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

TERESA PATTERSON, Personal Representative of the Estate of ANNA QUEEN,

Plaintiff-Appellant,

v

DIANE HABEGGER, COLLEEN BARLAND, and BATTLE CREEK HEALTH SYSTEMS,

Defendants-Appellees.

UNPUBLISHED
April 24, 2007

No. 267706
Calhoun Circuit Court
LC No. 04-004474-NH

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm in part and reverse in part.

Plaintiff's decedent was being treated for a fractured ankle and other medical problems at defendant hospital, Battle Creek Health Systems, but was discharged to another medical facility. On August 10, 2002, the decedent transferred back to defendant hospital after suffering anemia, a gastrointestinal bleed, pulmonary edema, and left ankle osteomyelitis. The decedent was receiving physical therapy services in the hospital, but was not ambulatory. On September 9, 2002, the decedent was receiving physical therapy services when a fall from the slide board resulted in another injury or re-injury to her ankle. Surgery was required allegedly as a result of this slide board injury. Eventually, the decedent developed a staph infection, sepsis, and osteomyelitis in her re-broken left ankle. The infection caused the decedent's left leg to be amputated. Nonetheless, she developed sepsis, her organs began to fail, and she died on November 10, 2002.

Plaintiff was appointed personal representative of the decedent's estate on December 9, 2003. In June 2004, plaintiff's legal representative contacted the risk management office of defendant hospital to determine the individuals who rendered physical therapy services to the decedent at the time her ankle was re-broken. On June 3, 2004, plaintiff's legal representative was purportedly told that the names of the individual treating physical therapists were unknown and to submit the notice of intent to defendant hospital. On June 17, 2004, plaintiff submitted a notice of intent to file a medical malpractice claim to defendant hospital. The notice of intent provided that it was to apply to all individuals involved in the treatment of the decedent, the notice of intent should be furnished by defendant hospital to any person not specifically named,

and defendant hospital should provide the name of any individual entitled to receive the notice of intent.

In a letter dated September 22, 2004, defendant hospital indicated that it had discovered that individual defendants, Diane Habegger, OTR, and Colleen Barland, OTA, were involved in the care of the decedent during the time period in question. Plaintiff did not file a new notice of intent with these individual defendants. Rather, on December 17, 2004, plaintiff filed a complaint alleging ordinary negligence and medical malpractice against the individual defendants and against defendant hospital based on a theory of respondeat superior. With the complaint, plaintiff filed two affidavits of merit. One affidavit was from a licensed medical doctor and the other from a licensed and registered occupational therapist.[1]

After receiving supplemental briefs regarding the propriety of summary disposition, the trial court granted defendants' motion for summary disposition. The trial court held that the individual defendants were required to be served with the notice of intent, but did not receive notice. The trial court also held that the affidavit of merit was defective with regard to the individual defendants, and defendant hospital was also entitled to summary disposition. Plaintiff appeals as of right.

Plaintiff alleges that the trial court erred in granting summary disposition of the claims against the individually named defendants. Specifically, plaintiff requested that defendant hospital disclose the names of the two individuals who provided physical therapy services to the decedent at the time of re-injury of the ankle. In response, a representative of defendant hospital purportedly told plaintiff's legal representative that the names of the individuals were unknown and to serve defendant hospital with the notice of intent. Plaintiff asserts that it was without the benefit of discovery and detrimentally relied on information provided by defendant hospital. It is asserted that the application of equitable estoppel precludes the dismissal of the claim based on MCL 600.2912b. We disagree.

MCL 600.2912b sets forth the procedure for filing a medical malpractice action and provides in relevant part:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility

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[1] Defendants filed a motion for summary disposition addressing whether the claims were properly filed as ordinary negligence claims or claims of medical malpractice. The trial court held that the claims were premised on ordinary negligence. However, in a peremptory order, this Court reversed, concluding that the complaint sounded in medical malpractice. *Patterson v Habegger*, unpublished order of the Court of Appeals, entered August 19, 2005 (Docket No. 263093). After defendants filed motions for summary disposition challenging the procedural filing of the complaint and compliance with the applicable medical malpractice statute, a second notice of intent naming the individual defendants was filed on April 12, 2005.

written notice under this section not less than 182 days before the action is commenced.

(2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

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(4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it was alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000). Under the plain meaning rule, "courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

Review of the plain language of the statute reveals that a medical malpractice action "shall" not be commenced unless 182 days notice has been given to the health professional. MCL 600.2912b(1). Furthermore, the name of the health professional must be included in the notice of intent to file suit. MCL 600.2912b(4)(f). The failure to name a health professional in

the notice of intent was addressed in *Rheaume v Vandenberg*, 232 Mich App 417, 418-419; 591 NW2d 331 (1998). In *Rheaume*, the plaintiff asserted that, during a physical therapy session, he was utilizing the leg press machine when his physical therapist adjusted the position to preclude him from fully extending the weight. After completing the exercise, the plaintiff noticed immediate pain in his lower extremity and was later diagnosed with a herniated disc. The plaintiff filed a medical malpractice action against the physical therapy center known as "Weisman, Gitlin & Herkowitz, P.C.", but did not know the name of his individual therapist. Therefore, the complaint identified the therapist as "John Doe." The plaintiff filed the medical malpractice claim and notice of intent to sue on the same day.[2] Because the plaintiff could not identify the individual therapist in the notice of intent, the notice provided that the corporate entity should furnish the notice to anyone encompassed in the claim that was not specifically named. The notice of intent contained the following information identifying the parties at issue:

