STATE OF MICHIGAN

COURT OF APPEALS

DANIAL COCHRANE, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED July 18, 2006
v	No. 267368 Jackson Circuit Court
W. A. FOOTE MEMORIAL HOSPITAL, Defendant-Appellee/Cross-Appellant.	LC No. 04-004288-NO

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition. We affirm. This case arose when plaintiff was taken to defendant hospital following a physical altercation with his girlfriend's brother. As a precautionary measure, plaintiff was sent to have his neck x-rayed. Plaintiff was told to stand in front of the x-ray device, which he did without any initial difficulty. On the last round of x-rays, however, plaintiff, who was intoxicated, fainted, fell, and fractured his leg.

Although plaintiff allowed the time for bringing a medical malpractice claim to expire, he eventually sued anyway, claiming that defendant breached its duty to provide him with a "reasonably safe premises" and failed to protect him from "unreasonable risks of injury" that allegedly caused him to break his leg. Defendant moved for summary disposition three times. Defendant first moved for summary disposition because the time for filing a medical malpractice claim had already passed. Plaintiff responded that his claim sounded in ordinary negligence that stemmed from some sort of premises liability duty and that he was not claiming medical malpractice. The trial court denied the motion, deciding that the facts were not yet developed and that plaintiff's complaint did not necessarily sound in malpractice alone.

After some discovery, defendant moved for summary disposition again and argued that MCL 600.2955a prevents individuals from suing for injuries caused by their voluntary intoxication. A month later, and three weeks before the motion hearing, defendant added a third motion for summary disposition, arguing that the facts did not support a prima facie case for premises liability because the injury was not caused by a dangerous defect on the premises and any negligence was malpractice. In response to the second motion, plaintiff argued that defendant illegally gathered the evidence of his intoxication and that he gave the staff no indication that he was intoxicated, so the evidence of his intoxication was inadmissible. Plaintiff

responded to the third motion by arguing that he only alleged a claim for ordinary negligence in his complaint, so defendant's arguments regarding premises liability were inapposite. The trial court held that plaintiff failed to state a claim of premises liability or ordinary negligence and granted defendant summary disposition.

On appeal, plaintiff argues that the trial court committed procedural error by granting defendant summary disposition on an issue that defendant did not argue and by hearing argument on defendant's third summary disposition motion without providing plaintiff with proper notice. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Contrary to plaintiff's argument, defense counsel argued the issue of ordinary negligence by citing *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004), for the proposition that plaintiff did not provide the x-ray technician with enough notice of his wooziness to subject the technician to an ordinary-negligence standard. Lack of notice to the technician was the essential basis for the trial court's decision to hold that plaintiff failed to demonstrate any arguable breach in the standard of care given the extremely short amount of time between plaintiff's complaints of lightheadedness and his alleged loss of consciousness. Furthermore, the record clearly reflects that plaintiff had ample notice of the third motion, that the other motion was coming on for hearing on the date in question, and that the trial court's office alerted plaintiff of its intent to hear both motions for summary disposition at the second motion's scheduled hearing. The trial court office provided plaintiff with an opportunity to file a written response, which plaintiff did. At the motion hearing, plaintiff did not assert that more time would have enabled him to supplement his response. Instead, plaintiff's counsel argued that it was unfair for defendant to supply only a portion of plaintiff's deposition transcript and leave him to pay to produce the remainder of his own deposition testimony. Plaintiff had filed an affidavit in response to the intoxication defense, but did not produce an affidavit that would explain his damaging deposition testimony. Under the circumstances, plaintiff had sufficient notice of when the trial court would hear defendant's motion on premises liability, so we find no error in the trial court's decision to hear the motion on the date in question.

Plaintiff argues that the motion for summary disposition on the basis of MCR 2.116(C)(10) was inappropriate, however, because the case was ordinary negligence and the jury could have inferred the technician's negligence from the facts. We disagree. We first note that plaintiff has repeatedly transformed his allegations of duty in reaction to the various defenses raised. In his complaint, plaintiff states that defendant owed him a duty as an invitee to keep the premises safe, and argued in response to the first motion for summary disposition that defendant's duty arose as the owner of the premises. Throughout discovery, plaintiff sought information regarding his medical caretakers' reaction to his intoxication, but in response to defendant's motion that intoxication was a defense, plaintiff shifted ground and submitted an affidavit that he was not intoxicated. When defendant raised issues regarding the lack of a dangerous defect on the premises, plaintiff argued that his original position regarding premises liability was mistaken and that the complaint actually asserted nothing but a claim for ordinary negligence.

Plaintiff has yet to assert a viable legal duty that defendant owed him and breached. In his affidavit in avoidance of the intoxication defense, plaintiff alleges that he was not feeling the effects of alcohol, slurring his speech, stumbling, or otherwise acting drunk. In his deposition,

he testified that he suddenly felt faint, told the technician he was about to pass out, and then did so "a few seconds" later. Although he alleges that the x-ray technician told him he could stand for a few more seconds while the last images were taken, plaintiff fails to outline or demonstrate what the technician should have done, how the technician failed to do it, or whether any action by the technician would have avoided the injury. Additionally, the statute of limitations requires us to avoid holding the technician to the standard of care of an individual with special medical knowledge, because doing so would allow plaintiff to avoid the procedural requirements and time limits applicable to medical malpractice cases. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 509; 668 NW2d 402 (2003). Instead, we must determine whether the hospital's unstated standard of care required the technician to take undefined action between the time he was told of plaintiff's sensations and the moment he fainted. Finally, we are asked to assume that whatever action the technician should have taken would have ultimately prevented plaintiff's injury.

From *Bryant*, *supra* at 431, we can discern that a medical facility does owe its patients the duty to take reasonable measures to decrease or eliminate known risks of imminent harm. Without asserting this duty, plaintiff vaguely argues that telling the technician he felt like he was going to pass out invoked the technician's duty to eliminate the dangers associated with falling. This raises two problems. First, the technician's response that plaintiff would be able to stand for a few more seconds indicates that the technician exercised a degree of medical judgment in determining whether plaintiff was in any real danger of fainting. Therefore, the issue is akin to the situation explained in *Bryant*, *supra* at 421 n 9, in which a seemingly ordinary situation actually involves a measure of professional, medical judgment and makes the matter one of malpractice. Second, plaintiff has failed to present any facts that could satisfy the other elements for which he carries the burden of proof, namely breach and causation. It is undisputed that the technician had only "a few seconds" to react to plaintiff's unanticipated statement that he felt faint, and that between his expression of lightheadedness and his collapse plaintiff did nothing to prevent or diminish his own fall. Therefore, the record clearly reflects that the technician needed to assess the situation and react very quickly. Despite plaintiff's years of ruminating over that same situation, plaintiff has failed to explain how the technician could have fulfilled his duty to diminish or eliminate the "known" danger of plaintiff's impending fall.[1] Without any concrete allegation of a particular breach and its causation of his injury, plaintiff leaves the court to guess whether his general, undefined allegations of breach and causation relate to a barred medical malpractice theory or a legitimate theory of ordinary negligence.

The trial court guessed that plaintiff meant that the technician, to fulfill his duty of reasonable care, should have run to catch plaintiff or perhaps thrown himself beneath him. Under the circumstances and given the uncertainty of the pleadings, the trial court did not err by

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[1] This is the crux of the case. If plaintiff suggests that the technician should have immediately told him to sit down and rest, the issue again becomes a question of reasonable medical judgment, diagnosis, and adequate treatment. Telling others what to do is not generally an obligation, or duty, of ordinary individuals. Plaintiff does not claim and does not allege that this is a medical malpractice cause of action.

holding that the technician, as a matter of law, did not breach a duty to plaintiff by failing to exert himself in this manner. The trial court correctly held that plaintiff failed to prove that such heroism would have prevented the injury anyway. "Our case law requires more than a mere possibility or a plausible explanation. Rather a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he 'set[s] forth specific *facts* that would support a reasonable inference of a logical sequence of cause and effect.'" *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004), emphasis ours, quoting *Skinner v Square D Co*, 445 Mich 153, 172-173; 516 NW2d 475 (1994). Because plaintiff failed to present any facts from which a jury could reasonably infer that the technician's unidentified act or omission was a cause of plaintiff's injury, the trial court correctly granted defendant's motion for summary disposition.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto