S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BRENDA WATSON, Personal Representative of the Estate of WILLIE R. WELLONS, Deceased,

Plaintiff-Appellant,

v

DETROIT RECEIVING HOSPITAL & UNIVERSITY HEALTH CENTER, SCOTT DULCHAVSKY, M.D., KIRK C. MILLS, M.D., and ROBERT D. WELCH, M.D.,

Defendants-Appellees,

and

CHARLES K. HU, M.D., JOHN J. LIM, M.D., and DAVID M. SCHORR, M.D.,

Defendants.

UNPUBLISHED
April 24, 2007

No. 273643
Wayne Circuit Court
LC No. 02-244111-NH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants Detroit Receiving Hospital, Scott Dulchavsky, Kirk Mills, and Robert Welch (defendants). We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff seeks damages primarily for defendants' alleged failure to diagnose and treat decedent's bowel condition, as a result of which decedent died on March 27, 2000. At issue on appeal is whether plaintiff's notice of intent to sue, sent pursuant to MCL 600.2912b(1), complied with the requirements of § 2912b(4). The trial court ruled that it did not and dismissed the action.

We review de novo a trial court's ruling on a motion for summary disposition. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Statutory interpretation is a question of law that is also reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

"The unambiguous language of MCL 600.2912b(4) requires a medical malpractice plaintiff to include in her notice of intent a statement of (1) the factual basis for the claim, (2) the applicable standard of practice or care alleged by the claimant, (3) the manner in which it is claimed that the applicable standard of practice or care was breached, (4) the alleged action that should have been taken to comply with the alleged standard, (5) the manner in which it is claimed that the breach was the proximate cause of the injury claimed in the notice, and (6) the names of all professionals and facilities the claimant is notifying." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 682; 684 NW2d 711 (2004). The plaintiff bears the burden of establishing compliance with § 2912b. *Id.* at 691.

The trial court did not err in finding that plaintiff's notice of intent did not comply with elements (2), (3), and (4) above. The notice of intent was directed toward a hospital, a radiologist, and ten physicians specializing in different areas of medicine. In particular, defendants Mills and Welch practice emergency room medicine while defendant Dulchavsky is a surgeon. The notice of intent complied with the statute to the extent that it indicated that the hospital was being sued both directly, for the allegedly negligent selection and retention of medical staff, and vicariously, for the alleged negligence of its individual staff members. *Id.* at 693, 693 n 10. However, the notice of intent otherwise combined elements (2), (3), and (4) above, under a single heading, without differentiating or distinguishing among the named defendants. Specifically, the notice of intent stated that all named parties were required to take certain actions, including (1) immediately hospitalizing decedent, (2) obtaining gastroenterology and surgical consults to evaluate decedent, (3) obtaining and properly interpreting x-rays and CT scans, (4) properly diagnosing decedent's condition, and (5) promptly treating decedent's condition by bowel decompression, total colectomy, or bowel resection.

We concede that plaintiff's notice of intent did specify how the standards of care were breached *in general*, and what actions should have been taken *in the aggregate* to comply with those standards of care. See *Boodt v Borgess Medical Ctr*, 272 Mich App 621, 630; 728 NW2d 471 (2006) (lumping the requirements of MCL 600.2912b(4)(b), (c), and (d) into a single paragraph "might be a risky practice that lends itself to misconstruction," but it "is not an inherently fatal deficiency"). However, the problem with plaintiff's notice of intent was that it did not otherwise differentiate among the various defendants. That is, it did not identify the standard of care applicable to each of the various healthcare providers, despite the obvious fact that the standards of care were not necessarily the same for each of the named defendants. *Roberts*, *supra* at 692 n 8. Nor did the notice of intent indicate whether the standard of practice required each named defendant to take all of the listed actions, or in contrast whether the standard of practice required each named defendant to take only some of the listed actions. Because the notice of intent did not indicate the particular standard of care applicable to each specific defendant, and because it did not specify precisely which defendant should have taken which of the listed actions, the trial court did not err in finding that the requirements of §§ 2912b(4)(b), (c), and (d) were not met.

Plaintiff's decedent died in March 2000, and plaintiff was appointed personal representative of the estate in June 2000.[1] Therefore, the medical malpractice limitations period expired in March 2002, and the wrongful-death savings period of MCL 600.5852 expired in June 2002. Nonetheless, plaintiff did not file her notice of intent until June 2002, and did not file her complaint until December 2002. A notice of intent cannot toll the period of limitations if that period of limitations has already expired. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573; 703 NW2d 115 (2005). Moreover, even if the notice of intent had been filed within the two-year limitations period, "the statute of limitations is not tolled if the notice of intent to sue does not comply with § 2912b." *Rheaume v Vandenberg*, 232 Mich App 417, 422; 591 NW2d 331 (1999). Nor does the mere filing of a notice of intent—whether in compliance with the requirements of § 2912b or not—toll the wrongful death saving period of MCL 600.5852. *Waltz v Wyse*, 469 Mich 642, 649-650; 677 NW2d 813 (2004). Accordingly, this action was already time-barred when plaintiff filed her complaint. It is axiomatic that when a complaint is time-barred, it should be dismissed with prejudice. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706-707; 620 NW2d 319 (2000).

In light of our resolution of this issue, we need not address the remaining argument raised by defendants on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello

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[1] The letters of authority appointing plaintiff are not contained in the lower court record as it was transmitted to this Court. Nonetheless, defendants have submitted the letters of authority with their briefs on appeal. The letters of authority indicate that the probate court appointed plaintiff personal representative of decedent's estate in June 2000. See MCR 7.216(4); MCR 7.216(6).