> 6. NAMES OF HEALTH PROFESSIONALS, ENTITIES, AND FACILITIES NOTIFIED
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> Weismann, Gitlin & Herkowitz, P.C. 3535 W. 13 Mile Road, Ste. 605, Royal Oak, Michigan, 48073 and all agents, physicians, physical therapists, and/or employees, actual or ostensible, thereof.
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> 7. TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY, OR FACILITY, NOT SPECIFICALLY NAMED HEREIN, THAT YOU REASONABLY BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

The following month, the plaintiff learned that the defendant, Steven Vandenberg, was the treating physical therapist. The plaintiff then filed an amended complaint naming Vandenberg as a defendant by replacing him with the John Doe designation. This Court concluded that the general designation of "John Doe" failed to satisfy the name requirement of the notice of intent provision of the medical malpractice statute, stating:

> The Legislature's use of the word "shall" in subsection 4 of § 2912b makes mandatory the inclusion of the "names of all health professionals" notified of an intention to sue. See, e.g., *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997) (explaining that use of the word "shall" indicates a mandatory, rather than a discretionary provision). When understood in its plain and ordinary sense, the word "name" does not encompass the broad description of defendant Vandenberg that was included in the sixth paragraph of plaintiffs' notice of intent to sue. This is so even when that broad description is considered in conjunction with the more specific factual description included in paragraph one of the notice. Simply put, a description is not a name. Because the specific statutory language of § 2912b is clear and unambiguous, we are bound to apply it as written. By

[2] The plaintiff filed the documents on the same day because the statute of limitations expired two days after the date of filing of the complaint.

> failing to include defendant Vandenberg's "name" in their notice of intent to sue, plaintiffs failed to comply with a specific mandatory requirement of § 2912b(4). Therefore, the statute of limitations was not tolled pursuant to MCL 600.5856(d); MSA 27A.5856(d), and plaintiffs' complaint naming Vandenberg as a defendant was not timely filed. [*Id*. at 423-424.]

Applying the *Rheaume* decision to the facts in the present case, the trial court did not err in granting summary disposition in favor of the individual defendants. The statute at issue expressly provides that a medical malpractice action "shall" not be commenced unless the health professionals have been given notice of the intent to file a claim. MCL 600.2912b(1). The notice of intent must expressly name the health professionals that allegedly breached the standard of care. MCL 600.2912b(4); *Rheaume, supra*.

In the present case, plaintiff filed notice of intent to sue, but did not name the individual defendants. This notice of intent was filed on June 17, 2004. In a letter dated September 22, 2004, a representative of defendant hospital provided the names of the individual defendants to plaintiff. Despite this notification of the named individuals, plaintiff did not file a new notice of intent directed to the individual defendants. On December 17, 2004, plaintiff filed a complaint against defendant hospital and the individually named defendants alleging both negligence and medical malpractice. Plaintiff had the opportunity to file a notice of intent to sue containing the names of the individual defendants before filing the complaint, but did not file a new notice of intent or amend the previously filed notice of intent. Accordingly, the trial court did not err in granting the defense motion when the notice of intent did not comply with the statutory requirements with regard to the individually named defendants.

Plaintiff asserts that it detrimentally relied on the statements by a representative of defendant hospital to file the notice of intent without naming the individual defendants and equitable estoppel operates to preclude the grant of summary disposition. We disagree. "Equitable estoppel arises where a party, by representation, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999), quoting *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994). Plaintiff cannot utilize equitable estoppel to avoid the dismissal of the individual defendants because there was no justification for relying on any representation by defendant hospital. The requirements for filing a medical malpractice action are governed by statute. Defendants cannot and did not stipulate to waive the requirements of the statute. See *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000) (stipulations of fact are binding on the parties, but stipulations of law are not binding). In this case, plaintiff was aware of the need to comply with the medical malpractice statute's notice of intent provision and gave the requisite notice with regard to defendant hospital. Plaintiff was apprised of the names of the individual defendants approximately three months before filing suit, but chose not to submit a notice of intent with regard to these defendants. The *Rheaume* decision was rendered in 1998, and therefore, plaintiff should have known of the construction given to the term "name" in the notice of intent statute. Plaintiff's reliance on equitable principles does not preclude the grant of summary disposition in favor of the individual defendants.

Next, plaintiff alleges that the trial court erred in granting summary disposition of the claim against defendant hospital. We agree. In *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978), the Supreme Court held that, in general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and simply uses the hospital's facilities to provide treatment to his patients. If the patient looked to the hospital to provide medical treatment and the hospital represented that medical treatment would be afforded by physicians working at the hospital, an agency by estoppel may be found. *Id*. at 251.

Applying the principle announced in *Grewe, supra*, the trial court erred in granting defendant hospital's motion on this basis. The defense moved for summary disposition of the claim at the outset prior to discovery regarding the nature of the relationship between the decedent and the individual defendants and any representations by defendant hospital with regard to those individuals. Consequently, the trial court erred in granting summary disposition prior to any development of the nature of the relationship and whether agency by estoppel may be found.

Next, plaintiff alleges that the trial court erred in granting summary disposition of the claim against defendant hospital based on the dismissal of the claim against the individual defendants. We agree. A medical malpractice action against a defendant hospital based on a vicarious liability theory remains intact even in the face of dismissal of the individual employees or agents, provided that the procedural requirements of the suit regarding the hospital were properly met. See *Nippa v Botsford Gen Hosp*, 257 Mich App 387, 391-392; 668 NW2d 628 (2003). Although plaintiff did not name the individual defendants in the notice of intent, plaintiff did provide the applicable notice to defendant hospital. The affidavit from the licensed occupational therapist was sufficient where plaintiff mistakenly believed that the affiant was qualified to render an opinion. See *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002).

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio