposed amended complaint still sounded in medical malpractice and, therefore, amendment would be futile. Accordingly, the trial court granted defendant's motion for summary disposition without allowing the filing of the amended complaint.

On appeal, plaintiff argues that the trial court erred in dismissing the case without allowing the filing of the amended complaint because the amended complaint sounds in ordinary negligence, not medical malpractice. We agree.

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[1] Plaintiff's complaint does not allege that the decedent's death was a result of these injuries.

Plaintiff's proposed Second Amended Complaint alleges in pertinent part as follows:

> 3. Ovid Healthcare had a duty to provide ordinary care.
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> 4. On October 17, 1999, Mrs. Arvin suffered a severe gash on her right leg when a non-professional defendant employee, negligently and without assistance attempted to place her in her wheelchair.
>
> 5. Due to the severity of her injury, Mrs. Arvin was taken to Owosso Memorial's emergency room, where she underwent treatment.
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> 6. Complications caused a November 5, 1999 emergency room entry and diagnosis of renal failure, dehydration, pneumonia, and extremely low blood pressure.
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> 7. On December 17, 1999, she suffered a 3.5 centimeter skin tear on the backside of her right leg, and while defendant's records indicate that the injury was of unknown origin, plaintiff believes and charges it to be a fact that the injury was again the result of ordinary negligence of defendant's non-professional staff.
>
> 8. Mrs. Arvin was re-injured on Christmas Day, 1999, when Defendant's non-professional employee's name tag sliced a 3.5 centimeter tear in Mrs. Arvin's left forearm.
>
> 9. On December 30, 1999, Mrs. Arvin was again injured due to inattentive and negligent care of defendant's non-professional employee(s) when an exposed metal bedrail release knob became imbedded in her lower left leg, again requiring emergency hospital treatment, consisting of five interior stitches, six on the exterior, and two tubes of superglue.
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> 10. On February 16, 2000, Mrs. Arvin suffered a total of five skin tears to her left and right elbows and left leg, which defendant's director of nursing described as occurring in the process of defendant's non-professional employee(s) transferring the resident to her bath.

As the Supreme Court discussed in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), a complaint cannot avoid the procedural requirements of a medical malpractice action merely by couching itself in terms of ordinary negligence. The Court, *id.* at 46, then discussed how to distinguish between malpractice claims and ordinary negligence claims:

> 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. *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981); *McLeod v Plymouth Court Nursing Home*, [957 F Supp 113, 115 (ED Mich, 1997)].

In *Dorris*, the Court specifically noted that issues involving professional judgments, including staffing decisions and patient monitoring come within the realm of medical malpractice, not ordinary negligence. *Id.* at 46-47. However, the discussion in *Wilson, supra* at 611, is also instructive:

> The plaintiffs contend that this case presents a question of ordinary negligence and that no expert testimony was necessary. With respect to this assertion, it seems evident that whether a hospital's negligence must be shown by expert testimony depends on the circumstances of the particular case. The plaintiffs rely on two cases in support of their theory. *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), clearly involved a case of ordinary negligence. Fogel had warned a nurse's aide that one aide was not capable alone of helping her get to the bathroom. The aide could not hold her and she fell and fractured her hip. *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368; 146 NW2d 723 (1966), also held that a patient's fall in a hospital was a matter of ordinary negligence. However, these cases presented issues which are within the common knowledge and experience of a jury.

Turning to the case at bar, the allegations in plaintiff's proposed Second Amended Complaint are those of ordinary negligence. First, plaintiff alleges that the decedent was injured when a non-professional employee attempted to place the decedent in a wheelchair. This is clearly similar to the allegations in *Fogel* and *Gold* regarding a patient's fall, which were held to be matters of ordinary negligence.[2] Similarly, the allegations of the various cuts sustained by the decedent on February 16, 2000, while being transferred to her bath would fall into this category. As for the allegations of the December 17, 1999, injury, it is of unknown origin; thus, we must wait until its origin is determined before it can be properly classified. As for the laceration caused by an employee's name tag, that too would appear to be a matter of ordinary negligence. Finally, there is the matter of the December 30, 1999, injury from a metal knob on the decedent's bedrail. Arguably, the selection of equipment appropriate for a patient involves medical judgment and, therefore, would fall within medical malpractice, not ordinary negligence. Similarly, this issue may involve questions of proper patient monitoring, which would also be a matter of malpractice, not ordinary negligence. However, defendant does not specifically develop this point. Accordingly, we are inclined to allow this allegation to proceed, but without prejudice to defendant making a motion for partial summary disposition in the trial court to examine this question in greater detail.

For the above reasons, we conclude that plaintiff's proposed Second Amended Complaint sounds in ordinary negligence and, therefore, the trial court incorrectly concluded that allowing

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[2] Defendant endeavors to distinguish away *Fogel* and *Gold* because, at the time those cases were decided, Michigan did not recognize a malpractice cause of action against nurses, which it does now. However, nothing in either of those cases indicates that the decision was based upon the fact that a nurse, or nurse's aide in *Fogel*, could not be sued for malpractice. Rather, those cases recognized that the alleged injury arose from ordinary negligence, not malpractice. Indeed, the Supreme Court in *Wilson, supra*, cited *Fogel* and *Gold* for this very proposition and *Wilson* was decided after the 1975 amendment to MCL 600.5838 which defendant argues first recognized a malpractice cause of action against nurses.

amendment would be futile. On remand, the trial court shall allow plaintiff to file the Second Amended Complaint and the case shall proceed based upon that complaint.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

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MURRAY, P.J. (*concurring*).

I concur in the majority's conclusion that the *allegations* in plaintiff's proposed second amended complaint can, at this procedural juncture, be construed to allege a negligence claim, rather than a medical malpractice claim. *Turner v Mercy Hospitals & Health Services*, 210 Mich App 345, 348; 533 NW2d 365 (1995). However, given the asserted (but not presently documented) condition of decedent's skin, discovery may (or may not) reveal that those allegations in the second amended complaint, considered in the context of decedent's condition, do fall within the purview of a malpractice claim. I also note that nothing in the majority's opinion, nor in the court rules, prohibits the filing of another motion for summary disposition once the parties engage in discovery.

/s/ Christopher M. Murray