

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD D. SHEAR,

Plaintiff-Appellant,

v

STEVEN B. BRINN, M.D., CAROL A.
WILKENING, and CARI L. DEYOUNG, R.N.,

Defendants-Appellees.

UNPUBLISHED
March 11, 2014

No. 314297
Ottawa Circuit Court
LC No. 12-003066-NZ

Before: MARKEY, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) regarding plaintiff's action alleging fraud and ordinary negligence arising from a surgical procedure. We affirm.

On February 16, 2010, plaintiff underwent a hernia repair surgery. Before surgery, defendant Cari DeYoung, R.N., asked plaintiff to sign a form. Plaintiff alleges that DeYoung lied and told him that the form was the consent for surgery when it was actually a consent for anesthesia. Defendants Carol Wilkening, a certified registered nurse anesthetist (CRNA), and Dr. Steven Brinn, then placed plaintiff under general anesthetic. Plaintiff alleges that all defendants failed to provide plaintiff with information about the anesthesia being used, the risks involved, or the presence of a CRNA during administration of the anesthetic. Plaintiff originally filed suit against the three named defendants here and five other healthcare professionals associated with them. That suit was dismissed without prejudice because plaintiff failed to include an affidavit of merit with his complaint. Plaintiff then brought the instant action on October 29, 2012, claiming fraud and ordinary negligence arising out of his interaction with defendants, the result of which caused plaintiff to suffer anxiety, insomnia, and panic attacks. Without any supporting facts or explanation, plaintiff also alleged defendants violated numerous public health code, consumer protection, criminal and other statutes. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claim sounded in medical malpractice; consequently, it should be dismissed with prejudice because the complaint was filed without an affidavit of merit, and the statute of limitations on medical malpractice actions had expired. The trial court granted the motion.

On appeal, plaintiff argues that his action is one of fraud and ordinary negligence, not medical malpractice, and is therefore not subject to the procedural requirements of a medical malpractice action. We disagree. A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). A plaintiff cannot avoid complying with the procedural requirements of a malpractice action by couching a cause of action in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999). The true nature of a claim is determined by viewing the claim as a whole without regard to procedural labels. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005). The first issue in distinguishing a case of ordinary negligence from one of medical malpractice is ascertaining whether the named defendants are capable of committing malpractice. *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 420; 684 NW2d 864 (2004). The next issue is whether "the alleged claim sounds in medical malpractice." *Id.* at 422. A court must consider two questions to determine if the 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." *Id.*

It is beyond dispute that the defendants in this case, as doctors and nurses, "are capable of malpractice." Additionally, the events at issue in this case occurred while plaintiff was receiving anesthesia before surgery at a hospital. Defendants were his treating medical professionals at the time. We are satisfied that the alleged errors by defendants took place "within the course of a professional relationship." *Bryant*, 471 Mich at 422. Plaintiff nevertheless insists that the questions he raises about defendants actions before his surgery were not "beyond the realm of common knowledge and experience." *Id.* We disagree. Plaintiff essentially presents a claim of lack of informed consent. "Claims of negligence based on the failure of a physician or surgeon to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient come within the general rule regarding the need for expert testimony." *Paul v Lee*, 455 Mich 204, 212; 568 NW2d 510 (1997), rev'd on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). Because plaintiff's claim presents questions beyond the jury's general knowledge, expert testimony is necessary; therefore, plaintiff's action is one of medical malpractice. *Bryant*, 471 Mich at 422.

Accordingly, because plaintiff did not file an affidavit of merit as required by MCL 600.2912d(1) for medical malpractice actions, and the two-year statute of limitations for medical malpractice claims had expired, MCL 600.5805(6), the trial court properly dismissed plaintiff's complaint with prejudice. *Ligons v Crittenton Hosp*, 490 Mich 61, 73; 803 NW2d 271 (2011).

We affirm. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray